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**THE**  
**ENGLISH AND EMPIRE DIGEST**  
**WITH**  
**COMPLETE AND EXHAUSTIVE**  
**ANNOTATIONS.**

**VOLUME XXVI.**



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXVI.

*GUARANTEE AND INDEMNITY.  
HIGHWAYS, STREETS, AND BRIDGES.*

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**In this Volume English Cases reported up to 1st January, 1926, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



# TABLE OF CONTENTS

AND

## TABLE OF CROSS-REFERENCES.

<i>Reports included in this Work and their Abbreviations</i>	— — — —	PAGE XV
<i>Abbreviations used in this Work</i>	— — — — — — — —	xxxiii
<i>Meaning of Terms used in Classifying Annotating Cases</i>	— — —	xxxvii
<i>Table of Cases</i>	— — — — — — — — —	xxxix
<b>GUARANTEE AND INDEMNITY</b>	— — — — — — —	1—246

[For detailed Table of Contents and Table of Cross-References, see pages 1—9.]

### GUARDIAN AND WARD.

See FRAUDULENT AND VOIDABLE CONVEYANCES ; INFANTS AND CHILDREN.

### GUARDIANS OF THE POOR.

See ELECTIONS ; POOR LAW.

### GUN LICENCES.

See GAME ; REVENUE.

### GUNPOWDER.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

### HABEAS CORPUS.

See CROWN PRACTICE ; PRISONS.

### HABENDUM.

See DEEDS AND OTHER INSTRUMENTS.

### HABITUAL CRIMINAL.

See CRIMINAL LAW AND PROCEDURE.

## HABITUAL DRUNKARD.

*See* CRIMINAL LAW AND PROCEDURE ; INTOXICATING LIQUORS.

## HACKNEY CARRIAGES.

*See* STREET AND AERIAL TRAFFIC.

## HALF-BLOOD.

*See* DESCENT AND DISTRIBUTION.

## HALF-TIMERS.

*See* EDUCATION ; FACTORIES AND SHOPS.

## HARBOURS.

*See* SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

## HARD LABOUR.

*See* CRIMINAL LAW AND PROCEDURE ; PRISONS.

## HARES.

*See* GAME.

## HAWKERS AND PEDLARS.

*See* MARKETS AND FAIRS.

## HAY AND STRAW.

*See* AGRICULTURE ; WEIGHTS AND MEASURES.

## HEALTH.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HEARSAY EVIDENCE.

*See* EVIDENCE.

## HEIRLOOMS.

*See* REAL PROPERTY AND CHATTELS REAL.

## HEIRSHIP.

*See* DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

## HERALDS AND HERALDS' COLLEGE.

*See* PEERAGE AND DIGNITIES.

## HEREDITAMENTS.

*See* COPYHOLDS ; REAL PROPERTY AND CHATTELS REAL.

## HERESY.

*See* ECCLESIASTICAL LAW.

## HERIOT.

*See* COPYHOLDS.

## HIGH BAILIFF.

*See* COUNTY COURTS.

## HIGH COURT.

*See* COURTS ; PRACTICE AND PROCEDURE.

## HIGH SEAS.

*See* FISHERIES ; PRIZE LAW AND JURISDICTION ; SHIPPING AND NAVIGATION.

## HIGH STEWARD.

*See* CONSTITUTIONAL LAW.

## HIGH TREASON.

*See* CONSTITUTIONAL LAW ; CRIMINAL LAW AND PROCEDURE.

<b>HIGHWAYS, STREETS, AND BRIDGES</b>	-	-	-	-	PAGE 250—590
---------------------------------------	---	---	---	---	-----------------

[For detailed Table of Contents and Table of Cross-References, see pages 250—260.]

## HIRE OF GOODS.

*See* BAILMENT.

## HIRE-PURCHASE.

*See* BAILMENT ; BILLS OF SALE.

## HOLDER IN DUE COURSE.

*See* BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

## HOLIDAYS.

*See* FACTORIES AND SHOPS ; MASTER AND SERVANT ; TIME.

## HOLY ORDERS.

*See* ECCLESIASTICAL LAW.

## HOMAGE.

*See* CONSTITUTIONAL LAW ; COPYHOLDS.

## HOME OFFICE.

*See* CONSTITUTIONAL LAW.

## TABLE OF CONTENTS.

## HOMICIDE.

*See* CRIMINAL LAW AND PROCEDURE.

## HOPS.

*See* AGRICULTURE ; FOOD AND DRUGS.

## HORSE FLESH.

*See* FOOD AND DRUGS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HORSE RACING.

*See* GAMING AND WAGERING ; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

## HORSE, WARRANTY OF.

*See* ANIMALS ; SALE OF GOODS.

## HOSIERY MANUFACTURE.

*See* FACTORIES AND SHOPS ; TRADE AND TRADE UNIONS.

## HOSPITALS.

*See* CHARITIES ; INCOME TAX ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HOTCHPOT.

*See* SETTLEMENTS ; WILLS.

## HOTELS.

*See* INNS AND INNKEEPERS ; INTOXICATING LIQUORS.

## HOUSE AGENT.

*See* AGENCY ; LANDLORD AND TENANT ; REVENUE ; VALUERS AND APPRAISERS.

## HOUSE OF COMMONS.

*See* CONSTITUTIONAL LAW ; ELECTIONS ; PARLIAMENT.

## HOUSE OF LORDS.

*See* CONSTITUTIONAL LAW ; COURTS ; PARLIAMENT ; PEERAGES AND DIGNITIES.

## HOUSEBREAKING.

*See* CRIMINAL LAW AND PROCEDURE.

## HOUSING OF THE WORKING CLASSES.

*See* COMPULSORY PURCHASE OF LAND AND COMPENSATION ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HUNTING.

*See* AGRICULTURE ; ANIMALS ; GAME ; TRESPASS.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armsstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.



Baild. ... ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ... ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ... ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ... ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ... ..	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. (Ch. ... ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ... ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes ... ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ... ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ... ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ... ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ... ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ... ..	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ... ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ... ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ... ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ... ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ... ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ... ..	Bellewe's Cases temp. Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ... ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. ... ..	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ... ..	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ... ..	New Brunswick Reports (Berton)	Can.
Bing. ... ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ... ..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ... ..	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ... ..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ... ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ... ..	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ... ..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ... ..	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
BLI. N. S. ... ..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett ... ..	Bluett's Isle of Man Cases	I. of M.
Bom. ... ..	Bombay High Court Reports	Ind.
Bom. A. C. ... ..	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ... ..	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ... ..	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ... ..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ... ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott. ... ..	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ... ..	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ... ..	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ... ..	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ... ..	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ... ..	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ... ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C. ... ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ... ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ... ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ... ..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ... ..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F. ... ..	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun ... ..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush. ... ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1803—1866	Eng.
Brownl. ... ..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce ... ..	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Buch. ... ..	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C. ... ..	Buchanan's Reports of Appeal Court (Cape) ... ..	S. Af.
Buchan. ... ..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ... ..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P. ... ..	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ... ..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb. ... ..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ... ..	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C. ... ..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ... ..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ... ..	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ... ..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ... ..	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ... ..	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. B. R. ... ..	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas. ... ..	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch. ... ..	Common Law Chambers	Can.
C. L. J. ... ..	Cape Law Journal	S. Af.
C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current)	Can.
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C. L. T. Occ. N. ... ..	Canadian Law Times, Occasional Notes	Can.
C. P. ... ..	Upper Canada Common Pleas	Can.
C. P. D. ... ..	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D. ... ..	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C. ... ..	Canadian Reports, Appeal Cases	Can.
C. T. R. ... ..	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N. ... ..	Calcutta Weekly Notes	Ind.
Cab. & El. ... ..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas. ... ..	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ... ..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ... ..	Cameron's Supreme Court Cases	Can.
Cam. Prac. ... ..	Cameron's Supreme Court Practice	Can.
Camp. ... ..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ... ..	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. ... ..	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ... ..	Canadian Gazette	Can.
Can. Ry. Cas. ... ..	Canadian Railway Cases	Can.
Car. & Kir. ... ..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ... ..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L. ... ..	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann. ... ..	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl. ... ..	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ... ..	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart. ... ..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart. ... ..	Cases on British North America Act (Cartwright)	Can.
Carth. ... ..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary ... ..	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ... ..	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ... ..	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ... ..	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch ... ..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King ... ..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. temp. Talb. ... ..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig. ... ..	Cassell's Digest	Can.
Ch. (preceded by date) ... ..	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ... ..	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch. ... ..	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch. ... ..	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ... ..	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob. ... ..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas. ... ..	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Pr. Cas. ... ..	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip. ... ..	New Brunswick Reports (Chipman)	Can.

xviii      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Chit. ... ..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822 ...	Eng.
Cl. & Fin. ... ..	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846 ... ..	Eng.
Cl. & Sc. Dr. Cas. ... ..	Clark and Scully's Drainage Cases ... ..	Can.
Clay. ... ..	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650 ... ..	Eng.
Clif. & Rick. ... ..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884 ...	Eng.
Clif. & Steph. ... ..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872 ...	Eng.
Co. A. ... ..	Cook's Lower Canada Admiralty Court Cases ... ..	Can.
Co. Ent. ... ..	Coke's Entries ... ..	Eng.
Co. Inst. ... ..	Coke's Institutes ... ..	Eng.
Co. L. J. ... ..	Colonial Law Journal ... ..	N.Z.
Co. Litt. ... ..	Coke on Littleton (1 Inst.) ... ..	Eng.
Co. Rep. ... ..	Coke's Reports, 13 parts, 1572—1616 ... ..	Eng.
Coch. ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
Cockb. & Rowe ... ..	Cockburn and Rowe's Election Cases, 1 vol., 1833 ... ..	Eng.
Coll. ... ..	Collyer's Reports, Chancery, 2 vols., 1844—1846 ... ..	Eng.
Coll. Jurid. ... ..	Collectanea Juridica, 2 vols. ... ..	Eng.
Colles ... ..	Colles' Cases in Parliament, 1 vol., 1697—1713 ... ..	Eng.
Colt. ... ..	Coltman's Registration Cases, 1 vol., 1879—1885 ... ..	Eng.
Com. ... ..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ... ..	Eng.
Com. Cas. ... ..	Commercial Cases. 1895—(current) ... ..	Eng.
Com. Dig. ... ..	Comyns' Digest ... ..	Eng.
Comb. ... ..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 ...	Eng.
Con. & Law. ... ..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ... ..	Ir.
Cong. Dig. ... ..	Congdon's Digest ... ..	Can.
Const ... ..	Const's edition of Bott's Poor Laws, 3 vols., 1807 ... ..	Eng.
Cooke & Al. ... ..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ... ..	Ir.
Cooke, Pr. Cas. ... ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 ...	Eng.
Cooke, Pr. Reg. ... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ... ..	Eng.
Coop. G. ... ..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ... ..	Eng.
Coop. Pr. Cas. ... ..	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 ...	Eng.
Coop. temp. Brough. ... ..	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ... ..	Eng.
Coop. temp. Cott. ... ..	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1840—1848 (and miscellaneous earlier cases) ... ..	Eng.
Cor. ... ..	Coryton's Reports ... ..	Ind.
Corb. & D. ... ..	Corbett and Daniell's Election Cases, 1 vol., 1819 ... ..	Eng.
Correspondances Jud. ... ..	Correspondances Judiciaires ... ..	Can.
Couper ... ..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout. ... ..	Coutlees' Unreported Cases ... ..	Can.
Cout. Dig. ... ..	Coutlees' Digest ... ..	Can.
Cowp. ... ..	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ... ..	Eng.
Cox & Atk. ... ..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 ...	Eng.
Cox, C. C. ... ..	E. W. Cox's Criminal Law Cases, 1843—(current) ... ..	Eng.
Cox, Eq. Cas. ... ..	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ... ..	Eng.
Cox, M. & H. ... ..	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1840—1852 ... ..	Eng.
Cr. & J. ... ..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832 ...	Eng.
Cr. & M. ... ..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834 ...	Eng.
Cr. & Ph. ... ..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ... ..	Eng.
Cr. App. Rep. ... ..	CoHEN's Criminal Appeal Reports, 1908—(current) ... ..	Eng.
Cr. M. & R. ... ..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ... ..	Eng.
Craw. & D. ... ..	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 ...	Ir.
Craw. & D. Abr. C. ... ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838 ...	Ir.
Cress. Insolv. Cas. ... ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ... ..	Eng.
Cripps' Church Cas. ... ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ... ..	Eng.
Cro. Car. ... ..	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ... ..	Eng.
Cro. Eliz. ... ..	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ... ..	Eng.
Cro. Jac. ... ..	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ... ..	Eng.
Cru. Dig. ... ..	Cruise's Digest of the Law of Real Property, 7 vols. ... ..	Eng.
Cunn. ... ..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 ...	Eng.
Curt. ... ..	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ... ..	Eng.
D. ... ..	Duxbury's Reports of the High Court of the South African Republic ... ..	S. Af.
D. C. A. ... ..	Dorion's Queen's Bench Reports ... ..	Can.
D. L. R. ... ..	Dominion Law Reports ... ..	Can.

Dal. ...	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1540—1574 ...	Eng.
Dalr. ...	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720 ...	Scot.
Dan. ...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll. ...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer. ...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844 ...	Eng.
Dav. Ir. ...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas. ...	...	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ...	...	Day's Election Cases, 1 vol., 1892—1893 ...	Eng.
Dea. & Sw. ...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac. ...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. ...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B. ...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C. ...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G. ...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm. ...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G. ...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane ...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick. ...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods. ...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas. ...	...	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L. ...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B. ...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
Dow. & Ry. M. C. ...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827 ...	Eng.
Dow. & Ry. N. P. ...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl. ...	...	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War. ...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra. ...	...	Draper's King's Bench Reports ...	Can.
Drew. ...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug. ...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig. ...	...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.) ...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning ...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer ...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A. ...	...	Upper Canada Error and Appeal ...	Can.
E. & B. ...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
E. & E. ...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E. ...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 ...	Eng.
E. D. C. ...	...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	...	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ...	...	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.) ...	...	English Reports ...	Eng.
E. R. ...	...	Ontario Election Reports ...	Can.
Eag. & Y. ...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	Can.
F. (Cl. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1700	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	...	General Index Digest	...	Can.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. Fl. Cas	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glascoc	...	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	...	Ir.

Godb. ...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637 ...	Eng.
Gouldsb. ...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601 ...	Eng.
Gow ...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820 ...	Eng.
Gr. ...	Upper Canada Chancery (Grant) ...	Can.
Griffin's Patent Cases ...	Griffin's Patent Cases, 1884—1887 ...	Eng.
Gwill. ...	Gwillim's Tithe Cases, 4 vols., 1224—1824 ...	Eng.
H. ...	Hertzog's Reports of the High Court of the South African Republic, 1893 ...	S. Af.
H. & C. ...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866 ...	Eng.
H. & N. ...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1850—1862 ...	Eng.
H. & Tw. ...	Hall and Twells' Reports, Chancery, 2 vols., 1818—1850 ...	Eng.
H. & W. ...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841 ...	Eng.
H. B. R. (preceded by date) ...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.) ...	Eng.
H. C. ...	Reports of the High Court of Griqualand West ...	S. Af.
H. E. C. ...	Hodgin's Election Reports ...	Can.
H. I. Cas. ...	Clark's Reports, House of Lords, 11 vols., 1847—1866 ...	Eng.
Hag. Adm. ...	Haggard's Reports, Admiralty, 3 vols., 1822—1838 ...	Eng.
Hag. Con. ...	Haggard's Consistorial Reports, 2 vols., 1789—1821 ...	Eng.
Hag. Ecc. ...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833 ...	Eng.
Hailes ...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1760—1791 ...	Scot.
Hale, C. L. ...	Hale's Common Law ...	Eng.
Hale, P. C. ...	Hale's Pleas of the Crown, 2 vols. ...	Eng.
Han. ...	New Brunswick Reports (Hannay) ...	Can.
Har. & Ruth. ...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866 ...	Eng.
Har. & W. ...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836 ...	Eng.
Harc. ...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691 ...	Scot.
Hard. ...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669 ...	Eng.
Hare ...	Hare's Reports, Chancery, 11 vols., 1811—1853 ...	Eng.
Hawk. P. C. ...	Hawkins's Pleas of the Crown, 2 vols. ...	Eng.
Hay ...	Hay's Reports ...	Ind.
Hay & Marr. ...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ...	Eng.
Hayes ...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832 ...	Ir.
Hayes & Jo. ...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834 ...	Ir.
Hem. & M. ...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865 ...	Eng.
Het. ...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631 ...	Eng.
Hob. ...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625 ...	Eng.
Hodg. ...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837 ...	Eng.
Hog. ...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834 ...	Ir.
Holt, Adm. ...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867 ...	Eng.
Holt, Eq. ...	W. Holt's Equity Reports, 2 vols., 1845 ...	Eng.
Holt, K. B. ...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710 ...	Eng.
Holt, N. P. ...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817 ...	Eng.
Home, Ct. of Sess. ...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744 ...	Scot.
Hong Kong L. R. ...	Hong Kong Reports ...	Hong Kong
Hop. & Colt. ...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878 ...	Eng.
Hop. & Ph. ...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867 ...	Eng.
Horn & H. ...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839 ...	Eng.
Hov. Supp. ...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817 ...	Eng.
How. C. ...	Howard's Chancery Practice ...	Ir.
How. C. S. ...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland ...	Ir.
How. E. E. ...	Howard's Equity Exchequer ...	Ir.
How. P. L. ...	Howard on the Popery Laws ...	Ir.
Hud. & B. ...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831 ...	Ir.
Hudson's B. C. ...	Hudson on Building Contracts, 2 vols. ...	Eng.
Hume ...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822 ...	Scot.
Hut. ...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638 ...	Eng.
Hy. Bl. ...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796 ...	Eng.
Hyde ...	Hyde's Reports ...	Ind.
I. C. L. R. ...	Irish Common Law Reports, 17 vols., 1840—1866 ...	Ir.
I. Ch. R. ...	Irish Chancery Reports, 17 vols., 1850—1867 ...	Ir.
I. Eq. R. ...	Irish Equity Reports, 13 vols., 1838—1851 ...	Ir.

# xxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

i. L. R. ... ..	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All. ... ..	Indian Law Reports, Allahabad ... ..	Ind.
I. L. R. (Vol.) Bom. ... ..	Indian Law Reports, Bombay ... ..	Ind.
I. L. R. (Vol.) Calc. ... ..	Indian Law Reports, Calcutta ... ..	Ind.
I. L. R. (Vol.) Lah. ... ..	Indian Law Reports, Lahore ... ..	Ind.
I. L. R. (Vol.) Mad. ... ..	Indian Law Reports, Madras ... ..	Ind.
I. L. R. (Vol.) Pat. ... ..	Indian Law Reports, Patna ... ..	Ind.
I. L. R. (Vol.) Ran. ... ..	Indian Law Reports, Rangoon ... ..	Ind.
I. L. T. ... ..	Irish Law Times, 1867—(current) ... ..	Ir.
I. L. T. Jo. ... ..	Irish Law Times Journal, 1867—(current) ... ..	Ir.
I. R. (preceded by date) ... ..	Irish Reports, since 1893 ( <i>e.g.</i> , [1891] 1 I. R.) ... ..	Ir.
I. R. (Vol.) C. L. ... ..	Irish Reports, Common Law, 11 vols., 1806—1877 ... ..	Ir.
I. R. Eq. ... ..	Irish Reports, Equity, 11 vols., 1806—1877 ... ..	Ir.
I. R., R. & L. ... ..	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876 ... ..	Ir.
Ind. Awards ... ..	Industrial Awards Recommendations ... ..	N.Z.
Ind. Jur. N. S. ... ..	Indian Jurist, New Series ... ..	Ind.
Ind. Jur. O. S. ... ..	Indian Jurist, Old Series ... ..	Ind.
Ir. Cir. Rep. ... ..	Reports of Irish Circuit Cases, 1 vol., 1841—1843 ... ..	Ir.
Ir. Jur. ... ..	Irish Jurist, 18 vols., 1849—1866 ... ..	Ir.
Ir. L. Rec. 1st ser. ... ..	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831 ... ..	Ir.
Ir. L. Rec. N. S. ... ..	Law Recorder (Ireland), New Series, 6 vols., 1833—1838 ... ..	Ir.
Irv. ... ..	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867 ... ..	Scot.
J. Bridg. ... ..	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621 ... ..	Eng.
J. D. R. ... ..	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division ... ..	S. Af.
J. P. ... ..	Justice of the Peace, 1837—(current) ... ..	Eng.
J. P. Jo. ... ..	Justice of the Peace (Weekly Notes of Cases) ... ..	Eng.
J. R. ... ..	Jurist Reports ... ..	N.Z.
J. R. N. S. ... ..	Jurist Reports, New Series ... ..	N.Z.
J. Shaw, Just. ... ..	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1818—1852 ... ..	Scot.
Jac. ... ..	Jacob's Reports, Chancery, 1 vol., 1821—1823 ... ..	Eng.
Jac. & W. ... ..	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821 ... ..	Eng.
James ... ..	Nova Scotia Reports (James) ... ..	Can.
Jebb & B. ... ..	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol. 1841—1842 ... ..	Ir.
Jebb & S. ... ..	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841 ... ..	Ir.
Jebb, C. C. ... ..	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840 ... ..	Ir.
Jebb, Cr. & Pr. Cas. ... ..	Jebb's Crown and Presentment Cases ... ..	Ir.
Jenk. ... ..	Jenkins' Reports, 1 vol., 1220—1623 ... ..	Eng.
Jo. & Car. ... ..	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839 ... ..	Eng.
Jo. & Lat. ... ..	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846 ... ..	Ir.
Jo. Ex. Ir. ... ..	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838 ... ..	Ir.
John. ... ..	Johnson's Reports, Chancery, 1 vol., 1858—1860 ... ..	Eng.
John. & H. ... ..	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862 ... ..	Eng.
Jur. ... ..	Jurist Reports, 18 vols., 1837—1854 ... ..	Eng.
Jur. N. S. ... ..	Jurist Reports, New Series, 12 vols., 1855—1867 ... ..	Eng.
K. ... ..	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881 ... ..	S. Af.
K. & G. ... ..	Keane and Grant's Registration Cases, 1 vol., 1854—1862 ... ..	Eng.
K. & J. ... ..	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858 ... ..	Eng.
K. B. (preceded by date) ... ..	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.) ... ..	Eng.
Kames, Dict. Dec. ... ..	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741 ... ..	Scot.
Kames, Rem. Dec. ... ..	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752 ... ..	Scot.
Kames, Sel. Dec. ... ..	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768 ... ..	Scot.
Kay ... ..	Kay's Reports, Chancery, 1 vol., 1853—1854 ... ..	Eng.
Keb. ... ..	Keble's Reports, fol., 3 vols., 1661—1677 ... ..	Eng.
Keen ... ..	Keen's Reports, Rolls Court, 2 vols., 1836—1838 ... ..	Eng.
Keil. ... ..	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ... ..	Eng.
Kel. ... ..	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707 ... ..	Eng.
Kel. W. ... ..	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734 ... ..	Eng.
Keny. ... ..	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759 ... ..	Eng.
Keny. Ch. ... ..	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754 ... ..	Eng.
Kerr ... ..	New Brunswick Reports (Kerr) ... ..	Can.

Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	...	Knox's Reports	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1820—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1860—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.



# xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep. ... ..	Legal Reporter ... ..	Ir.
Legge ... ..	Legge's Reports ... ..	Aus.
Leon. ... ..	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615 ... ..	Eng.
Lev. ... ..	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1600—1696 ... ..	Eng.
Lew. C. C. ... ..	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838 ... ..	Eng.
Ley ... ..	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629 ... ..	Eng.
Liber Ass. ... ..	Liber Assisarum, Year Books, 1—51 Edw. III. ... ..	Eng.
Lilly ... ..	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol. ... ..	Eng.
Litt. ... ..	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631 ... ..	Eng.
Lloyd, L. R. ... ..	Lloyd's List Law Reports, 1919—(current) ... ..	Eng.
Lloyd, Pr. Cas. ... ..	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918 ... ..	Eng.
Lofft ... ..	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774 ... ..	Eng.
Long. & T. ... ..	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842 ... ..	Ir.
Lords Journals ... ..	Journals of the House of Lords ... ..	Eng.
Luder, E. C. ... ..	Luder's Election Cases, 3 vols., 1784—1787 ... ..	Eng.
Lumley, P. L. C. ... ..	Lumley's Poor Law Cases, 2 vols., 1834—1842 ... ..	Eng.
Lush. ... ..	Lushington's Reports, Admiralty, 1 vol., 1859—1862 ... ..	Eng.
Lut. ... ..	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704 ... ..	Eng.
Lut. Reg. Cas. ... ..	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853 ... ..	Eng.
Lynd. ... ..	Lyndwood, Provinciale, fol., 1 vol. ... ..	Eng.
M. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850 ... ..	S. Af.
M. & S. ... ..	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817 ... ..	Eng.
M. & W. ... ..	Meeson and Welsby's Reports, Exchequer, 16 vols., 1830—1847 ... ..	Eng.
M. C. R. ... ..	Montreal Condensed Reports ... ..	Can.
M. H. C. R. ... ..	Madras High Court Reports ... ..	Ind.
M. L. R. (Vol.) K. B. or Q. B. ... ..	Montreal Law Reports, King's Bench or Queen's Bench ... ..	Can.
M. L. R. (Vol.) S. C. ... ..	Montreal Law Reports, Superior Court ... ..	Can.
M. M. Cas. ... ..	Martin's Reports of Mining Cases ... ..	Can.
Mac. ... ..	Macassey's New Zealand Reports ... ..	N.Z.
Mac. & G. ... ..	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852 ... ..	Eng.
Mac. & H. ... ..	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852 ... ..	Eng.
M'Cle. ... ..	M'Clelland's Reports, Exchequer, 1 vol., 1824 ... ..	Eng.
M'Cle. & Yo. ... ..	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825 ... ..	Eng.
Macfarlane ... ..	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839 ... ..	Scot.
Macl. & Rob. ... ..	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839 ... ..	Scot.
Macph. (Ct. of Sess.) ... ..	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1802—1873 ... ..	Scot.
Macq. ... ..	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865 ... ..	Scot.
Macr. ... ..	Macrory's Patent Cases, 2 parts, 1817—1856 ... ..	Eng.
Mad. ... ..	Madras High Court Reports ... ..	Ind.
Madd. ... ..	Maddock's Reports, Chancery, 6 vols., 1815—1821 ... ..	Eng.
Madd. & G. ... ..	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.) ... ..	Eng.
Madox ... ..	Madox's Formulæ Anglicanum ... ..	Eng.
Madox, Exch. ... ..	Madox's History and Antiquities of the Exchequer, 2 vols. ... ..	Eng.
Mag. ... ..	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852 ... ..	Eng.
Man. & G. ... ..	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845 ... ..	Eng.
Man. & Ry. K. B. ... ..	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830 ... ..	Eng.
Man. & Ry. M. C. ... ..	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830 ... ..	Eng.
Man. L. J. ... ..	Manitoba Law Journal ... ..	Can.
Man. L. R. ... ..	Manitoba Law Reports ... ..	Can.
Man. R. temp. Wood ... ..	Manitoba Reports temp. Wood ... ..	Can.
Mans. ... ..	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914 ... ..	Eng.
Mar. L. C. ... ..	Maritime Law Reports (Crockford), 3 vols., 1860—1871 ... ..	Eng.
March ... ..	March's Reports, King's Bench and Common Pleas, 1 vol., 1630—1642 ... ..	Eng.
Marr. ... ..	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779 ... ..	Eng.
Marsh. ... ..	Marshall's Reports, Common Pleas, 2 vols., 1813—1816 ... ..	Eng.
Marsh. ... ..	Marshall's Reports ... ..	Ind.
Mayn. ... ..	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326 ... ..	Eng.
Meg. ... ..	Megone's Companies Acts Cases, 2 vols., 1889—1891 ... ..	Eng.

Men. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850 ... ..	S. Af.
Mer. ... ..	Merivale's Reports, Chancery, 3 vols., 1815—1817 ... ..	Eng.
Milw. ... ..	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843 ... ..	Ir.
Mod. Rep. ... ..	Modern Reports, 12 vols., 1669—1755 ... ..	Eng.
Mol. ... ..	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831 ... ..	Ir.
Mont. ... ..	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832 ... ..	Eng.
Mont. & A. ... ..	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838 ... ..	Eng.
Mont. & B. ... ..	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833 ... ..	Eng.
Mont. & Ch. ... ..	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840 ... ..	Eng.
Mont. & M. ... ..	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1836—1830 ... ..	Eng.
Mont. D. & De G. ... ..	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844 ... ..	Eng.
Moo. & P. ... ..	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831 ... ..	Eng.
Moo. & S. ... ..	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834 ... ..	Eng.
Moo. Ind. App. ... ..	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872 ... ..	Eng.
Moo. P. C. C. ... ..	Moore's Privy Council Cases, 15 vols., 1836—1863 ... ..	Eng.
Moo. P. C. C. N. S. ... ..	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873 ... ..	Eng.
Mood. & M. ... ..	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830 ... ..	Eng.
Mood. & R. ... ..	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844 ... ..	Eng.
Mood. C. C. ... ..	Moody's Crown Cases Reserved, 2 vols., 1824—1844 ... ..	Eng.
Moore, C. P. ... ..	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827 ... ..	Eng.
Moore, K. B. ... ..	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620 ... ..	Eng.
Mor. Dict. ... ..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808 ... ..	Scot.
Morr. ... ..	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893 ... ..	Eng.
Mos. ... ..	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730 ... ..	Eng.
Mun. Rep. ... ..	Municipal Reports ... ..	Can.
Murd. Epit. ... ..	Murdoch's Epitome ... ..	Can.
Murp. & H. ... ..	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837 ... ..	Eng.
Murr. ... ..	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830 ... ..	Scot.
My. & Cr. ... ..	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841 ... ..	Eng.
My. & K. ... ..	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835 ... ..	Eng.
N. (preceded by date) ... ..	Northern Ireland Law Reports, 1925—(current) ( <i>e.g.</i> , [1925] N.) ... ..	Ir.
N. A. C. ... ..	Native Appeal Cases ... ..	S. Af.
N. & S. ... ..	Nichols and Stop's Reports (Tasmania) ... ..	Tasmania
N. B. Dig. ... ..	New Brunswick Digest (Stevens) ... ..	Can.
N. B. Eq. Rep. ... ..	New Brunswick Equity Reports ... ..	Can.
N. B. R. ... ..	New Brunswick Reports ... ..	Can.
N. B. R. (All.) ... ..	New Brunswick Reports (Allen) ... ..	Can.
N. B. R. (Ber.) ... ..	New Brunswick Reports (Berton) ... ..	Can.
N. B. R. (Carl.) ... ..	New Brunswick Reports (Carleton) ... ..	Can.
N. B. R. (Chip.) ... ..	New Brunswick Reports (Chipman) ... ..	Can.
N. B. R. (Han.) ... ..	New Brunswick Reports (Hannay) ... ..	Can.
N. B. R. (Kerr) ... ..	New Brunswick Reports (Kerr) ... ..	Can.
N. B. R. (P. & B.) ... ..	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
N. B. R. (P. & T.) ... ..	New Brunswick Reports (Pugsley and Trueman) ... ..	Can.
N. B. R. (Pug.) ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
N. B. R. (Tru.) ... ..	New Brunswick Reports (Trueman) ... ..	Can.
N. L. R. ... ..	Natal Law Reports ... ..	S. Af.
N. P. D. ... ..	South African Law Reports, Natal Provincial Division ... ..	S. Af.
N. S. R. ... ..	Nova Scotia Reports ... ..	Can.
N. S. R. (Coch.) ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
N. S. R. (G. & R.) ... ..	Nova Scotia Reports (Geldert & Russell) ... ..	Can.
N. S. R. (James) ... ..	Nova Scotia Reports (James) ... ..	Can.
N. S. R. (Old.) ... ..	Nova Scotia Reports (Oldrights) ... ..	Can.
N. S. R. (R. & C.) ... ..	Nova Scotia Reports (Russell and Chesley) ... ..	Can.
N. S. R. (R. & G.) ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
N. S. R. (Thom.) ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
N. S. W. Adm. or Ad. ... ..	New South Wales Reports, Admiralty ... ..	Aus.
N. S. W. B. ... ..	New South Wales Reports, Bankruptcy ... ..	Aus.
N. S. W. Bkpty. Cas. ... ..	New South Wales Bankruptcy Cases ... ..	Aus.
N. S. W. Eq. ... ..	New South Wales Reports, Equity ... ..	Aus.
N. S. W. Ind. Arbtrn. Cas. ... ..	New South Wales Industrial Arbitration Cases ... ..	Aus.
N. S. W. L. R. ... ..	New South Wales Law Reports ... ..	Aus.
N. S. W. Land App. Cts. ... ..	New South Wales Land Appeal Courts ... ..	Aus.
N. S. W. S. C. R. (Eq.) ... ..	New South Wales Supreme Court Reports (Equity) ... ..	Aus.
N. S. W. S. C. R. (L.) ... ..	New South Wales Supreme Court Reports (Law) ... ..	Aus.
N. S. W. S. C. R. N. S. ... ..	New South Wales Supreme Court Reports, New Series ... ..	Aus.
N. S. W. W. N. ... ..	New South Wales Weekly Notes ... ..	Aus.
N. W. ... ..	North-Western Provinces High Court Reports ... ..	Ind.
N. W. T. R. ... ..	North-West Territories Reports ... ..	Can.
N. Z. Jur. ... ..	New Zealand Jurist ... ..	N.Z.
N. Z. Jur. Mining Law ... ..	New Zealand Jurist Mining Law ... ..	N.Z.

N. Z. Jur. N. S. ...	... New Zealand Jurist, New Series ... ..	N.Z.
N. Z. L. R. ...	... New Zealand Law Reports, 1883—(current) ... ..	N.Z.
N. Z. L. R. C. A. ...	... New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	... Nelson's Reports, Chancery, 1 vol., 1625—1693 ... ..	Eng.
Nev. & M. K. B. ...	... Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C. ...	... Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B. ...	... Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C. ...	... Nevile and Perry's Magistrates' Cases, 1 vol., 1830—1837 ...	Eng.
New Mag. Cas. ...	... New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ... ..	Eng.
New Pract. Cas. ...	... New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	... New Reports, 6 vols., 1862—1805 ... ..	Eng.
New Sess. Cas. ...	... New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1814—1851 ... ..	Eng.
Nfld. L. R. ...	... Newfoundland Reports ... ..	Nfld.
Nolan ...	... Nolan's Magistrates' Cases, 1 vol., 1791—1793 ... ..	Eng.
Notes of Cases ...	... Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ... ..	Eng.
Noy ...	... Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	... Ollivier Bell and Fitzgerald's Reports ... ..	N.Z.
O. B. S. P. ...	... Old Bailey Session Papers ... ..	Eng.
O. Bridg. ...	... Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660— 1666 ... ..	Eng.
O. F. S. ...	... Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	... Ontario Law Reports ... ..	Can.
O'M. & H. ...	... O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	... South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	... Ontario Reports ... ..	Can.
O. R. ...	... Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	... Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	... Upper Canada Queen's Bench, Old Series ... ..	Can.
O. W. N. ...	... Ontario Weekly Notes ... ..	Can.
O. W. R. ...	... Ontario Weekly Reporter ... ..	Can.
Old. ...	... Nova Scotia Reports (Oldrights) ... ..	Can.
Ont. Dig. ...	... Digest of Ontario Case Law, 4 vols., 1823—1900 ... ..	Can.
Owen ...	... Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ... ..	Eng.
P. (preceded by date) ...	... Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ... ..	Eng.
P. & B. ...	... New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
P. & T. ...	... New Brunswick Law Reports (Pugsley and Trueman) ... ..	Can.
P. Cas. ...	... Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ... ..	Eng. & Col.
P. D. ...	... Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ... ..	Eng.
P. E. I. ...	... Prince Edward Island Reports ... ..	Can.
P. R. ...	... Ontario Practice ... ..	Can.
P. Wms. ...	... Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ... ..	Eng.
Palm. ...	... Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	... Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ... ..	Eng.
Pat. App. ...	... Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	... Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake ...	... Peake's Reports, Nisi Prius, 1 vol., 1790—1791 ... ..	Eng.
Peake, Add. Cas. ...	... Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	... Peckwell's Election Cases, 2 vols., 1803—1806 ... ..	Eng.
Pelham ...	... Pelham (S. A.) Reports ... ..	Aus.
Per. & Dav. ...	... Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	... Perry and Knapp's Election Cases, 1 vol., 1833 ... ..	Eng.
Per. C. S. ...	... Perrault's Conseil Supérieur ... ..	Can.
Per. P. ...	... Perrault's Prévosté de Québec, 1726—1756 ... ..	Can.
Ph. ...	... Phillips' Reports, Chancery, 2 vols., 1841—1849 ... ..	Eng.
Phil. El. Cas. ...	... Philipps' Election Cases, 1 vol., 1780 ... ..	Eng.
Phillim. ...	... J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	... Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	... Phipson's Digest of Natal Reports, 1858—1859 ... ..	S. Af.
Pig. & R. ...	... Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pite. ...	... Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	... Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ... ..	Eng.
Poll. ...	... Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	... Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	... Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

Pratt ... ..	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch. ... ..	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price ... ..	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price ... ..	Price's Mining Commissioners' Cases	Can.
Pug. ... ..	New Brunswick Reports (Pugsley)	Can.
Py. R. ... ..	Pykes' Lower Canada Reports	Can.
Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879—1901	Aus.
Q. L. R. ... ..	Quebec Law Reports	Can.
Q. L. R. (Beor) ... ..	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R. ... ..	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C. ... ..	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1890—1891	Aus.
Q. S. R. ... ..	Queensland State Reports	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland	Aus.
R. ... ..	The Reports, 15 vols., 1893—1895	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.) ... ..	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C. ... ..	Ramsay, Appeal Cases	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert)	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J. ... ..	Revue de Jurisprudence	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1815—1848	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q. ... ..	Quebec Revised Reports	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S. ... ..	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C. ... ..	Reports of Patent Cases, 1884—(current)	Eng.
R. R. ... ..	Revised Reports	Eng.
Rast. ... ..	Rastell's Entries	Eng.
Rayn. ... ..	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas. ... ..	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A. ... ..	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud. ... ..	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas. ... ..	Reserved Cases	Ir.
Rick. & M. ... ..	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1891	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep. ... ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1781—1796	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep. ... ..	Ritchie's Equity Reports	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1814—1853	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
Rom. ... ..	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	Eng.
Roscoe's B. C. ... ..	Roscoe, Digest of Building Cases	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols.	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M. ... ..	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.

# xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ... ..	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ... ..	Russell's Election Reports... ..	Can.
Ry. & Can. Cas. ... ..	Railway and Canal Cases, 7 vols., 1835—1854 ... ..	Eng.
Ry. & Can. Tr. Cas. ... ..	Railway and Canal Traffic Cases, 1855—(current) ... ..	Eng.
Ry. & M. ... ..	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1828 ... ..	Eng.
Ryde & K. Rat. App. ... ..	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ... ..	Eng.
Ryde, Rat. App. ... ..	Ryde's Rating Appeals, 3 vols., 1871—1893 ... ..	Eng.
S. ... ..	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ... ..	South African Law Journal ... ..	S. Af.
S. A. L. R. ... ..	South Australian Law Reports ... ..	Aus.
S. A. L. R. ... ..	South African Law Reports ... ..	S. Af.
S. A. R. ... ..	Reports of the High Court of the South African Republic, 1881—1892 ... ..	S. Af.
S. A. S. R. ... ..	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ... ..	Aus.
S. C. ... ..	Reports of the Supreme Court of the Cape of Good Hope from 1880 ... ..	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.)) ... ..	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.)) ... ..	Scot.
S. C. R. ... ..	Canada, Supreme Court Reports ... ..	Can.
S. L. T. ... ..	Scots Law Times, 1893 (current) ... ..	Scot.
S. Q. R. ... ..	Queensland State Reports ... ..	Aus.
S. R. ... ..	Reports of the High Court of Southern Rhodesia ... ..	S. Af.
S. R. C. ... ..	Stuart's Lower Canada Reports ... ..	Can.
S. R. N. S. W. ... ..	New South Wales, State Reports ... ..	Aus.
S. R. Q. ... ..	Queensland Reports, Supreme Court ... ..	Aus.
S. V. A. R. ... ..	Stuart's Vice-Admiralty Reports ... ..	Can.
S. W. A. ... ..	South-West Africa Law Reports ... ..	S.-W. Af.
Saint ... ..	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ... ..	Eng.
Salk. ... ..	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ... ..	Eng.
Sask. L. R. ... ..	Saskatchewan Law Reports ... ..	Can.
Sau. & Sc. ... ..	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ... ..	Ir.
Saund. ... ..	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ... ..	Eng.
Saund. & A. ... ..	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904 ... ..	Eng.
Saund. & B. ... ..	Saunders and Bidder's Locus Standi Reports, 1905—(current) ... ..	Eng.
Saund. & C. ... ..	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ... ..	Eng.
Saund. & M. ... ..	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ... ..	Eng.
Sav. ... ..	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ... ..	Eng.
Say. ... ..	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ... ..	Eng.
Sc. Jur. ... ..	Scottish Jurist, 46 vols., 1829—1873 ... ..	Scot.
Sc. L. R. ... ..	Scottish Law Reporter, 1865—(current) ... ..	Scot.
Sc. R. R. ... ..	Scots Revised Reports ... ..	Scot.
Sch. & Lef. ... ..	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ... ..	Ir.
Scott ... ..	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ... ..	Eng.
Scott, N. R. ... ..	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ... ..	Eng.
Sea. & Sm. ... ..	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ... ..	Eng.
Sel. Cas. Ch. ... ..	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ... ..	Eng.
Selwyn's N. P. ... ..	Selwyn's Abridgement of the Law of Nisi Prius ... ..	Eng.
Sess. Cas. K. B. ... ..	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747 ... ..	Eng.
Sett. & Rem. ... ..	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ... ..	Eng.
Sh. (Cl. of Sess.) ... ..	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ... ..	Scot.
Sh. & MacL. ... ..	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ... ..	Scot.
Sh. Dig. ... ..	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1808 ... ..	Scot.
Sh. Just. ... ..	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ... ..	Scot.
Sh. Sc. App. ... ..	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824 ... ..	Scot.
Sh. Teind Ct. ... ..	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831 ... ..	Scot.
Shep. Touch. ... ..	Sheppard's Touchstone of Common Assurances ... ..	Eng.
Show. ... ..	Shower's Reports, King's Bench, 2 vols., 1678—1695 ... ..	Eng.
Show. Parl. Cas. ... ..	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ... ..	Eng.
Sid. ... ..	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ... ..	Eng.

Sim. ... ..	Simons' Reports, Chancery, 17 vols., 1826—1852 ... ..	Eng.
Sim. & St. ... ..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ... ..	Eng.
Sim. N. S. ... ..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ... ..	Eng.
Skin. ... ..	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ... ..	Eng.
Sm. & Bat. ... ..	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ... ..	Ir.
Sm. & G. ... ..	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ... ..	Eng.
Smith, K. B. ... ..	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ... ..	Eng.
Smith, L. C. ... ..	Smith's Leading Cases, 2 vols. ... ..	Eng.
Smith, Reg. Cas. ... ..	C. L. Smith's Registration Cases, 1895—(current) ... ..	Eng.
Smythe ... ..	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ... ..	Ir.
Sol. Jo. ... ..	Solicitors' Journal, 1856—(current) ... ..	Eng.
Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ... ..	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ... ..	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.) ... ..	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1601—1681 ... ..	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ... ..	Eng.
State Tr. ... ..	State Trials, 31 vols., 1163—1820 ... ..	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ... ..	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ... ..	Can.
Stockton ... ..	Stockton's Vice-Admiralty Report and Digest ... ..	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ... ..	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1710—1747 ... ..	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ... ..	Scot.
Stuart ... ..	Sessions Cases (Stuart) ... ..	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ... ..	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ... ..	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ... ..	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ... ..	Eng.
Sw. ... ..	Swabey's Report, Admiralty, 1 vol., 1855—1859 ... ..	Eng.
Sw. & Tr. ... ..	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ... ..	Eng.
Swan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ... ..	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ... ..	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ... ..	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ... ..	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ... ..	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ... ..	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ... ..	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ... ..	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current) ... ..	S. Af.
T. P. D. ... ..	South African Law Reports, Transvaal Provincial Division ... ..	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ... ..	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909 ... ..	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ... ..	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ... ..	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ... ..	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ... ..	Eng.
Tay. ... ..	Taylor's King's Bench Reports ... ..	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ... ..	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ... ..	Eng.
Torr. L. R. ... ..	Territories Law Reports ... ..	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ... ..	Eng.
Town St. Tr. ... ..	Townsend, Modern State Trials ... ..	Eng.
Trem. P. C. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ... ..	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ... ..	Eng.
Tru. ... ..	New Brunswick Reports (Trueman) ... ..	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ... ..	Eng.
Tudor, L. C. Real Prop. ... ..	Tudor's Leading Cases on Real Property ... ..	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ... ..	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ... ..	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ... ..	Eng.
J. C. Jur. ... ..	Upper Canada Jurist ... ..	Can.
J. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ... ..	Can.

# xxx      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 10 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1708	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.

Y. & C. Ch. Cas.	...	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	...	...	...	...	Eng.
Y. & C. Ex.	...	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	...	...	...	...	Eng.
Y. & J.	...	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	...	...	...	...	Eng.
Y. B.	...	...	Year Books	...	...	...	...	...	Eng.
Y. B. (Rolls Series)	...	...	Year Books (Rolls Series)	...	...	...	...	...	Eng.
Y. B. (Sel. Soc.)	...	...	Year Books (Selden Society)	...	...	...	...	...	Eng.
Yelv.	...	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	...	...	...	...	Eng.
You.	...	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	...	...	...	...	Eng.





# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv.—xxxi., *ante*.)

A.-G.	.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	.	„ Admiralty.
Afd.	.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	.	„ Application.
Appln.	.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	.	„ Association.
B. C.	.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	.	„ Doubted.
Def.	.	.	.	.	.	„ Defendant.

Distd. . . . .	for Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs. . . . .	„ Ecclesiastical Commissioners.
Eccl. Ct. . . . .	„ Ecclesiastical Court.
Ex. Ch. . . . .	„ Exchequer Chamber.
<i>Ex p.</i> . . . . .	„ <i>Ex parte</i> .
Exch. . . . .	„ Exchequer.
Exor. . . . .	„ Executor.
Exorship. . . . .	„ Executorship.
Expld. . . . .	„ Explained.
Ext'd. . . . .	„ Extended.
Extrix. . . . .	„ Executrix.
<i>Fi. fa.</i> . . . . .	„ <i>Fieri facias</i> .
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. . . . .	„ Glasgow & South Western Railway Co.
G. C. Ry. Co. . . . .	„ Great Central Railway Co.
G. E. Ry. Co. . . . .	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. . . . .	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co. . . . .	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . . . .	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland . . . . .	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . . . .	„ Great Western Railway Co.
Govt. . . . .	„ Government.
Grdns. . . . .	„ Guardians or Guardians of the Poor.
H. C. of A. . . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs. . . . .	„ Inland Revenue Commissioners.
Inscc. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . . . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. . . . .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. . . . .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. . . . .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . . . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. . . . .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. . . . .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. . . . .	„ London Electric Railway Co.
L. G. Board . . . . .	„ Local Government Board.
L. J. . . . .	„ Lord Justice.
L. J. J. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. . . . .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. . . . .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. . . . .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. . . . .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. . . . .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. Ry. Co. . . . .	„ North British Railway Co.
N. E. Ry. Co. . . . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.
Ord. . . . .	„ Order.
Overd. . . . .	„ Overruled.

# ABBREVIATIONS.

xxxv

P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Ptlf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mk.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsg.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.



# TABLE OF CASES.

INCLUDING CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND DOMINIONS BEYOND THE SEAS.

A.				PAGE
— v. — (1832) ... ..	182,	183	Aldridge v. Harper (1833) ... ..	176
— v. Dover Corpn. (1908) ... ..	402		Alexander Third Party, Williams v. Buchanan	
— v. Ewer (1735) ... ..	155		(1891) ... ..	146, 148
Aachener Disconto Gesellschaft, <i>Ex p.</i> , <i>Re</i>			Alexander v. Cresheld (1631) ... ..	17
Blakeley (1892) ... ..	91		— v. Scott (Scot.) ... ..	87
Abbeyleix Union Guardians v. Sutcliffe (Ir.)	103		— v. Vane (1836) ... ..	108, 130
Abbott v. Bruere (1839) ... ..	133		— v. Watson (Can.) ... ..	92
Abell v. York County (Can.) ... ..	331		Allan v. Houlden (1843) ... ..	109, 217
Abercromby v. Fernoy Town Comrs. (Ir.) ...	296		— v. Inman (1843) ... ..	109
Aberdeen (City) v. Watt (Scot.) ... ..	518		— v. Kenning (1833) ... ..	92
Aberdeen Harbour Comrs. v. Adam (Scot.)	81		Allaway v. Bennett (1860) ... ..	159
Abingdon Rural Council v. City of Oxford			— v. Duncan (1867) ... ..	45
Electric Tramways. Ltd. (1917) ... ..	461		— v. Harris (1860) ... ..	159
Abinger (Inhabitants), <i>Re</i> , <i>R. v. Surrey J.J.</i>			— v. Roberts (1860) ... ..	159
(1852) ... ..	383		Allen, <i>Re</i> , Adcock v. Evans (1896) ... ..	122
Abington v. Jeans (1826) ... ..	168,	170	— v. Baldock (1867) ... ..	426
Ablert v. Pritchard (1866) ... ..	316		— v. De Lisle (1856) ... ..	117, 135
Abraham v. Hannay (1843) ... ..	138		— v. Fulham Vestry (1899) ... ..	269, 278
Absor v. French (1678) ... ..	319		— v. Grand Valley Ry. Co. (Can.) ... ..	164
Accrington Corpn. v. Nutter (1880) ... ..	335		— v. Kemble (1848) ... ..	110
Ackermann v. Ehrensperger (1816) ... ..	85		— v. London County Council (1895) ... ..	506
Ackersviller v. Perth (Can.) ... ..	390		— v. Ormond (1866) ... ..	305
Acton District Council v. London United			— v. Shehyn (Can.) ... ..	34
Tramways (1909) ... ..	439		Allen & Cazenove, <i>Ex p.</i> , <i>Re</i> Roberts (1858)	129,
Acton Local Board v. Lewsey (1886) ... ..	529			132
Acton Urban District Council v. Watts			Allen & Driscoll's Contract, <i>Re</i> (1904)	537, 539
(1903) ... ..	529		Allen & Napance Town, <i>Re</i> (Can.) ... ..	387, 388
Adams v. Aberdeen Magistrates (Scot.) ...	447		Alliance & Dublin Gas Consumers' Co. v.	
— v. Dansey (1830) ... ..	232,	240	Blott (1886) ... ..	161
— v. Hartland (Ir.) ... ..	49		Alliance Trust Co. v. Johnson (Can.) ... ..	165
— v. McFarlane (Can.) ... ..	185		Allinson v. Cumberland County Council	
Adams & East Whitby Township Corpn.,			(1907) ... ..	355
<i>Re</i> (Can.) ... ..	287,	476	Allison v. Frisby, <i>Re</i> Frisby (1889) ... ..	106
Adcock v. Evans, <i>Re</i> Allen (1896) ... ..	122		Allman v. Hardcastle (1903) ... ..	424, 459
Adjala Corpn. v. McElroy (Can.) ... ..	166		Allnutt v. Ashenden (1813) ... ..	61
Agacio v. Forbes (1861) ... ..	100		Alloa Magistrates v. Wilson (Scot.) ... ..	549
Agra Bank, <i>Ex p.</i> , <i>Re</i> Barber & Co. (1870) ...	65		Alresford Rural Sanitary Authority v. Scott	
Agra Municipal Board v. Sudarshan Das			(1881) ... ..	357
Shastri (Ind.) ... ..	312,	313	Alston, <i>Ex p.</i> , <i>Re</i> Holland (1868) ... ..	111
Agricultural Insurance Co. v. Sargeant (Can.)	177		— v. Dennistoun & Co. (Scot.) ... ..	147
Airey v. Smith (1907) ... ..	559		— v. Scales (1832) ... ..	386
Aiton v. Balloch (Can.) ... ..	49		American Surety Co. of New York v. Wright-	
Albert Life Assurance Co., <i>Re</i> , <i>Ex p.</i> Western			son (1910) ... ..	140, 141
Life Assurance Society (1870) ... ..	12		Amesbury Guardians v. Wilts J.J. (1883) ... ..	395
Alcoy & Gandia Railway & Harbour Co.,			Amherst Boot & Shoe Co. v. Carter (Can.) ... ..	87
Ltd. v. Greenhill (1897) ... ..	111,	138	Amos v. Smith (1862) ... ..	106
Alcoy & Gandia Railway & Harbour Co.,			Amott v. Holden (1852) ... ..	64, 65, 67, 108
Ltd. v. Greenhill (1898) ... ..	111,	138	Anderson v. Hayman (1789) ... ..	37
Alderson v. Bishop Auckland Urban Council			— v. Juggodumba Dabi (Ind.) ... ..	294
(1913) ... ..	542		— v. Richards (1906) ... ..	561
— v. Maddison (1881) ... ..	30,	31	— v. Rochester Township & Merses	
Aldred v. Miller (Scot.) ... ..	427		(Can.) ... ..	390
Aldridge, <i>Ex p.</i> , <i>R. v. Minister of Health</i>			— v. Thornton (1842) ... ..	166
(1925) ... ..	545		Anderton v. Arrowsmith (1839) ... ..	234
			Andrews v. Calceary (City) (Can.) ... ..	453



	PAGE		PAGE
Andrews v. Dally (1828) ... ..	337	Ashbee v. Pidduck (1836) ... ..	107, 192
— v. Lawrence (1805) ... ..	219	Ashby v. Day (1886) ... ..	165, 208
— v. Merton & Morden Urban District Council (1921) ... ..	402, 405	Ashfield Township & Huron County, <i>Re</i> (Can.) ... ..	572
— v. Smith (1835) ... ..	39	Ashley Road District (Inhabitants) v. Kowai Road District (Inhabitants) (N.Z.) ... ..	585, 586
— v. Southward (1885) ... ..	218	Ashton v. Eccles Corp'n. (1906) ... ..	395
Angell v. Paddington Vestry (1868) ... ..	491	— v. New Liskeard Town (Can.) ... ..	389
Angerstein v. Clark (1790) ... ..	101	Ashton-under-Lyne Corp'n. v. Pugh (1898) ... ..	548, 549
Anglo-Californian Bank v. London & Provincial Marine & General Insurance Co. (1904) ... ..	73, 74	Assets Realisation Board v. Auckland District Land Registrar (N.Z.) ... ..	309
Angrove v. Tippet (1805) ... ..	241	Atcheson v. Portage La Prairie Rural Municipality (Can.) ... ..	408
Angus v. Union Gas & Oil Stove Co. (Can.) ... ..	95	Atherton v. Cheshire County Council (1895) ... ..	334
Annandale v. Pattison (1829) ... ..	51	Atkin v. Hamilton (City) (Can.) ... ..	447
Anon. (undated), 3 Salk. 182 ... ..	200, 316, 319, 328, 358, 365, 367, 368, 372, 448	Atkins v. Arcedeckne, <i>Re</i> Arcedeckne (1883) ... ..	143, 144, 150
— (1468), Y. B. 8 Edw. 4, fo. 9, pl. 7 ... ..	316	— v. Revell (1860) ... ..	234
— (1469), Cary, 1 ... ..	180	Atkinson, <i>Ex p.</i> (1792) ... ..	90
— (1481), Y. B. 21 Edw. 4, fo. 38, pl. 4 ... ..	368	— v. Grey (1853) ... ..	62, 63, 65
— (1492), Y. B. 8 Hen. 7, fo. 5, pl. 2 ... ..	448	— v. Gylby (1852) ... ..	173
— (1493), Y. B. 8 Hen. 7, fo. 5, pl. 2 ... ..	427	Attenborough v. Ledgard, <i>Re</i> Ledgard (1922) ... ..	128
— (1497), Y. B. 12 Hen. 7, fo. 15, pl. 1 ... ..	368	A.-G. v. Antrobus (1905) ... ..	264, 297, 299, 304
— (1536), Y. B. 27 Hen. 8, fo. 27, pl. 10 ... ..	452, 453	— v. Ashborne Recreation Ground Co. (1903) ... ..	558
— (1546), Moore, K. B. 5 ... ..	262	— v. Ashby (1908) ... ..	326
— (1573), 3 Leon. 45 ... ..	193	— v. Atkinson (1827) ... ..	72
— (1583), Moore, K. B. 180 ... ..	452	— v. Barker (1900) ... ..	414, 420, 441
— (prior to 1602), Cary, 12 ... ..	71, 72	— v. Bidder (1881) ... ..	374, 527
— (1626), 3 Salk. 183 ... ..	377	— v. Biphosphated Guano Co. (1879) ... ..	283, 287, 289
— (1672), 3 Salk. 183 ... ..	382	— v. Blackpool Corp'n. (1907) ... ..	426
— (1674), 3 Salk. 183 ... ..	380	— v. Bowen (1914) ... ..	451
— (1698), 1 Ld. Raym. 725 ... ..	358, 366	— v. Bradford Corp'n. (1911) ... ..	292
— (1709), 2 Eq. Cas. Abr. 98 ... ..	227	— v. Brighton & Hove Co-operative Supply Assoc'n. (1900) ... ..	425
— (1773), Loft, 358 ... ..	319, 320	— v. Cambridge Consumers Gas Co. (1868) ... ..	451
— (prior to 1820), cited in 3 B. & Ald. at p. 336 ... ..	437	— v. Cameron (Can.) ... ..	82
— (1827), 2 Coop. Temp. Cott. 524 ... ..	185	— v. Chandos Land & Building Society (1910) ... ..	264, 298
— (1843), 7 J. P. 498 ... ..	366	— v. Conduit Colliery Co. (1895) ... ..	331, 421, 422
Anstey v. Marden (1801) ... ..	43, 41	— v. Day (1900) ... ..	372
Antrobus v. Davidson (1817) ... ..	62, 65, 127	— v. Denby (1925) ... ..	560
Arbuthnot v. Victoria (City) Corp'n. (Can.) ... ..	519	— v. Dorin (1912) ... ..	556, 557, 558
Arcedeckne, <i>Re</i> , Atkins v. Arcedeckne (1883) ... ..	143, 144, 150	— v. Eastlake (1853) ... ..	397, 398
— v. Howard (Lord) (1872) ... ..	142, 143	— v. Edwards (1891) ... ..	500, 561
— v. — (1875) ... ..	142, 143	— v. Esher Linoleum Co., Ltd. (1901) ... ..	281, 282, 295, 312, 313
Archer v. Hale (1828) ... ..	177	— v. Folkestone Corp'n. (1873) ... ..	558
— v. Hudson (1844) ... ..	161	— v. Gibb (1909) ... ..	271, 272, 553, 558
— v. — (1846) ... ..	164	— v. Godstone Rural District Council (1912) ... ..	295, 296, 299
Ardern v. Rowney (1805) ... ..	42	— v. Grays Chalk Quarries Co., Ltd. (1910) ... ..	569
Arlington (Lord) v. Merrioke (1672) ... ..	54	— v. Great Central Ry. Co. (1912) ... ..	292
Armitage, <i>Ex p.</i> (1756) ... ..	476	— v. Great Northern Ry. Co. (1910) ... ..	582
—, <i>Re</i> , <i>Ex p.</i> Good (1877) ... ..	200	— v. Hatch (1893) ... ..	564
Armitage & Co., <i>Re</i> , <i>Ex p.</i> Halifax Joint Stock Banking Co. (1876) ... ..	200	— v. Heathcote Road District (Inhabitants) (N.Z.) ... ..	353, 354
Armitstead, <i>Ex p.</i> , <i>Re</i> Dilworth (1828) ... ..	227	— v. Heameon (Can.) ... ..	82
Armour v. Peterborough Town (Can.) ... ..	402	— v. Hemingway (1916) ... ..	301, 302
Armstrong v. Cahill (Ir.) ... ..	87	— v. Hooper (1893) ... ..	566
— v. Hunt (1870) ... ..	343	— v. Horner (1885) ... ..	423, 442, 443
— v. London County Council (1900) ... ..	274	— v. — (No. 2) (1913) ... ..	303, 304
Arnell v. Regent's Canal Co. (1854) ... ..	571	— v. International Bridge Co. (Can.) ... ..	451
Arnold v. Blaker (1871) ... ..	417, 444, 568	— (Down County Council) v. Lagan Navigation Co. (Ir.) ... ..	581, 582
— v. Holbrook (1873) ... ..	319, 417, 444, 449, 568	— v. Laird (1925) ... ..	269, 272, 561
— v. Morgan (1911) ... ..	291	— v. Lindsay-Hogg (1912) ... ..	295, 308
Arnott v. Whitby Urban District Council (1908) ... ..	334	— v. London & South Western Ry. Co. (1905) ... ..	292
— v. Whitby Urban District Council (1909) ... ..	307, 334	— v. Mayo County Council (Ir.) ... ..	451
Arter v. Hammersmith Vestry (1897) ... ..	277, 278, 279, 495	— v. Metcalf & Greig (1908) ... ..	502
Arundel Corp'n., <i>Ex p.</i> , R. v. West Sussex County Council (1921) ... ..	293		
Ascherson v. Tredegar Dry Dock & Wharf Co., Ltd. (1909) ... ..	127, 128, 129		

## xli

	PAGE
Augero <i>v.</i> Keen (1830) ... ..	55, 166
Austen <i>v.</i> Baker (1698) ... ..	37
— <i>v.</i> Howard (1816) ... ..	72
— <i>v.</i> — (1817) ... ..	84, 85
Austerberry <i>v.</i> Oldham Corpn. (1885)	267, 307
Austin <i>v.</i> Gibson (Can.) ... ..	161, 180
— <i>v.</i> St. Mary's, Newington, Vestry (1894) ... ..	424
Austin's Case (1672) ... ..	260, 358, 365
Aveland (Lord) <i>v.</i> Lucas (1880) ... ..	460, 461, 463, 475
Aylett <i>v.</i> East Ham Urban District Council (1905) ... ..	533
Aylwin <i>v.</i> Witty (1861) ... ..	112
Ayre <i>v.</i> Toronto (City) (Can.) ... ..	403
B.	
Babb's Case (1706) ... ..	116, 147
Baby <i>v.</i> Baby (Can.) ... ..	168, 169
Bach (or Back) <i>v.</i> Holmes (1887) ... ..	416, 427, 459
Backhouse <i>v.</i> Hall (1865) ... ..	207
Bacon <i>v.</i> Chesney (1816) ... ..	53, 103, 164, 210
Bacup Corpn. <i>v.</i> Smith (1890) ... ..	524
Badams <i>v.</i> Toronto (City) (Can.) ... ..	404
Baddeley <i>v.</i> Gingell (1847) ... ..	493
Badeley <i>v.</i> Consolidated Bank (1886) ... ..	121, 123, 137
— <i>v.</i> — (1888) ... ..	121, 123, 137
Badgeley <i>v.</i> Bender (Can.) ... ..	303, 304
Badger <i>v.</i> Finch (1857) ... ..	160
Bagge <i>v.</i> Slade (1616) ... ..	147
Bagshaw <i>v.</i> Buxton Local Board of Health (1875) ... ..	449, 505, 566
Bailey <i>v.</i> Croft (1812) ... ..	19
— <i>v.</i> Griffith (Can.) ... ..	174
— <i>v.</i> Jamieson (1876) ... ..	260, 261, 264, 476
Bailey's Claim, <i>Re</i> , Lacey <i>v.</i> Hill (1872) ... ..	132
Bain <i>v.</i> Balfour & Co. (Scot.) ... ..	161
— <i>v.</i> Cooper (1842) ... ..	193
— <i>v.</i> Harris (1859) ... ..	35
Bainbridge <i>v.</i> Wade (1850) ... ..	59, 60
Baird <i>v.</i> Tunbridge Wells Corpn. (1891) ... ..	330
— <i>v.</i> Wilson (Can.) ... ..	453
Baker, <i>Re</i> , Collins <i>v.</i> Rhodes (1881) ... ..	233
— <i>v.</i> Bradley (1910) ... ..	423
— <i>v.</i> Dalby (Can.) ... ..	242
— <i>v.</i> Garratt (1825) ... ..	83, 84
— <i>v.</i> Greenhill (1842) ... ..	580
— <i>v.</i> Jefferies (1790) ... ..	151
— <i>v.</i> Moore (1696) ... ..	454
— <i>v.</i> Portsmouth Corpn. (1878) ... ..	552, 553, 555, 558
— <i>v.</i> Whitechurch Township (Can.) ... ..	403
Baldock <i>v.</i> Westminster (City) Council (1918) ... ..	392, 515
Baldwin <i>v.</i> O'Brien (Can.) ... ..	294
Baldwin's, Ltd. <i>v.</i> Halifax Corpn. (1916) ... ..	407, 408
Balfour <i>v.</i> Baird & Brown (Scot.) ... ..	263, 264
— <i>v.</i> Crace, <i>Re</i> Crace (1902) ... ..	204, 208
Balfour, Junor & Co. <i>v.</i> Russel (Scot.) ... ..	227
Balkrishna Kirtikar <i>v.</i> Bank of Bengal (Ind.) ... ..	214
Ball <i>v.</i> Herbert (1789) ... ..	262
— <i>v.</i> Tennant (Can.) ... ..	231
— <i>v.</i> Ward (1875) ... ..	416
Ballard <i>v.</i> Dyson (1808) ... ..	265
— <i>v.</i> Wandsworth Borough Council (1906) ... ..	496, 500
Balsh <i>v.</i> Wilkinson (1852) ... ..	212
Balzer <i>v.</i> Gosfield South Corpn. (Can.) ... ..	412, 413
Bamber <i>v.</i> R. (1843) ... ..	371
Bamford <i>v.</i> Iles & Neale (1849) ... ..	168
Bampton <i>v.</i> Paulin (1827) ... ..	38
Banbury <i>v.</i> Bank of Montreal (1918) ... ..	32, 33
Bank of Africa, Ltd. <i>v.</i> Cohen (1909) ... ..	16

	PAGE		PAGE
Bank of Australasia v. Adams (N.Z.) ...	215	Baslingappa Parappa v. Dharmappa Basappa (Ind.) ...	316
— v. Reynell (N.Z.) ...	211	Basset & Prove's Case (1584) ...	230
— v. Wilson (N.Z.) ...	213	Basterach v. Atkinson (Can.) ...	313
Bank of Bengal v. Radakissen Mitter (1842) ...	191	Bastow v. Bennett (1812) ...	92, 161, 204
Bank of British North America v. Cu villier (1861) ...	54, 170	Batard v. Douglas (1853) ...	144, 145, 208
Bank of England v. Cutler (1908) ...	228	— v. Hawes (1853) ...	144, 145, 208
Bank of Hamilton v. Bamfield (Can.) ...	53	Batchellor v. Lawrence (1861) ...	116
Bank of Hindostan, China & Japan, Ltd. v. Smith (1867) ...	220	Batchelor v. Sturley (1905) ...	427
Bank of Ireland (Governor & Co.) v. Beresford (1818) ...	175, 180, n., 181	Bateman v. Bluck (1852) ...	263, 448
Bank of Ireland v. M'Manamy (Ir.) ...	14, 15	— v. Burge (1834) ...	452, 569
Bank of London, <i>Ex p.</i> , <i>Re</i> Barned's Banking Co., Ltd. (1869) ...	133	— v. Middlesex County (Can.) ...	408
Bank of Montreal v. Holoboff (Can.) ...	15	— v. Phillips (1812) ...	44, 57
— v. McFaul (Can.) ...	199	Bateman & Matthews v. Spencer (Can.) ...	35
— v. Munster Bank (Ir.) ...	53, 54	Bates v. Cort (1824) ...	17, 18
— v. Stuart (1911) ...	218	Bateson v. Gosling (1871) ...	190, 198
Bank of New Brunswick v. Wiggins (Can.) ...	168	Bath River Navigation Co. v. Willis (1840) ...	325
Bank of New Zealand v. Wilson (N.Z.) ...	94, 95	Bath Rural Council, <i>Ex p.</i> , <i>R. v.</i> Bath County Court Judge & Midland Ry. Co. (1908) ...	474, 475
Bank of Scotland v. Morrison (Scot.) ...	211	—, <i>Ex p.</i> , <i>R. v.</i> James (Judge) & Midland Ry. Co. (1908) ...	474, 475
Bank of Toronto v. Roeder & Knox (Can.) ...	162	Bathurst Borough v. Macpherson (1879) ...	405, 406
— v. Wilmot (Can.) ...	159	Batson v. King (1859) ...	232
Bank of Upper Canada v. Covert (Can.) ...	168	— v. Spearman (1838) ...	69, 95
Bannatyne v. Suburban Rapid Transit Co. (Can.) ...	328	Batt v. Beaverton Village (Can.) ...	284, 288
Bantwick v. Rogers (1891) ...	430	— v. Metropolitan Water Board (1911) ...	418
Barber v. Fox (1871) ...	17	Batten, Carne & Carne's Banking Co. v. Reed (1902) ...	109, 218
— v. — (1816) ...	34	Battersca Vestry v. County of London & Brush Provincial Electric Lighting Co., Ltd. (1899) ...	328, 330
— v. Mackrell (1892) ...	61, 68, 70, 104	Battersey's Case (1922) ...	224
— v. Penley (1893) ...	428	Bauman v. St. Pancras Vestry (1867) ...	504, 507
— v. Pott (1859) ...	132	Baxendale v. London, Chatham & Dover Ry. Co. (1874) ...	137
Barber & Co., <i>Re</i> , <i>Ex p.</i> Agra Bank (1870) ...	65	Baxter v. Jackson (1664) ...	20
Barclay v. Ancaster Township (Can.) ...	390	Bayley v. Wilkinson (1864) ...	525, 531, 532
— v. Gooch (1797) ...	129, 131	— v. Williams (1865) ...	15
— v. Lucas (1783) ...	172	— v. Wolverhampton Waterworks Co. (1860) ...	412, 413
Bardwell v. Lydall (1831) ...	88, 89	Bayne v. Hare (1850) ...	35
Barker v. Fox (1671) ...	17	Beard v. Hardy (1901) ...	35
— v. Parker (1786) ...	172	Beattie v. Dinnick (Can.) ...	34
Barlow v. St. Mary Abbotts, Kensington, Vestry (1886) ...	505, 506, 509	— v. Garbutt (Can.) ...	49
Barned's Banking Co., Ltd., <i>Re</i> , <i>Ex p.</i> Bank of London (1869) ...	133	— v. Workman (Can.) ...	14
Barned's Banking Co., <i>Re</i> , <i>Ex p.</i> Stephens (1868) ...	100	Beavan, <i>Re</i> , Davies, Banks & Co. v. Beavan (1913) ...	126, 127
Barnes v. Exchange Bank of Canada (Can.) ...	168	Beaver v. Manchester Corp'n. (1857) ...	269, 571
— v. White (1845) ...	349	Bechervaise v. Lewis (1872) ...	111, 115, 127, 138
Barnett v. Covell (1903) ...	567	Beckett v. Addyman (1882) ...	208
— v. Eccles Corp'n. (1900) ...	239	— v. Leeds Corp'n. (1872) ...	320, 322
— v. Hoo Highway Board (1882) ...	467	— v. Midland Ry. Co. (1867) ...	455
Barnett & Eccles Corp'n., <i>Re</i> (1900) ...	230	— v. Potts (1844) ...	76
Barnsley British Co-operative Society, Ltd. v. Worsborough Urban Council (1916) ...	462, 463, 464, 472	Bedford v. Deakin (1817) ...	184, 185
Barnstaple Rural District Council v. Rudd (1897) ...	385	— v. — (1818) ...	184, 185
Barracrough v. Johnson (1838) ...	286, 287, 288, 302	Bedfordshire County Council & Bedford Urban Sanitary Authority, <i>Re</i> (1894) ...	396
Barrall v. Trussell (1811) ...	17, 44	Beechey v. Quentery (1842) ...	393
Barrett (Doe d.) v. Kemp (1831) ...	324	Beerling v. Terry (1862) ...	349
— v. — (1835) ...	324	Behn v. Kemble (1859) ...	32
Barrie Township v. Gillies (Can.) ...	328	Behrens v. Richards (1905) ...	299
Barry v. Moroney (Ir.) ...	148, 149	Belford v. Haynes (Can.) ...	286
Barry & Cadoxton Local Board v. Parry (1895) ...	529	Belford Union Guardians v. Pattison (1856) ...	81
Bartlett, <i>Ex p.</i> (1860) ...	383	Bell v. Banks (1841) ...	175, 181, 187
— v. A.-G. (1709) ...	167	— v. Free (1818) ...	234
— v. Bartlett (1842) ...	104	— v. Shuttleworth (1841) ...	175
— v. Lyne (1842) ...	104	— v. Vickers (1863) ...	50, 157
— v. Symons (1842) ...	104	— v. — (1864) ...	50, 157
Barton Regis Rural District Council v. Stevens (1896) ...	555	— v. Welch (1850) ...	21, 59
Barwick v. English Joint Stock Bank (1867) ...	98, 99	— v. Winnipeg (City) (Can.) ...	402, 404
Basinstoke Union Guardians v. Smith (1855) ...	166	Bell & Sons v. Great Crosby Urban District Council (1912) ...	540

	PAGE		PAGE
Bellairs v. Ebsworth (1811) ... ..	170	Blackmore v. Mile End Old Town Vestry (1882) ... ..	399, 412
Bellamy v. Wells (1890) ... ..	428, 429	Blackpool Corp'n. v. Johnson (1902) ... ..	562, 563
Bellingham v. Freer (1837) ... ..	158, 159	Blackshire v. Stegmann, Esselen & Roos (S. Af.) ... ..	84
Belmore (Countess) v. Kent County Council (1901) ... ..	314, 315	Blackwood v. Percival (Can.) ... ..	175, 176
Benfieldside Local Board v. Conselt Iron Co. (1877) ... ..	326, 422, 439, 455, 456	Blagrove v. Bristol Waterworks Co. (1856) ... ..	454
Benham v. United Guarantee & Life Assurance Co. (1852) ... ..	189	Blake v. Douglas (Nfld.) ... ..	404
Benjamin v. Storr (1874) ... ..	425, 453, 454	— v. White (1835) ... ..	104, 170, 177
Bennett, <i>Ex p.</i> (1860) ... ..	383	Blakeley, <i>Re, Ex p.</i> Aachener Disconto Gesellschaft (1892) ... ..	91
— v. York County Corp'n. (Can.) ... ..	519, 520	Blakely, <i>Re, Ex p.</i> Harvey, <i>Ex p.</i> Springfield (1854) ... ..	157, 198
Bennett & Hamilton (City), <i>Re</i> (Can.) ... ..	451	Blakslee v. Nickerson (Can.) ... ..	151
Benson v. Duncan (1849) ... ..	226	Blakely v. Prescott Corp'n. (Can.) ... ..	388
Beplat v. Dold & Stone (S. Af.) ... ..	84	Blest v. Brown (1862) 79, 108, 109, 157, 161, 216	
Bermondsey Vestry v. Brown (1865) ... ..	307	Blood, <i>Ex p., Re</i> International Life Assurance Society & Hercules Insurance Co. (1870) ... ..	10
— v. Ramsey (1871) ... ..	496, 499	Bloor v. Beckenham Urban District Council (1908) ... ..	529
Berridge v. Berridge (1890) ... ..	150	Bluck v. Gompertz (1852) ... ..	49, 50
— v. Ward (1860) ... ..	332	Blundell v. Catterall (1821) ... ..	261, 262
— v. — (1861) ... ..	322, 332	Blyth v. Smith (1843) ... ..	137, 237
Berwick Corp'n. v. Dobie (1857) ... ..	101	Boaler v. Mayor (1865) ... ..	178
— v. Murray (1857) ... ..	101	Board of Trade v. Employers' Liability Assurance Corp'n., Ltd. (1910) ... ..	85
— v. Oswald (1853) ... ..	56, 57	Boehm v. Goodall (1911) ... ..	234
— v. — (1854) ... ..	56, 57	Bold v. Williams (1857) ... ..	335
Berwick-upon-Tweed Corp'n. v. Murray (1857) ... ..	101	Bolton, <i>Re, Morant v.</i> Bolton (1892) ... ..	40, 232
Bettleron's Case (1895) ... ..	427, 428	— v. Buckenham (1891) ... ..	178, 179
Bettesworth & Richer, <i>Re</i> (1888) ... ..	536, 537, 539	— v. Cooke (1825) ... ..	57
Betts v. Gibbins (1834) ... ..	224, 232	— v. Crowther (1824) ... ..	334, 335
Bettsworth, <i>Re</i> (Can.) ... ..	413	— v. Salmon (1891) ... ..	163, 179
Beven v. Cowling (1626) ... ..	22, 24	Bolton Corp'n. v. Scott (1913) ... ..	552
Beveridge v. Creelman (Can.) ... ..	287	Bonar v. Macdonald (1850) ... ..	163, 170
Beverley Township v. Barlow (Can.) ... ..	160	Bond v. Treahay (Can.) ... ..	34
Bewley v. Whiteford (Ir.) ... ..	17	Bond's Case (1639) ... ..	279
Rigg v. London Corp'n. (1873) ... ..	336	Bonella v. Twickenham Local Board of Health (1887) ... ..	527, 528, 529
Biggar v. Crowland Township (Can.) ... ..	410	Bonsor v. Cox (1841) ... ..	72, 171
Billericay Rural Council v. Poplar Union & Keeling (1911) ... ..	475	— v. — (1844) ... ..	72, 159, 171
Bing, Harris & Co. v. Hilslop (N.Z.) ... ..	161	Bonthrone v. Paterson (Scot.) ... ..	70
Bingham v. Corbitt (1864) ... ..	184	Booker, <i>Ex p., Re</i> West of England Bank (1880) ... ..	16, 17
Bingley Urban District Council v. Ferrand (1903) ... ..	370	Boor, <i>Re, Boor v.</i> Hopkins (1889) ... ..	537, 538
Binns, <i>Re, Lee v.</i> Binns (1896) ... ..	123, 124	Booth, <i>Re, Browning v.</i> Baldwin (1879) ... ..	95
Bird v. Gammon (1837) ... ..	36	— v. Stone (1855) ... ..	549
Birdsall v. Merritt (Can.) ... ..	430	Borland v. Curry (Ir.) ... ..	130
Birkenhead Improvement Comrs. v. Sansom (1876) ... ..	552	Boss v. Litton (1832) ... ..	316
Birkenhead Union Guardians v. Brookes (1906) ... ..	229	Bothamley v. Danby (1871) ... ..	430
Birkmyr v. Darnell (1704) ... ..	9, 29, 33	Botsford v. Henderson (Can.) ... ..	165
Birmingham & District Land Co. v. London & North Western Ry. Co. (1886) ... ..	222, 223	Bottomley v. Wilson (1822) ... ..	209
Birmingham Brewing, Malting & Distilling Co., Ltd., <i>Re</i> (1883) ... ..	109, 110	Boudreau v. Sherbrooke Corp'n. (Can.) ... ..	451
Birmingham Canal Co. v. Docker (1860) ... ..	397	Boulton v. Stubbbs (1811) ... ..	178
Birmingham Corp'n. v. Baker (1881) ... ..	536	Boulton v. Crowther (1824) ... ..	334, 335
— v. Wright (1851) ... ..	56, 166	Bourke v. Davis (1889) ... ..	204, 297, 300, 301
Bischoff's Trustee v. Frank (1903) 210, 211, 218		Bourkmire v. Darnell (1704) ... ..	9
— v. — (1909) 210, 211, 218		Bournemouth Comrs. v. Watts (1884) ... ..	534, 535
Bishop, <i>Ex p., Re</i> Fox, Walker & Co. (1880) ... ..	136	Bouverie v. Miles (1830) ... ..	513
— v. Balkis Consolidated Co. (1890) ... ..	32	Bovill v. Turner (1815) ... ..	93
— v. Wandsworth Board of Works (1900) ... ..	499	Bowditch v. Wakefield Local Board (1871) ... ..	523
Bishop Auckland Urban Council v. Alderson (1913) ... ..	542	Bowen v. Anderson (1894) ... ..	418
Black v. Bank of Nova Scotia (Can.) ... ..	112	— v. Canada Southern Ry. Co. (Can.) ... ..	334
— v. Ottoman Bank (1862) ... ..	187, 188, 189	Bowler v. Bull (1850) ... ..	118
Black Bridge, Sandown Bridge & Tinker's Bridge Cases (1852) ... ..	572, 589	Bowler, <i>Ex p., R. v.</i> Slater (1903) ... ..	559
Blackburn Corp'n. v. Micklethwait (1886) ... ..	551	Bowles v. St. Mary, Islington, Vestry (1875) ... ..	275
— v. Parkinson (1858) ... ..	551, 552	Bowmaker v. Moore (1816) ... ..	109
— v. Sanderson (1902) ... ..	548, 552	— v. — (1819) ... ..	177
Blackett v. Crissop (1897) ... ..	230	Bowsfield v. Tower (1812) ... ..	179
Blackie v. Osmaston (1884) ... ..	148	Bowyear v. Pawson (1881) ... ..	111, 156
		Boyd v. Brooks, <i>Re</i> Brooks (1865) ... ..	122
		— v. Cheney (Can.) ... ..	10
		— v. Moyle (1846) ... ..	19, 20, 21
		— v. Robins & Langlands (1859) ... ..	63, 209
		— v. Robinson (Can.) ... ..	242

	PAGE		PAGE
Boyfield v. Porter (1811) ... ..	356, 357	Bromley Local Board v. Lloyd (1892) ...	554, 555
Boyle v. Bradley (Can.) ... ..	61	Bromley Rural District Council v. Chittenden (1906) ... ..	470, 471, 472, 475
— v. Dundas Town (Can.) ... ..	402	Bromley Rural District Council v. Croydon Corpn. (1908) ... ..	469, 473, 474
Boys, <i>Re</i> , Eedes v. Boys, <i>Ex p.</i> Hop Planters Co. (1870) ... ..	59, 60	Brook v. Jenney (1841) ... ..	387, 388
Brackenborough v. Thorsby (1869) ...	416, 417, 444	Brooks, <i>Re</i> , Boyd v. Brooks (1865) ... ..	122
Brackley v. Midland Ry. Co. (1910) ...	302	— v. Haigh (1840) ... ..	19, 20, 52, 57
— v. St. Mary, Battersea, Vestry (1889) ... ..	423, 424, 449	— v. Stuart (1839) ... ..	102, 192
Bradbury v. Morgan (1862) ... ..	208	— v. Terry (1888) ... ..	513
Bradford v. Gammon (1925) ... ..	128, 129	Broom v. Batchelor (1856) ... ..	21, 53, 59
— v. Roulston (Ir.) ... ..	28	— v. Hall (1859) ... ..	146
Bradford Old Bank v. Sutcliffe (1918) ...	68, 69, 105, 106, 155, 171, 204, 209	Brophy v. Attwood & Haynes (Nfld.) ...	186
Bradley v. Brown & Street (Can.) ... ..	440	Brotherton v. Tittensor (1896) ... ..	438
— v. Greenwich Board of Works (1878) ...	497	Brotherton & Medicine Hat (City), <i>Re</i> (Can.)	550
— v. Scott (N.Z.) ... ..	35	Broughton v. Hutt (1858) ... ..	246
Braithwaite v. Watson (1889) ... ..	417	Broughton Local Board of Health, <i>Re</i> (1865)	397
Bramley Union (Guardians v. Guarantee Society (1900) ... ..	180	Brown v. Brown, <i>Re</i> Brown's Estate (1893)	68
Brandon v. Brandon (1859) ... ..	114	— v. Clegg (1851) ... ..	549
Brantford, Waterloo & Lake Erie Ry. Co. v. Huffman (Can.) ... ..	78	— v. Duncan (1829) ... ..	159, 160
Brass, <i>Ex p.</i> , R. v. London Sewers Comrs. (1870) ... ..	516, 517	— v. Edmonton Town (Can.) ... ..	293, 294, 440
Brecon Markets Co. v. Neath & Brecon Ry. Co. (1872) ... ..	337, 338, 339	— v. Lambeth Borough Council (1915) ...	515
— v. Neath & Brecon Ry. Co. (1873) ... ..	337, 338, 339	— v. Leicester Corpn. (1892) ... ..	560
Brent v. Whitecock (1866) ... ..	367	— v. Moore (Can.) ... ..	97, 98
Breslau v. Brown (1878) ... ..	133	— v. Toronto & Nipissing Ry. Co. (Can.)	452
Brett, <i>Ex p.</i> , <i>Re</i> Howe (1871) ... ..	113	— v. Torrance (Can.) ... ..	75, 76
— v. Beales (1830) ... ..	307	— v. Wilkinson (1844) ... ..	159
— v. Whitehot (1866) ... ..	367	Brown's Estate, <i>Re</i> , Brown v. Brown (1893)	68
Brettel v. Williams (1840) ... ..	47	Browne v. Carr (1831) ... ..	158, 158
Brewis v. Hornsey Local Board (1890) ...	522, 523	— v. Duncan (1829) ... ..	159, 160
Brewster v. Durrand (1880) ... ..	77	— v. Garborough (1588) ... ..	18
Brickell, <i>Ex p.</i> , R. v. Chiswick Urban District Council (1908) ... ..	559	— v. Hancock (1628) ... ..	240
Brickwood v. Anniss (1814) ... ..	181	— v. Lee (1827) ... ..	64
Bridges, Highways (Repair), etc., Case (1609)	367, 387	Browning v. Baldwin, <i>Re</i> Booth (1879) ...	95, 155
Bridgett v. Wandsworth Corpn. (1905) ...	497	— v. Stallard (1814) ... ..	35
Bridgewater Corpn. v. Stone (1908) ... ..	545	Brownlow v. Tomlinson (1840) ... ..	305
Brierley Hill Local Board v. Pearsall (1884)	336	Bruce v. Willis (1840) ... ..	325
Briggs v. Conn (N.Z.) ... ..	568	Bruce County Corpn. v. Cromar (Can.) ...	60
Brinckman v. Matley (1904) ... ..	262	Brumby & Frodingham Urban District Council, <i>Re</i> , <i>Re</i> Trent Ancholine & Grimsby Ry. Co. (1904) ... ..	354
Bristol & West of England Land Co. v. Taylor (Can.) ... ..	164	Brunning v. Odhams Brothers, Ltd. (1896)	53, 54
Bristol Corpn. v. Sinnott (1918) ... ..	525, 526	Brunswick (City) v. Baker (Aus.) ... ..	550
Britannia Steamship Insurance Assn., Ltd. v. Duff (Scot.) ... ..	70	Brunton v. Dullens (1859) ... ..	58
British Canadian Loan Co. v. Tear (Can.) ...	227	Brutton v. St. George's, Hanover Square, Vestry (1871) ... ..	508, 509
British Cash & Parcel Conveyors, Ltd. v. Lamson Store Service Co., Ltd. (1908)	221, 222	Bryans v. Peterson (Can.) ... ..	178, 179
British Cast Plate Manufacturers' Co. v. Meredith (1792) ... ..	454, 455	Bryant v. Christie (1816) ... ..	124
British Columbia Express Co. v. Grand Trunk Pacific Ry. Co. (Can.) ... ..	444	Buchanan v. Galt Town (Can.) ... ..	407
British Empire Assurance Co. v. Luxton (Can.) ... ..	214	— v. Main (Scot.) ... ..	144
British-Italian Corpn., Ltd. v. Inland Revenue Comrs. (1921) ... ..	52	Buck v. Hurst & Bailey (1866) ... ..	63
British Linen Co.'s Bank v. Thomson (Scot.)	200	Buckley v. Hanson (1898) ... ..	357, 413
British Museum Trustees v. Finnis (1833)	295, 299	Buckly v. Turner (1670) ... ..	22
British Union & National Insurance Co. v. Rawson (1916) ... ..	231, 234	Buckmyr v. Darnall (1704) ... ..	9
Britton v. Tipperary County Council, South Riding (Ir.) ... ..	356	Bulawayo Municipality v. Stewart (S. Af.)	404
Brockman v. Folkestone Corpn. (1912) ...	284	Bull v. Shoreditch Corpn. (1902) ... ..	412, 421
Brockville & North Augusta Plank Road Co. v. Crozier (Can.) ... ..	339	Bullen v. Wakely (1898) ... ..	450
Bromley v. Mercer (1922) ... ..	434	Bullock v. Lloyd (1825) ... ..	240
Bromley Local Board v. Lansbury (1894) ...	374, 521, 522	Bulmer, <i>Re</i> , <i>Ex p.</i> Johnson (1853) ... ..	120
		Burden v. Rigler (1911) ... ..	318
		Burgess v. Eve, <i>Ex p.</i> London & County Banking Co. (1872) ... ..	53, 96, 108, 188, 204
		— v. Morris (1897) ... ..	394
		— v. Northwich Local Board (1880) ... ..	329, 335, 336, 353
		Burke v. Glover (Can.) ... ..	163
		— v. Rogerson (1866) ... ..	212
		Burke's Case ( <i>circa</i> 1780) ... ..	180
		Burkmire v. Darnel (1704) ... ..	9
		Burleigh v. Stott (1828) ... ..	105, 106
		Burleigh Township v. Hales (Can.) ... ..	328
		Burnand v. Seaton (1900) ... ..	9, 212, 213
		Burnham v. Choat (Can.) ... ..	101
		— v. Peterborough (Can.) ... ..	123

	PAGE		PAGE
Burnley Corpn. v. Lancaster County Council (1889) ... ..	395	Cannam v. Johnson (1847) ... ..	213
Burnly v. Jennings (1806) ... ..	96	Cannan v. Abingdon (Earl) (1900) ... ..	348
Burrell, <i>Ex p.</i> , <i>Re</i> Robinson (1876) ... ..	122, 123	Canniff v. Bogert (Can.) ... ..	176
Burrows v. London (City) Sewers Comrs. (1888) ... ..	401	Cannon v. Rands (1870) ... ..	27
Burslem Corpn. & Staffordshire County Council, <i>Re</i> (1896) ... ..	395, 568	Cape of Good Hope Bank (Liquidators) v. Forde & Co. (S. Af.) ... ..	110
Burt v. Dominion Iron & Steel Co. (Can.) ... ..	335	Capel v. Butler (1825) ... ..	190, 192
Burton, <i>Re</i> (1851) ... ..	16	Capon v. Toronto (City) (Can.) ... ..	550, 551
— v. Dougherty (Can.) ... ..	452	Cardwell v. Smith (1886) ... ..	202, 203
— v. Gray (1873) ... ..	76	Carey v. Bexhill Corpn. (1904) ... ..	543
Burwell v. Edison (Can.) ... ..	203	Carlill, <i>Re</i> , <i>Ex p.</i> Marsh (1815) ... ..	171
Bury St. Edmunds Corpn. v. West Suffolk County Council (1898) ... ..	576	Carlisle Corpn. v. Wilson (1804) ... ..	349
Bushell v. Beavan (1834) ... ..	29	Carlisle Rural Council v. Carlisle Corpn. (1909) ... ..	473, 474
— v. Collett (1862) ... ..	191	Carlston v. Municipal Council (Nfld.) ... ..	588
— v. Creer (1900) ... ..	558	Carlton v. Sherwood Municipality (Can.) ... ..	407
Bussey v. Storey (1832) ... ..	350	Carnahan v. North Invercargill Borough (N.Z.) ... ..	409
Butcher v. Churchill (1808) ... ..	79	Carney v. Phalen (Can.) ... ..	141
— v. Steuart (1843) ... ..	36, 61	Carpenter v. Finsbury Borough Council (1920) ... ..	515, 516
Butler v. Butler (1877) ... ..	241	Carpenter & Barton Corpn., <i>Re</i> (Can.) ... ..	553, 554
— v. Prendergast (1720) ... ..	98	Carr, <i>Ex p.</i> (1814) ... ..	31
Butt (Henry) & Co. v. Weston-super-Mare Urban District Council (1922) ... ..	462, 463, 464, 475	— v. Browne (1826) ... ..	65, 70
Butten, <i>Re</i> (1913) ... ..	183, 184	— v. Roberts (1833) ... ..	240
Butterfield v. Forrester (1809) ... ..	146, 147	Carrick v. Johnston (Can.) ... ..	318
Butterly v. Drogheda Corpn. (Ir.) ... ..	407	Carroll v. Goold (1823) ... ..	151
Byrne v. Muzio (Ir.) ... ..	188	Curshore v. North Eastern Ry. Co. (1885) ... ..	148
Byrnes v. Bown (Can.) ... ..	263	Carstairs, <i>Ex p.</i> , <i>Re</i> Slade (1820) ... ..	198, 203
		Carter v. Price (1845) ... ..	149
		— v. Wareham Highway Board (1866) ... ..	370, 371
		— v. White (1883) ... ..	68, 70, 185, 186, 192
		Carty v. London (City) (Can.) ... ..	402
		Cary v. Dawson (1869) ... ..	141
		— v. Kingston-upon-Hull Local Board of Health (1864) ... ..	527
		Casey v. Hamlin (Nfld.) ... ..	296
		Cashin v. Perth (Can.) ... ..	211
		Cassidy v. Moose Jaw (City) (Can.) ... ..	332
		Castling v. Aubert (1802) ... ..	30, 39, 42, 43
		Castor v. Uxbridge Township (Can.) ... ..	447
		Caswell v. St. Mary's & Proof Line Junction Road Co. (Can.) ... ..	388
		Catton v. Simpson (1838) ... ..	219
		Cavan County Council & Bailieborough Rural District Council v. Kane (Ir.) ... ..	470, 471
		Cawston v. Bromley Urban District Council (1900) ... ..	531
		Cawston & Bromley Urban District Council, <i>Re</i> (1900) ... ..	531
		Caxton & Arrington Union v. Dew (1899) ... ..	108, 189, 214
		Central London Ry. Co. v. London City Land Tax Comrs. (1911) ... ..	321
		Chadwick v. Manning (1896) ... ..	125
		Chalmers v. Victors (1868) ... ..	22, 59, 93
		Chambers, <i>Ex p.</i> , <i>R. v.</i> Bradford (1908) ... ..	356
		— v. Manchester & Milford Ry. Co. (1864) ... ..	124, 125
		— v. Williams (1826) ... ..	341
		Chambers & Burford Town Corpn., <i>Re</i> (Can.) ... ..	553
		Chapleo v. Brunswick Building Society (1881) ... ..	97
		Chaplin, <i>Re</i> , Jones v. Young (1863) ... ..	186
		Chaplin & Co., Ltd. v. Brammall (1908) ... ..	15, 218
		Chaplin (W. H.) & Co., Ltd. v. Westminster Corpn. (1901) ... ..	317, 333, 445
		Chapman v. Beckinton (1842) ... ..	206, 207
		— v. Cripps (1862) ... ..	299
		— v. Robinson (1858) ... ..	435, 458
		— v. Sutton (1846) ... ..	21
		Chare v. Hart (1918) ... ..	390, 391
		Charing Cross & Strand Electricity Supply Corpn. v. Woodthorpe (1903) ... ..	514

## C.

Cababé v. Walton-on-Thames Urban Council (1914) ... ..	362, 363
Caiger v. St. Mary, Islington, Vestry (1881) ... ..	491
Cairns v. Ottawa (City) Water Comrs. (Can.) ... ..	445
Calcutta Town Corpn. v. Anderson (Ind.) ... ..	409
Caledonian Banking Co. v. Kennedy's Trustees (Scot.) ... ..	61, 62
Caledonian Ry. Co. v. Edinburgh Magistrates (Scot.) ... ..	550
Callaghan v. Hobkirk (Can.) ... ..	294
Calvert v. London Dock Co. (1838) ... ..	181
Cambeftor v. Chapman (1887) ... ..	201
Camberwell Corpn. v. Dixon (1910) ... ..	277, 490
Cambridge Corpn. v. Dennis (1858) ... ..	169
Cambridge University v. Baldwin (1839) ... ..	171
Cambridgeshire County Council v. Pepper & Hollis (1912) ... ..	465, 475
Cameron v. Boulton (Can.) ... ..	143, 174
— v. Caledonian Ry. Co. (Scot.) ... ..	550
— v. Moncton Town (Can.) ... ..	402, 404
Campbell v. Lang (1853) ... ..	263, 264
— v. Leith Police Comrs. (Scot.) ... ..	523, 524
— v. Paddington Corpn. (1911) ... ..	429, 453, 454
— v. Pond (Can.) ... ..	286
— v. Rothwell (1877) ... ..	115
Campbell & Southampton Village, <i>Re</i> (Can.) ... ..	480
Campbell Davys v. Lloyd (1901) ... ..	449, 569, 570
Canada Agricultural Insurance Co. v. Watt (Can.) ... ..	168
Canada Atlantic Ry. Co. v. Ottawa Corpn. (Can.) ... ..	351, 352
Canada Life Assurance Co. v. Calkins (Can.) ... ..	108
Canada Permanent L. & S. Co. v. Ball (Can.) ... ..	204
Canadian Bank of Commerce v. Swanson & McMillan (Can.) ... ..	156, 157
Canadian Northern Ontario Ry. Co. v. Billings (Can.) ... ..	294
Canadian Northern Ry. Co. & St. Boniface (City), <i>Re</i> (Can.) ... ..	479
Canavan v. Meek (Can.) ... ..	227, 228

	PAGE		PAGE
Charity Comrs. v. London Corpn., <i>Re White's</i> Charities (1898) ... ..	321	Clerkenwell Vestry v. Edmondson & Sons (1902) ... ..	279
Chater v. Beckett (1797) ... ..	30	Cline v. Cornwall Corpn. (Can.) ... ..	452
Chatfield v. Cox (1852) ... ..	52	Clinton v. Hastings County (Can.) ... ..	402
Chatham Corpn. v. McCrea (Can.) ... ..	189, 190	Clipsam v. Morris (1668) ... ..	25
Chatterton v. Glanford Rural Council (1915) ... ..	541, 542	Clode v. London County Council (1914) ... ..	505
———— v. Parker (1914) ... ..	438, 439	Cloete v. Bergh (S. Af.) ... ..	144
Cheetham v. Crook (1825) ... ..	104	Close v. Close (1853) ... ..	125, 183
———— v. Ward (1797) ... ..	202	Clothworkers' Co. v. Thames Conservators (1862) ... ..	333
Chelsea Vestry v. Evans (1870) ... ..	498	Clowes v. Beck (1851) ... ..	354, 355
———— v. Stoddard (1879) ... ..	308, 444	———— v. ——— (1852) ... ..	354, 355
Cherrington v. Phillips (1838) ... ..	32	Clutterbuck's Estate, <i>Re</i> (1856) ... ..	186
Cherry v. Snook (N.Z.) ... ..	294	Clydebank & District Water Trustees v. Fidelity & Deposit Co. of Maryland (Scot.) ... ..	60
Chertsey Rural District Council & Binns, <i>Re</i> (1905) ... ..	475	Clydesdale Bank, Ltd. v. Paton (Scot.) ... ..	32
Chertsey Urban District Council v. Binns (1905) ... ..	475	Clypsam v. Morris (1668) ... ..	25
Cheshire Lines Committee v. Heaton Norris Urban District Council (1913) ... ..	568, 569	Coakes v. Sherrington (1848) ... ..	93
Chester (Goodtitle d.) v. Alker & Elmes (1757) ... ..	325	Coates v. Coates (1864) ... ..	87, 91, 92, 191
Chester Corpn. v. Briggs (1924) ... ..	544, 545, 547	Coats v. Herefordshire County Council (1909) ... ..	288, 291, 295, 301, 305
Chesterfield Rural Council v. Newton (1904) ... ..	471, 474, 475	Cobb v. Saxby (1914) ... ..	333
Chichester v. Lethbridge (1738) ... ..	448, 452, 453	Cobbett v. Brock (1855) ... ..	210
Chichester Corpn. v. Foster (1906) ... ..	431, 433, 461, 462	Coburg Hotel v. London County Council (1899) ... ..	503
Chinnock v. Hartley Wintney Rural District Council (1899) ... ..	286, 288, 296, 302	Cochran's Estate, <i>Re</i> , <i>De Wolf v. Lindsay</i> (1868) ... ..	116, 122
Chippendale v. Pontefract Rural District Council (1907) ... ..	315	Cochrane & Co. v. Mathie (Scot.) ... ..	161
Chiranji Lal v. Naraini (Ind.) ... ..	242	Cockburn v. Gillespie (Can.) ... ..	112
Chitguppi, etc. v. Vinayak, etc. (Ind.) ... ..	159	Cocks v. Nash (1832) ... ..	198
Cholmeley v. Darley (1845) ... ..	51	Cocks, Biddulph & Co., <i>Ex p.</i> , <i>Re Hallett &amp;</i> <i>Co.</i> (1894) ... ..	100, 101
Chorley Corpn. v. Nightingale (1907) ... ..	315, 521	Coe v. Duffield (1822) ... ..	46
Christchurch Inclosure Act, <i>Re</i> , <i>Meyrick</i> <i>v. A.-G.</i> (1894) ... ..	523	Coggins v. Bennett (1877) ... ..	435, 459
Christie v. Reid (Scot.) ... ..	87	Cohrell v. Hatfield (Can.) ... ..	36
———— v. St. John (City) (Can.) ... ..	408	Cokain v. Goodlage (1610) ... ..	69
Church of England Life & Fire Assurance Co. v. Hodges & Macadam (Scot.) ... ..	202, 203	Colbeck v. Brantford Township Corpn. (Can.) ... ..	401
Church of England Life & Fire Assurance Co. v. Wink (Scot.) ... ..	203	Colbourn v. Dawson (1851) ... ..	60
Churchill (Lord), <i>Re</i> , <i>Manisty v. Churchill</i> (1888) ... ..	130	Colchester Corpn. v. Gepp (1912) ... ..	237, 469, 470, 471, 475
Citizens Insurance Co. v. Cluxton (Can.) ... ..	150	———— v. ——— (1913) ... ..	237, 469, 470, 471, 475
City & South London Ry. Co. v. London County Council (1891) ... ..	508	Colchester, Wemyss & Co. v. Gloucestershire County Council (1897) ... ..	468
City Discount Co. v. McLean (1874) ... ..	95, 153	Coldham v. Showler (1846) ... ..	47
City of London Brewery v. Thames Con- servators (1862) ... ..	333	Cole v. Maxwell (Can.) ... ..	294
City of Peking, The (1800) ... ..	241	———— v. Miles (1888) ... ..	470, 477
Clabbon, <i>Re</i> (1904) ... ..	229	Coleman v. Halifax (Can.) ... ..	400
Clacton Local Board v. Harman (1895) ... ..	540	———— v. Waller (1829) ... ..	26
———— v. Young & Sons (1895) ... ..	540	Coles v. Pack (1869) ... ..	61, 93, 94
Clancy v. Piggott (1835) ... ..	43	———— v. Peyton, <i>Re Ennis</i> (1893) ... ..	208, 209
Clapperton v. Mutchmor (Can.) ... ..	34	———— v. Strick (1850) ... ..	26
Clare v. Dobson (1911) ... ..	238	Collinge v. Heywood (1839) ... ..	240, 241
Clare's Claim, <i>Re</i> Victor Varnish Co. (Can.) ... ..	112	Collins v. Gwynne (1833) ... ..	65
Clark v. Calgary (Can.) ... ..	398	———— v. Hornsey Urban Council (1901) ... ..	567
———— v. Chipman (Can.) ... ..	124	———— v. Lightfoot (1826) ... ..	209
———— v. Winnipeg (City) & Winnipeg Electric Ry. Co. (Can.) ... ..	400, 401	———— v. Owen (1866) ... ..	197
Clarke v. Birley (1889) ... ..	175, 176	———— v. Prosser (1823) ... ..	87, 102, 218
———— v. Chilliwack Corpn. (Can.) ... ..	398	———— v. Rhodes, <i>Re Baker</i> (1881) ... ..	233
———— v. Green (1849) ... ..	74, 75	Colman v. Eastern Counties Ry. Co. (1846) ... ..	16
———— v. Henty (1838) ... ..	12, 179, 197	———— v. Eyles (1817) ... ..	34
———— v. Portland Town (Can.) ... ..	386	Colnaghi, <i>Re</i> , <i>Ex p.</i> Marks (1838) ... ..	64
———— v. Ritchey (Can.) ... ..	213	Colonial Bank of New Zealand v. Lewis & Moffett (N.Z.) ... ..	58
———— v. Wilson (1838) ... ..	185	Colquhoun v. Bruce County (Chairman, Councillors & Inhabitants) (N.Z.) ... ..	398
Clarson v. Arnold (1890) ... ..	435	Colquhoun v. Fullerton Corpn. (Can.) ... ..	403
Clay v. Ray (1864) ... ..	26	Colvin v. Buckle (1841) ... ..	85, 105
Clements v. Smith (1800) ... ..	346	Combe v. Woolf (1832) ... ..	176, 177
———— v. Tyrone County Council (Ir.) ... ..	409	Combe's (Abbot) Case (1369) ... ..	586
Clerk v. Blackstock (1810) ... ..	51	Comeau v. Leblanc (Can.) ... ..	281
		Comley v. Carpenter (1865) ... ..	347
		Commercial Bank of Australia, Ltd. v. Colonial Finance Mortgage Investment & Guarantee Corpn., Ltd. (Aus.) ... ..	94, 105

# TABLE OF CASES.

xlvii

	PAGE		PAGE
Commercial Bank of Australia v. Wilson & Co.'s Estate (Official Assignee) (1893) ...	156	Coulton v. Ambler (1844) ...	345
Commercial Bank of Scotland v. Pattison's Trustees (Scot.) ...	95	Coumbe, <i>Re</i> (Can.) ...	78
Commercial Bank of Scotland v. Sprott (Scot.) ...	87	County of London Electric Supply Co., Ltd. v. Perkins (1908) ...	514
Commercial Bank of Tasmania v. Jones (1893) ...	35, 192, 196, 198	Coupland v. Hardingham (1813) ...	441
Confederation Life Assn. v. Borden (Can.) ...	188, 189	Course, <i>Ex p.</i> , R. v. Epsom Urban District Council (1912) ...	539
Coniagas Mines, Ltd. v. Cobalt & Jamieson Meat Co. (Can.) ...	69, 70	Coventry (Earl) v. Willes (1863) ...	317, 318
— v. Jacobson & Blais (Can.) ...	326	Coverdale v. Charlton (1878) ...	329, 330
Connor v. Brant (Can.) ...	352	Cowardin, <i>In the Goods of</i> (1901) ...	73
Conrad v. Kaplan (Can.) ...	34, 35	Cowell v. Edwards (1800) ...	145, 148
Constable v. Nicholson (1863) ...	355	Cowley v. Russell (1812) ...	193
Conway Bridge Comrs. v. Jones (1910) ...	337	— v. Newmarket Local Board (1892) ...	400
Cook v. Bath Corp'n. (1868) ...	453	Cowper, <i>Ex p.</i> , R. v. Tynemouth Corp'n. (1911) ...	556
— v. Ipswich Local Board (1871) ...	521, 530, 534, 538	— v. Smith (1838) ...	197
— v. North Vancouver District Corp'n. (Can.) ...	356, 357	Cox v. Paddington Vestry (1891) ...	411
Cooke v. — (1886) ...	139, 141	Coyte v. Elphick (1874) ...	73, 78
— v. Green (1823) ...	320	Crace, <i>Re</i> , Balfour v. Crace (1902) ...	204, 208
Cooke's Case (1686) ...	141	Crafts v. Tritton (1818) ...	125, 147
Cooksley v. New Westminster Corp'n. (Can.) ...	405, 406	Cragoe v. Jones (1873) ...	194
Cool v. Switzer (Can.) ...	101	Crampton v. Walker (1860) ...	138, 139
Coope v. Twynam (1823) ...	140, 142	Crane v. Murray (Nfld.) ...	447
Cooper v. Crabtree (1882) ...	454	— v. South Suburban Gas Co. (1916) ...	436
— v. Evans (1867) ...	62, 78	Crathern v. Bell (Can.) ...	156
— v. Jenkins (1863) ...	121	Crawford v. Stirling (1802) ...	104
— v. Joel (1859) ...	77, 216	Graythorne v. Swinburne (1807) ...	139, 141, 142
— v. Robinson (1818) ...	244	Crears v. Burnycat (1887) ...	23
— v. Walker (1862) ...	265, 266, 282, 309, 419, 442, 444	— v. Hunter (1887) ...	23, 25
— v. Wandsworth Board of Works (1863) ...	518	Crease v. Barrett (1835) ...	303
Copeland v. Blenheim Village (Can.) ...	403	Creighton v. Rankin (1840) ...	163, 164, 188, 189
Copestake v. West Sussex County Council (1911) ...	304	Cresswell v. Wood (1839) ...	232
Copis v. Middleton (1823) ...	121, 122	Crippen v. Hitchen (Can.) ...	227
Copland v. Miller (1903) ...	132	Cripps v. Hartnoll (1863) ...	40, 41
Coplestone, <i>Ex p.</i> , <i>Re</i> Snell (1839) ...	88	Crisp, <i>Ex p.</i> (1744) ...	114
Corbett v. Badger (1901) ...	518	— v. London County Council (1899) ...	514
— (Sheriff) v. Hopkirk (Can.) ...	230	Crosdill v. Ratcliffe (1862) ...	415, 416, 427, 439
— v. O'Reilly (Can.) ...	230	Croft v. Johnson (1814) ...	179
Corby v. Gray (Can.) ...	228	— v. Rickmansworth Highway Board (1888) ...	386
Cornwall Town Corp'n. v. Derochie (Can.) ...	389	— v. Smallwood (1793) ...	37
Corsellis v. London County Council (1907) ...	289, 306	Crofts v. Beale (1851) ...	18, 28
— v. — (1908) ...	289, 306, 488, 489	Cross v. Sprigg (1819) ...	180, 195
Cory & Son, Ltd. v. France, Fenwick & Co., Ltd. (1911) ...	230	— v. — (1850) ...	180, 195
Cory (W.) & Son, Ltd. v. Lambton & Hetton Collieries, Ltd. (1916) ...	225	Crossdill v. Ratcliff (1862) ...	415, 416
Cosford Union v. Poor Law & Local Government Officers' Mutual Guarantee Assn., Ltd. (1910) ...	167, 190	Crosse v. Wandsworth Board of Works (1898) ...	277
Cosgrave Brewing & Malting Co. v. Starrs (Can.) ...	205	Crowley's Claim, Lacey v. Hill (1874) ...	129, 242
Cottin v. Blane (1795) ...	71	Croydon Gas Co. v. Dickinson (1876) ...	158, 182, 184
Cottingham v. Cottingham (Can.) ...	237	Croydon Rural District Council v. Betts (1914) ...	536
Cotton v. Vancouver (Can.) ...	330	Croydon Rural District Council v. Sutton District Water Co. (1908) ...	471
Cotton's Trustees v. Metropolitan Ry. Co. (1880) ...	332	Crump v. Chorley Corp'n. (1908) ...	520
Couch v. Louise Municipality (Can.) ...	402	Crystal Palace Gas Co. v. Idris & Co. (1900) ...	394, 395
Coughlin & Irwin's Claim, <i>Re</i> Stratford Fuel, Ice & Construction Co. (Can.) ...	88	Cubitt v. Maxse (Lady Caroline) (1873) ...	282, 309, 312
Coulstring v. Nova Scotia Telephone Co. (Can.) ...	453, 454	Cuckfield Rural District Council v. Goring (1898) ...	369
Coulthart v. Clementson (1879) ...	208	Cumberland (Inhabitants) v. R. (1803) ...	583, 584, 585
		Cumberland County Council v. Inland Revenue Comrs. (1898) ...	357
		Cumberlege v. Lawson (1857) ...	73
		Cuming v. Hill (1819) ...	96, 97
		Cumming v. Bank of Montreal (Can.) ...	198
		— v. Smollett (Scot.) ...	284
		Cummings v. Dundas Town (Can.) ...	373
		Cunliffe v. Whalley (1851) ...	326
		Cunningham v. Buchanan (Can.) ...	210, 211
		Cunningham & Co., Ltd., <i>Re</i> , Simpson's Claim (1887) ...	16
		Curle v. Brandon (City) (Can.) ...	587
		Curling v. Chalklen (1815) ...	56, 166



	PAGE		PAGE
Currey v. Armitage (1858) ... ..	196	De la Chevrotière v. Montreal (City) (Can.)...	330
Curry v. Edensor (1790) ... ..	52	De la Rosa v. Prieto (1864) ... ..	97, 98
Curtis v. Embury (1872) ... ..	274	Dell v. Chesham Urban Council (1921) ...	408
— v. Kesteven County Council (1890) ...	391	De Medewe, <i>Re</i> (1859) ... ..	95
— v. Wilkinson (1886) ... ..	427	Dendy v. Simpson (1856) ... ..	323
Cuthbertson v. Young (Scot.) ... ..	446	— v. — (1861) ... ..	323
Cutler v. Southern (1867) ... ..	243	Denison v. Mair (1811) ... ..	244
Cuzner v. Calgary (Can.) ... ..	388	Denman v. Finchley Urban District Council (1912) ... ..	529, 530
D.		Dennis & Sons, Ltd. v. Good (1918)...	417, 444
Dale v. Powell (1911) ... ..	116, 192	Denny v. Thwaites (1876) ... ..	450
Dalgety v. Moss (N.Z.) ... ..	213	Denton's Estate, <i>Re</i> , Licenses Insurance Corpn. & Guarantee Fund, Ltd. v. Dehton (1904) ... ..	10, 11, 45, 139, 142
Dallas v. Walls (1873) ... ..	74, 145	De Ponthieu v. Pennyfeather (1814) ...	477, 478, 483
Dally v. Pooley (1844) ... ..	232, 233	Derby Corpn. v. Grudgings (1894) ...	520, 530, 535
Dalton v. Tuke (1848) ... ..	207	Derby County Council v. Matlock Bath & Scarthin Nick Urban District (1896) ...	395, 568
Dalton Overseers v. North Eastern Ry. Co. (1900) ... ..	370, 371	Dering v. Winchelsea (Earl) (1787) ...	139, 141, 142
Daly v. Robertson (Can.) ... ..	294	De Souza, <i>Ex p.</i> , <i>Re</i> Lacy (1853) ... ..	155
Damodar Das v. Muhammad Husain (Ind.)	176	Devaux v. Steinkeller (1839) ... ..	31
Danby v. Hunter (1879) ... ..	438	Devenish v. Johnstone (S. Af.) ... ..	137
Dance v. Girdler (1804) ... ..	172	Devey v. Edwards & Tappen (1826) ...	187
Dane v. Mortgage Insurance Corpn., Ltd. (1894) ... ..	12	Devonport Corpn. v. Tozer (1903) ... ..	558
Daniels v. Potter (1830) ... ..	417	De Wolf v. Lindsell, <i>Re</i> Cochran's Estate (1868) ... ..	116, 122
Dargie v. Forfar Magistrates (Scot.) ...	404	De Young v. Giles (Can.) ... ..	284, 294
Darnell v. Tratt (1825) ... ..	37	Dholka Town Municipality v. Patel Desaihai (Ind.) ... ..	398
Darthez v. Lee (1835) ... ..	126	Diamond v. East Hants Municipality (Can.)	587
Dartmouth Corpn. v. Silly (1857) ... ..	169	Dickie v. Woodworth (Can.) ... ..	164
Darwen Corpn. v. Lancashire JJ. (1887)	396	Dickson v. Hatfield (1825) ... ..	38, 39
Dashwood v. Manlove (1891) ... ..	226	— v. McPherson (Can.) ... ..	179
Daventry Rural District Council v. Parker (1900) ... ..	369	Dilworth, <i>Re</i> , <i>Ex p.</i> Armitstead (1828) ...	227
Davey v. Phelps (1841) ... ..	164	Dime Savings Bank v. Mills (Can.) ... ..	94
— v. Prendergrass (1821) ... ..	175	Dimes v. Petley (1850) ... ..	448
— v. Warne (1845) ... ..	516	Dixon v. Broomfield (1814) ... ..	45
Davidson v. Cooper (1844) ... ..	219	— v. Chester (1906) ... ..	450
— v. McGregor (1841) ... ..	199	— v. Cockett (1872) ... ..	340
Davies v. Funston (Can.) ... ..	22	— v. Hatfield (1825) ... ..	38, 39
— v. Humphreys (1840) ... ..	130, 132, 144, 148	— v. Steel (1901) ... ..	108, 113, 125
— v. London & Provincial Marine Insur- ance Co. (1878) ... ..	210, 217	Dobell v. Ontario Bank (Can.) ... ..	156
— v. Mann (1842) ... ..	447	Dobie v. Berwick-on-Tweed Corpn. (1856)	56, 57
— v. R. (Can.) ... ..	389	Dodd v. St. Pancras Vestry (1869) ...	494
— v. Stainbank (1855) ... ..	109, 181	— v. Whelan (Ir.) ... ..	208
— v. Stephens (1836) ... ..	261, 265, 289, 293, 308, 411	Dodworth Urban District Council v. Ibbotson (1903) ... ..	542
Davies, Banks & Co. v. Beavan, <i>Re</i> Beavan (1913) ... ..	126, 127	Doe d. Harrison v. Hampson (1847) ...	324
Davis v. Greenwich District Board of Works (1895) ... ..	278, 499	— d. Barrett v. Kemp (1831) ... ..	324
Davison v. Gill (1800) ... ..	324, 459, 481	— d. — v. — (1835) ... ..	324
Davison's Estate, <i>Re</i> (Ir.) ... ..	113, 117	— d. Pring v. Pearsey (1827) ... ..	320, 323
Davys v. Buswell (1913) ... ..	42	Doig v. Lawrie (Scot.) ... ..	126
Daw v. Metropolitan Board of Works (1862)	517	Dominion Bank v. Blair (Can.) ... ..	211
Daw & Son v. London County Council (1890) ... ..	512	Dominion of Canada Investment & Deben- ture Co., Ltd. v. Gelhorn (Can.) ... ..	146, 147
Dawes, <i>Re</i> , <i>Ex p.</i> Kendal (1811) ... ..	111	Donaldson v. Woolwich Corpn. (1911) ...	303, 407
— v. Hawkins (1860) ... ..	261, 295, 296, 306, 319	Done v. Walley (1848) ... ..	149, 150
Dawson v. Bank of Whitehaven (1877) ...	118	Donegal County Council v. Life & Health Assurance Assocn. (Ir.) ... ..	160
— v. Lawes (1854) ... ..	188	Douglas v. Blackey (Can.) ... ..	103, 104
— v. Raynes (1826) ... ..	85	— v. Fox (Can.) ... ..	328
— v. Willoughby Highways Surveyor (1864) ... ..	367	— v. Regina (City) (Can.) ... ..	411
Dawson & Co. v. Bingley Urban Council (1911) ... ..	407	Dovaston v. Payne (1795) ... ..	316, 317
Dean v. Newhall (1799) ... ..	196	Dover & Deal Ry., Cinque Ports, Thanet & Coast Junction Co., <i>Re</i> , Londesborough's (Lord) Case (1854) ... ..	17, 105
Deane v. City Bank of Sydney (Aus.) ...	181	Dover & Deal Ry., Cinque Ports, Thanet & Coast Junction Co., <i>Re</i> , Mowatt & Elliott's Case (1853) ... ..	105
Deards v. Goldsmith (1879) ... ..	351, 352	Dow v. Metropolitan Board of Works (1862)	517
De Brettes v. Goodman (1855) ... ..	78	Dowden v. Levis (Ir.) ... ..	184
Debtor, <i>Ex p.</i> , <i>Re</i> E. W. A. (1901) ... ..	202	Downie v. Barr (Scot.) ... ..	93
Debtor, A (No. 14 of 1913), <i>Re</i> (1913) ...	183, 184	Downing v. Gault (Can.) ... ..	315
Deering v. Winchelsea (Earl) (1787) ...	142	Drake v. Mitchell (1803) ... ..	200
Defries v. Smith (1862) ... ..	185, 192	Drew v. Lockett (1863) ... ..	112, 113, 119

	PAGE		PAGE
Drew v. New River Co. (1834) ...	421	Edwards v. Jevons (1849) ...	20, 60
Drink v. Regal Shoe Co., Ltd. (Can.) ...	163	— v. Kelly (1817) ...	38
Drinkwater v. Goodwin (1775) ...	134	— v. Poulter (1912) ...	244
Driscoll v. Barker (Can.) ...	163	Eedes v. Boys, <i>Ex p.</i> Hop Planters Co., <i>Re</i>	
— v. Battersea Borough Council (1903) ...	490, 491	Boys (1870) ...	59, 60
— v. St. John (City) Corp'n. (Can.) ...	407, 408	Egbert v. National Crown Bank (1918) ...	159, 205
Driver v. Kingston Highway Board (1871) ...	357	— v. Northern Crown Bank (1918) ...	205
Drummond v. Drummond (1868) ...	123, 124	Egerly's Case (1841) ...	432
Dry v. Davy (1839) ...	171	Egg v. Blayney (1888) ...	496
Dryden v. Putney Overseers (1876) ...	278, 489, 490	Egham Rural District Council v. Gordon	
Duck v. Toronto (City) (Can.) ...	402	(1902) ...	468
Duff v. Barrett (Can.) ...	176	Einarson v. Winnipeg (City) (Can.) ...	404
Duffield v. Scott (1789) ...	130, 131	Ekin v. Flay (1845) ...	342
Dugdale v. Lovering (1875) ...	223	Elgin County Road Trustees v. Innes (Scot.) ...	455, 456
Duke v. Courage & Co. (1882) ...	427	Elgin Loan & Savings Co. v. London Gua-	
Dumbell v. Isle of Man Ry. Co. (1880) ...	123	rantee & Accident Co. (Can.) ...	215
Duncan, <i>Re, Ex p.</i> Littlejohn (1813) ...	20	Elgood v. Bullock (1844) ...	441
— v. Benson (1817) ...	226	Elkins v. Heart (1731) ...	42
— v. Findlater (1839) ...	408	Ellesmere Brewery Co. v. Cooper (1896) ...	73, 145, 150, 220
— v. Louch (1845) ...	305, 306	Ellice & Co. v. Finlayson (Scot.) ...	101, 102
— v. Sutton (1835) ...	193	Elliott v. Winnipeg Electric Ry. Co. (Can.) ...	445
Duncan, Fox & Co. v. North & South Wales		Ellis v. Bromley Local Board (1876) ...	354
Bank (1880) ...	113, 115, 116	— v. Ellis (1857) ...	116
Duncomb's Case (1634) ...	372	— v. Emmanuel (1876) ...	62, 87, 90
Dunlop v. York Township (Can.) ...	288	— v. Lee (1857) ...	116
Dunn v. Hott (1904) ...	415, 416, 425	— v. Levy (1835) ...	27, 28
— v. Slee (1817) ...	143, 184	— v. London County Council (1892) ...	509
Dunning v. Trainer (1909) ...	458, 459	— v. Maidstone Rural Sanitary Authority	
Durga Kunwar v. Kali Charan (Ind.) ...	242	(1882) ...	461, 467, 468
Durham Corp'n. v. Crichton (1889) ...	82, 83	— v. Plumstead Board of Works (1893) ...	503
— v. Fowler (1889) ...	82, 83, 185, 189	— v. Sheffield Gas Consumers Co. (1853) ...	421
— v. Porter (1889) ...	82, 83	— v. Warnes (1804) ...	213
Dutchman v. Tooth (1839) ...	48	— v. Woodbridge (1860) ...	390, 570
Du Toit v. Aberdeen Divisional Council		Elliston v. Berryman (1850) ...	225
(S. Af.) ...	281	Elsdon, <i>Ex p.</i> (1882) ...	509
Dwyer v. Portland Town (Can.) ...	402	— (or Elston) v. Hampstead Corp'n.	
— v. Rich (Ir.) ...	321	(1905) ...	495, 496, 499
Dwyre v. Ottawa Corp'n. (Can.) ...	357	Elton, Hammond & Co. v. Neilson (Scot.) ...	171
Dykes v. Watson (Scot.) ...	64	Elwood v. Bullock (1844) ...	441
E.		Elworthy v. Maunder (1828) ...	77
E. W. A., <i>Re, Ex p.</i> Debtor (1901) ...	202	Ely Brewery Co. v. Pontypridd Urban	
Eales v. Fraser (1843) ...	197	District Council (1903) ...	407
Earle v. Oliver (1848) ...	119, 120	Embling v. McEwan (Aus.) ...	112
East v. Berkshire County Council (1911) ...	314	Emery v. Clark (1857) ...	134
East & West India Dock Co., <i>Re</i> (1888) ...	581	Emmet v. Dewhurst (1851) ...	77
East Fremantle Corp'n. v. Annois (1902) ...	455	Emmett (or Emmott) v. Kearns (1839) ...	22
East Ham Urban Council v. Aylett (1905) ...	533	Empson v. Knowles (1849) ...	21
East Hawkesbury Township v. Lochiel Town-		English & Scottish Trust Co. v. Flatau	
ship (Can.) ...	204	(1887) ...	138
East Zorra Township v. Douglas (Can.) ...	162	Ennis, <i>Re, Coles v. Peyton</i> (1893) ...	208, 209
Eastern District Council v. Hutchins (Can.) ...	99	Enright v. Falvey (Ir.) ...	188
Eastern Shipping Co. v. Quah Beng Kee		Epsom Urban Council v. London County	
(1924) ...	222	Council (1900) ...	468, 471
Eastern Union Ry. Co. v. Cochrane (1853) ...	173	Era Life Assurance Society, <i>Re</i> (1866) ...	16
Easton v. Richmond Highway Board (1871) ...	435	Erie & Niagara Ry. Co. v. Great Western Ry.	
Eastwood v. Kenyon (1840) ...	40	Co. (Can.) ...	332
Eaton, Robins & Co. v. Nel (S. Af.) ...	98	Errington, <i>Re, Ex p.</i> Mason (1894) ...	35
Eatwell v. Richmond (1865) ...	347	—, <i>Re, Ex p.</i> Official Receiver (1894) ...	35
Eccles v. Wirral Rural Sanitary Authority		Escott v. Newport Corp'n. (1904) ...	327
(1886) ...	531	Esher & Dittons Urban Council v. Marks	
Ecclesiastical Comrs. v. Clerkenwell Vestry		(1902) ...	368, 369, 476
(1861) ...	501	Espley v. Wilkes (1872) ...	288
Eddowes v. Argentine Loan & Mercantile		Essex Corp'n. v. Park (Can.) ...	67
Agency Co., Ltd. (1890) ...	243, 244	Essex County Council v. Chelmsford Union	
Edinburgh Magistrates v. Midlothian County		(1891) ...	585
Council (Scot.) ...	354	Essex, Kent & Lambton Municipal Council	
— v. North British Ry.		v. Baby (Can.) ...	163
Co. (Scot.) ...	281	Etherley Grange Coal Co. v. Auckland Dis-	
Edmunds v. Wallingford (1885) ...	225, 226	trict Highway Board (1894) ...	463, 464
Edwards v. Brown (1829) ...	216	Etter v. Saskatoon (City) (Can.) ...	452, 453
— v. — (1831) ...	216	Evans v. Beattie (1803) ...	102, 103
		— v. Bremridge (1855) ...	72, 203
		— v. — (1856) ...	72, 203

# TABLE OF CASES.

	PAGE		PAGE
Evans v. Duncan (1831) ... ..	28	Fielden v. Cox (1906) ... ..	318
— v. Duncombe (1831) ... ..	28	Figgess v. Hartley Wintney Rural District Council (1899) ... ..	286, 288, 296, 302
— v. Earle (1854) ... ..	56	Filshie v. Egremont Township (Can.) ... ..	576
— v. Edinburgh Corpn. (Scot.) ... ..	404, 566	Finch v. Jukes (1877) ... ..	165
— v. Jones (1839) ... ..	11	Finchley Electric Light Co. v. Finchley Urban Council (1903) ... ..	329, 330
— v. Newport Urban Sanitary Authority (1889) ... ..	520, 521	Fineux v. Hovenden (1599) ... ..	452
— v. Oakley & Phillips (1843) ... ..	435	Finlay v. Mexican Investment Corpn. (1897) ... ..	66, 113
— v. Pugh (1834) ... ..	84	Fish v. Hutchinson (1759) ... ..	39
— v. Rhymney Local Board (1887) ... ..	406	Fisher v. Fallows (1804) ... ..	123, 137
— v. Richmond Township (Can.) ... ..	409	— v. Prowse (1862) ... ..	265, 266, 282, 309, 419, 442, 444
— v. Whyte (1829) ... ..	164	— v. Vaughan Township (Can.) ... ..	452
— v. Williams (1832) ... ..	197	— v. Webster (Can.) ... ..	321
Evelyn v. Mirrieles (1900) ... ..	315	Fitzgeorge, <i>Re</i> , <i>Ex p.</i> Robson (1905) ... ..	87
Evens v. Halifax (City) (Can.) ... ..	407	Fitzgerald v. Dressler (1859) ... ..	41, 42
Ewart v. Latta (1865) ... ..	108, 113	— v. Lilly (Nfld.) ... ..	79
Exall v. Partridge (1709) ... ..	131, 225	— v. McCowan (Ir.) ... ..	72
Exchange & Discount Bank v. Billinghamst (1880) ... ..	95	Fitzgibbon v. Toronto City Corpn. (Can.) ... ..	288
Exchange Bank of Canada v. Barnes (Can.) ... ..	225	Fleetwood v. Charnock (1629) ... ..	143
— v. Springer (Can.) ... ..	225	Fleming v. London County Council (1911) ... ..	505
Exeter & Crediton Ry. Co., <i>Re</i> , <i>Ex p.</i> Exeter Roads Trustees (1852) ... ..	375	— v. Simpson (Scot.) ... ..	72
Exeter Roads Trustees, <i>Ex p.</i> , <i>Re</i> Exeter & Crediton Ry. Co. (1852) ... ..	375	— v. Wilson (Scot.) ... ..	186
Eynsham Parish Ratepayers, <i>Re</i> (1849) ... ..	393	Fletcher v. Calgary (City) (Can.) ... ..	389
Eyre v. Bartrop (1818) ... ..	180, 181	— v. Fields (1891) ... ..	424
— v. Everett (1826) ... ..	179, 187, 197	— v. Harcot (1622) ... ..	224
— v. New Forest Highway Board (1892) ... ..	260, 281, 289, 295, 309, 319	Fleury v. Moore (Can.) ... ..	65, 66
Eyton v. Knight (1838) ... ..	154, 171	Flower v. Adam (1810) ... ..	447
F.		Foley v. East Flamborough Township (Can.) ... ..	353, 403, 404
Faber v. Lathom (Earl) (1897) ... ..	53, 61, 86, 193	Foley's Charity Trustees v. Dudley Corpn. (1910) ... ..	324, 330
Fabian v. Plant (1691) ... ..	27	Folkstone Corpn. v. Brockman (1914) ... ..	284, 287, 301
Fahey v. Frawley (Ir.) ... ..	120	— v. Brooks (1893) ... ..	530, 531, 532
Fair v. Pengelly (Can.) ... ..	176	— v. Ladd (1893) ... ..	530, 531, 532
Falcke v. Scottish Imperial Insurance Co. (1886) ... ..	226	— v. Marsh (1905) ... ..	540, 544
Falconer v. North of Scotland Bank (Scot.) ... ..	215	— v. Rook (1907) ... ..	540, 544
Fane v. Bancroft (Can.) ... ..	39	— v. Woodward (1872) ... ..	504, 505
Farebrother v. Wodehouse (1856) ... ..	119	Fook Lung Firm v. Lai Yuen Firm (Hong Kong) ... ..	35
— v. — (1857) ... ..	119	Foot v. Wood (1863) ... ..	234
— v. Worsley (1831) ... ..	85	Foot v. Bullock (Can.) ... ..	97
Fareham Local Board & Fareham Electric Light Co. v. Smith (1891) ... ..	393	Forbes v. Clarton (Aus.) ... ..	49
Farmers' Loan & Saving Co. v. Patchett (Can.) ... ..	162, 163	— v. Forbes (Scot.) ... ..	281
Farnworth Local Board v. Compton (1886) ... ..	524	— v. Jackson (1882) ... ..	115, 118
Farquhar v. Newbury Rural Council (1909) ... ..	289, 290, 306	Ford v. Harrow Urban District Council (1903) ... ..	315
Farthing v. Pieters & Co. (S. Af.) ... ..	113	— v. Stobridge (1832) ... ..	130, 137
Fawcett v. Fowles (1827) ... ..	358, 365	— v. Stuart (1852) ... ..	233
Fear v. Freebody (1858) ... ..	501	Foreman v. Canterbury Corpn. (1871) ... ..	408, 409
Fearnley v. Morley (1826) ... ..	341	Forrest v. Winnipeg (City) (Can.) ... ..	404
— v. Ormsby (1879) ... ..	416, 427	Forsyth v. McLeod (N.Z.) ... ..	187
Fell v. Goslin (1852) ... ..	87	— v. Wishart (Scot.) ... ..	180
Fellowes v. Sedgley Urban District Council (1906) ... ..	557, 558	Fortescue v. St. Matthew, Bethnal Green, Vestry (1891) ... ..	513
Fennell v. McGuire (Can.) ... ..	208	Fortune v. Young (Scot.) ... ..	32, 33, 44
— v. Mulcahy (Ir.) ... ..	38	Forward v. Toronto Corpn. (Can.) ... ..	388
Fenton v. Swallow (1834) ... ..	342	Foster, <i>Re</i> , <i>R. v.</i> Bedfordshire JJ. (1830) ... ..	460
Fentum v. Pocock (1813) ... ..	180	— v. Halliman (1663) ... ..	19
Fenwick v. Croydon Rural Sanitary Authority (1891) ... ..	271, 272, 520	— v. Maule (1871) ... ..	484
Ferguson v. Gibson (1872) ... ..	121	— v. Tucker (1870) ... ..	344
Fernandes, <i>Re</i> , <i>Ex p.</i> Hope (1844) ... ..	119	Fowler v. Sanders (1617) ... ..	422, 441, 452
Ferrand v. Bingley Urban Council (1903) ... ..	370	Fox v. Bailey (1843) ... ..	233
— v. Milligan (1845) ... ..	309, 310	Fox, Walker & Co., <i>Re</i> , <i>Ex p.</i> Bishop (1880) ... ..	136
Field v. Kemp (Can.) ... ..	329	Frank v. Edwards (1852) ... ..	168, 169
— v. Robins (1838) ... ..	151	— v. Harwich Township Corpn. (Can.) ... ..	297
— v. Sowle (1827) ... ..	218	Fraser v. Diamond (Can.) ... ..	297
— v. Thorne (1869) ... ..	435	— v. Murdoch (1881) ... ..	223
		— v. Ruthesay Magistrates (Scot.) ... ..	389
		Freedman v. Winnipeg (City) (Can.) ... ..	447
		Freelove v. Mitchell, <i>Re</i> Mitchell (1913) ... ..	126, 127, 128
		Freeman v. Burgess (1827) ... ..	134

# TABLE OF CASES.

li

	PAGE
Freeman v. Freeman (1814) ... ..	19
— v. — (1891) ... ..	40
— v. Line (1778) ... ..	339
Freen & Morrice, <i>Ex p.</i> , <i>Re</i> Starkey (1827) ... ..	104, 135
Freestone v. Casswell (1869) ... ..	429, 430
French v. Cameron (Scot.) ... ..	214
— v. French (1841) ... ..	18, 28
Friern Barnet Urban District Council v. Richardson (1898) ... ..	314
Frisby, <i>Re</i> , Allison v. Frisby (1889) ... ..	103
Fritz v. Hobson (1880) ... ..	317, 336, 423, 454
Frompton v. Tiffin (1838) ... ..	387
Frost v. Richardson (1910) ... ..	320
Fulham Board of Works v. Smith (1884) ... ..	423
Fulham Vestry, <i>Ex p.</i> , <i>R. v.</i> London JJ. (1890) ... ..	460
— v. Minter (1901) ... ..	492
Fuller v. Chippenham Rural District Council (1914) ... ..	266
Fussell v. Lewis (1849) ... ..	192
Fyfe v. Bertawin Municipality (Can.) ... ..	417

## G.

Gabriel v. St. James', Westminster, Vestry (1859) ... ..	513
Galbreath v. Armour (Scot.) ... ..	325
Galer v. Rawson (1889) ... ..	432
Galley v. Taylor (1818) ... ..	103
Galloway v. London Corpn. & Metropolitan Ry. Co. (1866) ... ..	268, 269
Gananoque Corpn. v. Stunden (Can.) ... ..	215
Gandy v. Gandy (1885) ... ..	212, 213
Garbrey v. Brown (1588) ... ..	18
Gardner v. Brooke (Ir.) ... ..	144
— v. Walsh (1855) ... ..	219
Gardom, <i>Ex p.</i> (1808) ... ..	62
Garner, <i>Re</i> , <i>Ex p.</i> Holmes (1839) ... ..	90, 91
Garrard v. James (1925) ... ..	98
Garrett v. Handley (1824) ... ..	76
— v. — (1825) ... ..	100
Garrow v. McDonald (Can.) ... ..	101
Garway, <i>Re</i> , <i>Ex p.</i> Marshall (1751) ... ..	137
Gas Light & Coke Co. v. St. Mary Abbott's, Kensington, Vestry (1884) ... ..	432, 433, 462
Gas Light & Coke Co. v. St. Mary Abbott's, Kensington, Vestry (1885) ... ..	432, 433, 462
Gaselee v. Darling, The Millwall (1905) ... ..	235, 236
Gaskell v. Lindsay (1816) ... ..	209
Gateshead Corpn. v. Lumsden (1914) ... ..	552
Gathe v. Coan (Ir.) ... ..	61
Gaunt v. Hill (1815) ... ..	14, 15
Gayner v. Royner (1777) ... ..	114
Geary v. Gore Bank (Can.) ... ..	112
Gedye v. Matson (1858) ... ..	117, 119, 135
Gee v. Liddell (1913) ... ..	119
— v. Pack (1863) ... ..	89
Geirionydd Rural Council v. Green (1909) ... ..	462, 466
General Estates Co., <i>Ex p.</i> , <i>R. v.</i> Somers (1906) ... ..	374
General Financial Corpn. of Canada v. Le Jeune (Can.) ... ..	9, 10, 66, 163
General Steam Navigation Co. v. Rolt (1858) ... ..	157, 162
Geopel v. Swinden (1844) ... ..	143
Gerard (Lord) v. Kent County Council (1897) ... ..	407
Germaine v. London Exhibitions, Ltd. (1896) ... ..	426, 429
German v. Ottawa (City) (Can.) ... ..	389
Gerring v. Barfield (1864) ... ..	441
Gery v. Redman (1875) ... ..	324
Gesman v. Regina (City) (Can.) ... ..	481

Getynog Llantwit Colliery Co., Ltd., <i>Re</i> , Gray v. Seckham (1872) ... ..	89, 90
Gibbons v. McCasland (1818) ... ..	44
Gibson v. Preston Corpn. (1870) ... ..	357, 358, 399
Giddens v. Dodd (1856) ... ..	194, 195
Gifford, <i>Ex p.</i> (1802) ... ..	139, 200
Gignac v. Toronto (City) (Can.) ... ..	403
Gilbart v. Wandsworth District Board of Works (1888) ... ..	506
Gilchrist v. Carden Township (Can.) ... ..	408, 409, 519
— v. Oamaru (Mayor, etc.) (N.Z.) ... ..	411
Gill v. Carson & Nield (1917) ... ..	415, 416
Gillespie, <i>Re</i> (Ir.) ... ..	119
Gillett v. Rippon (1829) ... ..	235
Gillingham v. Gwyer (1807) ... ..	321
Gilmor v. St. John (City) Corpn. (Can.) ... ..	418
Gilmour v. Finnie (Scot.) ... ..	139
Gingell, Son & Foskett, Ltd. v. Stepney Borough Council (1909) ... ..	113
Glamorganshire Canal Navigation Co. v. Rhymney Ry. Co. & Great Western Ry. Co. (1903) ... ..	585
Glasgow (Provost) v. Hillhead Police Comrs. (Scot.) ... ..	572
Glasgow & South-Western Ry. Co. v. Ayr Magistrates (Scot.) ... ..	274
Glasgow Corpn. v. Barclay, Curle & Co., Ltd. (Scot.) ... ..	462
— v. Caledonian Ry. Co. (Scot.) ... ..	586, 587
Glendinning, <i>Ex p.</i> , <i>Re</i> Renton (1819) ... ..	193, 198
Glenie v. Smith (1908) ... ..	46
— v. Tucker (1908) ... ..	46
Glenn v. Scott (Can.) ... ..	230
Glenn Brothers v. Commercial General Agency Co., Ltd. (S. Af.) ... ..	93
Glossop v. Harrison (1814) ... ..	135
Glossop Corpn., <i>Ex p.</i> , <i>R. v.</i> Derbyshire JJ. (1917) ... ..	480
Gloster v. Toronto Electric Light Co. (Can.) ... ..	204
Gloucester Township v. Canada Atlantic Ry. Co. (Can.) ... ..	261, 265
Glover v. Halkett (1857) ... ..	51
Glyn v. Hertel (1818) ... ..	14, 76
Goddard v. Whyte (1860) ... ..	114, 115
Godmanchester Rural District Council v. Hooley (1901) ... ..	474
Goepel v. Swinden (1844) ... ..	143
Gold Medal Furniture Co. v. Stephenson (Can.) ... ..	218
Goldberg & Son, Ltd. v. Liverpool Corpn. (1900) ... ..	445
Golding v. Stocking (1869) ... ..	429
Goldshede v. Swan (1847) ... ..	21, 60
Goldsmith v. Goldsmith (Can.) ... ..	124
Goldstraw v. Duckworth (1880) ... ..	505
— v. Jones (1906) ... ..	505
Goldthorpe v. Hardman (1844) ... ..	427
Gooch, <i>Re</i> , <i>Ex p.</i> Judd (1921) ... ..	45, 46
Good, <i>Ex p.</i> , <i>Re</i> Armitage (1877) ... ..	200
Gooderham v. Bank of Upper Canada (Can.) ... ..	170
— v. Moore (Can.) ... ..	231
— v. Toronto (City) Corpn. (Can.) ... ..	518
Goodman v. Chase (1818) ... ..	85, 36
— v. Keel (Can.) ... ..	149, 150
Goodricke v. Taylor (1864) ... ..	63
Goodson v. Richardson (1874) ... ..	326
— v. Sunbury Gas Consumers' Co., Ltd. (1896) ... ..	421
Goodtitle d. Chester v. Alker & Elmes (1757) ... ..	325
Goodwin v. Gray (1874) ... ..	117
— v. Willoughby (1626) ... ..	22, 23, 24
Gopal Daji v. Gopal Bin Sonu (Ind.) ... ..	105, 106
Gopell v. Swindon (1844) ... ..	113

## TABLE OF CASES.

	PAGE		PAGE
Gordon v. Belleville (City) (Can.)	448	Green v. London General Omnibus Co., Ltd.	426
— v. Calvert (1828)	205	(1859)	130
— v. Martin (1731)	9, 34	— v. Parr (Aus.)	108, 131, 200
— v. Rae (1858)	76, 77	— v. Wynn (1869)	404
Goring v. Edmonds (1829)	187	Greenaway v. Canadian Pacific Ry. Co. (Can.)	210
Gorman v. Dixon (Can.)	182	Greenfield v. Edwards (1865)	107, 108
Gosnell v. Southwold Township (Can.)	404	Greenough v. McClelland (1860)	292, 300
Gould v. Bacup Local Board (1881)	526, 527, 534, 536	Greenwich Board of Works v. Maudslay (1870)	148, 149
— v. Birkenhead Corpn. (1909)	409	Greenwood, Ltd. v. Hawkings (1906)	223, 224
Gouldson v. Birkenhead Corpn. (1909)	409	Gregory v. Williams (1817)	39, 40, 100
Goverdhandas Gokuldas Tejpal v. Bank of Bengal (Ind.)	113	Greig v. Merritt (Can.)	407
Gozzett v. Maldon Sanitary Authority (1894)	557	Griely's Case (1669)	420
Gragoe v. Jones (1873)	194	Grieve v. Dow (Scot.)	79
Graham, Re, Graham v. Noakes (1895)	82	— v. Milton (1850)	588
— v. Queen Victoria Niagara Falls Park Comrs. (Can.)	380, 390	— v. Smith (Can.)	164
Grahame v. Grahame (Ir.)	57	Griffin v. Drayton-in-Hales Highway Board (1876)	354
— v. St. Cyrus District Committee of Kincardineshire (Scot.)	356	Grimshaw v. Woollsley (Ir.)	20
Grand Junction Canal Co. v. Petty (1888)	290, 306	Grose v. West (1810)	323, 324
Grand Junction Waterworks Co. v. Hampton Urban Council (1898)	560, 562	Groundwater v. Waterman (Can.)	306
Grand Surrey Canal Co. v. Hall (1840)	287, 291, 301, 305	Groux's Improved Soap Co., Ltd. v. Cooper (1860)	173
Grand Trunk Ry. Co. of Canada v. Toronto (City) (Can.)	277, 294, 309	Groves & Son v. Webb & Kenward (1916)	224
Grant v. Budd (1874)	157, 172	Guelpe v. Jules Motor Co. (Can.)	163, 164
Gray v. Employers' Liability Assurance Corpn. (Can.)	160	Guest v. Godsborough & Co. (Aus.)	296
— v. Hill (1826)	29	— v. Hunter (Can.)	36
— v. Lewis (1873)	243	Guest's Estates, Ltd. v. Milner's Safes, Ltd. (1911)	419
— v. St. Andrews & Cupar D. Co. (Scot.)	386, 387	Guild & Co. v. Conrad (1894)	11, 40, 221, 232
— v. Seckham, Re Getynog Llantwit Colliery Co., Ltd. (1872)	89, 90	Guinness v. Box (Aus.)	95
— v. Shilling (1820)	340	Gull v. Lindsay (1849)	34
Gray-Campbell, Ltd. v. Jamieson (Can.)	161	Gully v. Smith (1883)	416, 427
Greasly v. Odling (1824)	454	Gunderson v. Calder Rural Municipality (Can.)	584, 585
Great Central Ry. Co. v. Balby-with-Hex- thorpe Urban Council (1912)	292	Gunendra Mohan Ghosh v. Calcutta Corpn. (Ind.)	330
Great Central Ry. Co. v. Hewlett (1916)	419	Gunter v. James (1908)	431
Great Clacton Local Board v. Young & Sons (1895)	510	Gurney v. Seppings (1846)	126
Great Eastern Ry. Co. v. Hackney Board of Works (1883)	494	Gurwicz, Re, Ex p. Trustee (1919)	231
Great Indian Peninsular Ry. Co. v. Bombay (City) Municipal Corpn. (Ind.)	330	Guthrie v. O'Connor (Can.)	79
Great Marlow Bridge, Re, R. v. Bucks (Inhabitants) (1828)	584, 585	Gwynell v. Eamer (1875)	417
Great Northern Ry. Co. v. Eastern Counties Ry. Co. (1851)	263	Gwyn v. Hardwicke (1856)	264
Great Salterns Syndicate v. Portsmouth Corpn. (1904)	555	Gwynne v. Burnell (1835)	65, 71
Great Western v. McDonald (Can.)	175	— v. ——— (1840)	65, 71
Great Western Ry. Co. v. Bishop (1872)	439	— v. Drewitt (1894)	477
— v. Fisher (1905)	235, 237, 239		
— v. Sharman (1892)	339		
— v. Solihull Rural Dis- trict Council (1902)	290, 291, 292		
Great Western Ry. Co. v. West Bromwich Improvement Comrs. (1859)	519		
Great Western Smelting & Refining Co. v. Francisco Pereira (Marques) (Hong Kong)	210, 211		
Greaves, Re (1827)	28		
Grece v. Hunt (1877)	532, 535		
Green, Ex p., R. v. Norfolk County Council (1901)	391		
— v. Cresswell (1837)	232		
— v. ——— (1830)	232		
— v. Gosden (1841)	216		

## TABLE OF CASES.

lii

	PAGE		PAGE
Hall v. Thompson (Can.) ... ..	195, 199	Harrison v. James (1787) ... ..	344
Hall's Charity, <i>Re</i> , Severn Comrs. v. Charity Trustees & Worcestershire County Council (1911) ... ..	578, 579	— v. Leaper (1802) ... ..	437
Hallet, <i>Ex p.</i> , <i>Re</i> Moss (1905) ... ..	85	— v. Nettleship (1833) ... ..	110
Hallett v. Mountstephen (1823) ... ..	183	— v. New Street Mews (Owner) (1906) ... ..	500
— v. Taylor (1921) ... ..	202, 204	— v. Parker (1805) ... ..	590
Hallett & Co., <i>Re</i> , <i>Ex p.</i> Cocks, Biddulph & Co. (1894) ... ..	100, 101	— v. Rutland (Duke) (1893) ... ..	317, 318
Halliwell v. Council (1878) ... ..	209	— v. Seymour (1866) ... ..	157, 158
— v. Johannesburg Municipal Council (S. Af.) ... ..	404	Harriss v. Fawcett (1873) ... ..	208
Halsell's Case (1826) ... ..	377	Harrod v. Worship (1861) ... ..	311
Halstead v. Thomas (1830) ... ..	158	Hart v. Basset (1681) ... ..	452, 453
Halsted v. Friedlander (1901) ... ..	240	— v. Bown (Can.) ... ..	227
Hamar v. Alexander (1808) ... ..	98	Hartland v. Jukes (1802) ... ..	20, 105, 106
Hambro v. Burnand (1904) ... ..	50	— v. — (1863) ... ..	20, 105, 106
Hamilton v. McKay (Nfld.) ... ..	49	Hartley v. Bowlzer (1865) ... ..	351
— (City) v. Morrison (Can.) ... ..	290, 291	— v. Rochdale Corpn. (1908) ... ..	421, 422
— v. St. George, Hanover Square (1873) ... ..	375, 517	Hartnall v. Ryde Comrs. (1863) ... ..	399
— v. Watson (1845) ... ..	210, 211, 215	Harvey, <i>Ex p.</i> , <i>Ex p.</i> Springfield, <i>Re</i> Blakely (1854) ... ..	157, 198
Hamilton's Executor v. Bank of Scotland (Scot.) ... ..	205	— v. Bethnal Green Vestry (1874) ... ..	482, 483
Hamilton's Executrix v. Davis & Ford (Can.) ... ..	83, 84	— v. British Columbia Boat & Engine Co. (Can.) ... ..	333
Hamm v. McAfee (Can.) ... ..	36	— v. Hunt (Trustee) (Nfld.) ... ..	61
Hampstead Borough Council v. Western (1907) ... ..	496	— v. Pritchard (1845) ... ..	59
Hampstead Corpn. v. Caunt (1903) ... ..	499, 500	— v. Truro Rural Council (1903) ... ..	261, 313, 314
— v. Midland Ry. Co. (1905) ... ..	493, 496	Harvey's Claim, <i>Re</i> Hunt (1902) ... ..	146
Hampstead Vestry v. Cotton (1885) ... ..	273	Harvie v. Rogers (Scot.) ... ..	281
Hancock v. Clay (1817) ... ..	233	Hasleham v. Young (1844) ... ..	50
Handsworth District Council v. Derrington (1897) ... ..	521, 528, 529, 531, 532	Haslock v. Fergusson (1837) ... ..	31, 32
Hannington v. Beare (1835) ... ..	179	Hassell v. Long (1814) ... ..	51, 55, 166
Hansard v. Lethbridge (1892) ... ..	72	Hastings v. St. Catharines (City) Corpn. (Can.) ... ..	309
Hanwell Urban District Council & Smith, <i>Re</i> (1904) ... ..	531, 532, 534, 538	Hastings Corpn. v. Letton (1908) ... ..	195
Harbison v. Armagh County Council (Ir.) ... ..	400, 402	Hastings County v. Clinton (Can.) ... ..	576
Harbour Comrs. of Montreal v. Guarantee Co. of North America (Can.) ... ..	60	Hatch v. Hatch (1872) ... ..	131, 132, 133
Harburg India Rubber Comb Co. v. Martin (1902) ... ..	42, 43	Hatch, Mansfield & Co., Ltd. v. Weingott (1906) ... ..	84
Hardcastle v. Bielby (1892) ... ..	413	Hawkins v. Robinson (1872) ... ..	420
Harden v. Clifton (1841) ... ..	218	Hawkshaw v. Parkins (1819) ... ..	180, 193
Harding, <i>Ex p.</i> , <i>Re</i> Smith, Fleming & Co. (1879) ... ..	50	Haworth & Co. v. Sickness & Accident Assurance Assn., Ltd. (Scot.) ... ..	189
— v. Barker (1888) ... ..	394	Hayes Common Conservators v. Bromley Rural District Council (1897) ... ..	355
— v. Headington (1874) ... ..	351	Hayles v. Sandown Urban District Council (1903) ... ..	546, 547
— v. Preece (1882) ... ..	195	Haynes v. King (1893) ... ..	321
Hardwick v. Wright (1865) ... ..	192	Headlam v. Hedley (1816) ... ..	320
Hare v. Michell (1814) ... ..	176	Healey v. Batley Corpn. (1875) ... ..	283, 302
Hargreave v. Smece (1829) ... ..	53, 92, 93	Heath v. Key (1827) ... ..	175
Hargreaves v. Parsons (1844) ... ..	40	— v. Weaverham Township Overseers (1894) ... ..	370, 371
Harmer & Co. v. Gibb (Scot.) ... ..	79, 93	Heath's Garage, Ltd. v. Hodges (1916) ... ..	420
Harold v. Simcoe County (Can.) ... ..	573	Heathcote Road Board v. Manson (N.Z.) ... ..	588
Harper v. Charlesworth (1825) ... ..	289, 293, 301	Heatley v. Foakes (1889) ... ..	270
— v. Culbert (Can.) ... ..	130	Hefield v. Meadows (1869) ... ..	93
— v. Knowlson (Can.) ... ..	87	Heigh v. Jackson (1838) ... ..	133
Harrendro Coomar Chowdhry v. Taramonee Chowdhraim (Ind.) ... ..	260, 261	Heiminck v. Edmonton Town (Can.) ... ..	294
Harriett, The (1842) ... ..	157, 162, 177, 181	Heming v. Maline (1835) ... ..	77
Harris v. Baker (1815) ... ..	392	Hemming v. Trenery & Malim (1835) ... ..	77
— v. Ferguson (Can.) ... ..	107, 108	— v. — (1837) ... ..	77
— v. Huntbach (1757) ... ..	39	— v. — (1839) ... ..	219
— v. Mobbs (1878) ... ..	437	Hemsworth Rural District Council v. Micklethwaite (1904) ... ..	461, 463, 464, 475
— v. Northamptonshire County Council (1897) ... ..	449	Henderson v. St. John Corpn. (Can.) ... ..	393
— v. Venables (1872) ... ..	24	— v. Vermilyea (Can.) ... ..	73
Harrison v. Brough (1796) ... ..	345	Henderson's Trustees v. Dunfermline D. C. (Scot.) ... ..	356
— v. Danby (1870) ... ..	417, 444	Hendon Local Board v. Pounce (1889) ... ..	552, 554
— v. Fitzhenry (1800) ... ..	187	Henn's Case (1833) ... ..	318, 372
— (Doe d.) v. Hampson (1847) ... ..	324	Henniker v. Wigg (1843) ... ..	154
		Henton v. Paddison (1893) ... ..	26, 79, 106
		Herne Bay Urban Council v. Payne & Wood (1907) ... ..	542, 544
		Hertfordshire County Council v. Barnet Rural District Council (1902) ... ..	589

	PAGE		PAGE
Hertfordshire County Council v. Great Eastern Ry. Co. (1909) ...	580, 587	Holborn Guardians v. St. Leonard, Shoreditch, Vestry (1876) ...	399
Hertfordshire County Council v. New River Co. (1904) ...	585, 586	Holbrow v. Wilkins (1822) ...	69
Heahord v. Wills (1870) ...	337	Holden v. Kynaston (1840) ...	104
Hesketh v. Atherton Local Board (1873) ...	533, 534	—— v. St. Mary, Islington, Vestry (1887) ...	269, 278
Heston & Isleworth Urban Council v. Grout (1897) ...	539	—— v. Yarmouth Township (Can.) ...	390, 402
Hewison v. Ricketts (1894) ...	193	Hole v. Harrison (1873) ...	147, 148
Hewlett v. Great Central Ry. Co. (1916) ...	419	Holl v. Hadley (1835) ...	64, 71, 180
Heyman v. Dubois (1871) ...	111	Holland, <i>Re</i> , <i>Ex p.</i> Alston (1868) ...	111
Hickinbotham v. Perkins (1819) ...	344	—— (Lady) v. Kensington Vestry (1867) ...	490
Hickman v. Maisey (1900) ...	317, 318	—— v. Lea (1854) ...	169
—— v. Matthews (1900) ...	317	—— v. York Township (Can.) ...	295
Hidson v. Barclay (1865) ...	192, 196	Holliday v. St. Leonard, Shoreditch, Vestry (1861) ...	408
Higginbotham v. Perkins (1819) ...	344	Hollier v. Eyre (1840) ...	106
Higgins v. Glasgow Corp'n. (Scot.) ...	403	Hollond v. Teed (1848) ...	154, 206
—— v. Harding (1872) ...	494	Holloway v. Birmingham Corp'n. (1905) ...	401
—— v. Pitt (1849) ...	245	—— v. Egham Urban District Council (1908) ...	302, 303, 306
High Wycombe Rural District Council v. Palmer (1905) ...	464	Holme v. Brunskill (1878) ...	157, 161, 162
Highland District Committee of Perth County Council v. Rattray (Scot.) ...	471	Holmes, <i>Ex p.</i> , <i>Re</i> Garner (1839) ...	90, 91
Hilary v. Macara (N.Z.) ...	344	—— v. Bellingham (1859) ...	320
Hildreth v. Adamson (1860) ...	306, 307	—— v. Mentze (1835) ...	227
Hill v. Browning (1870) ...	343	—— v. Mitchell (1859) ...	48, 49, 58
—— v. Crediton Urban District Council (1899) ...	397	—— v. Twickenham Local Board of Health (1887) ...	527, 528, 529
—— v. Ingerol & Port Burwell Gravel Road Co. (Can.) ...	357	Holmes (J. W.) & Co. v. Durkee (1883) ...	45
—— v. Kelly (Ir.) ...	130	Homer v. Cadman (1886) ...	416
—— v. New River Co. (1868) ...	420, 439, 440	Homewood v. Hamilton (City) (Can.) ...	390
—— v. Nuttall (1864) ...	77, 78	Hooker v. Gamble (Can.) ...	180
—— v. O'Connor (Ir.) ...	339	—— v. Morris (N.Z.) ...	337, 338
—— v. Somerset (1887) ...	436	Hoole Urban Council v. Fidelity & Deposit Co. of Maryland (1916) ...	84
—— v. Thomas (1893) ...	462, 463, 470	Hooper v. Bromet (1904) ...	236
—— v. Tottenham Urban District Council (1898) ...	404, 409	—— v. Hawkins (1886) ...	356
—— v. Wallasey Local Board (1894) ...	270	Hop Planters Co., <i>Ex p.</i> , <i>Re</i> Boys, <i>Fedes v.</i> Boys (1870) ...	59, 60
Hilliard, <i>Re</i> , <i>Ex p.</i> Smith (1845) ...	28	Hope, <i>Ex p.</i> , <i>Re</i> Fernandes (1844) ...	119
Hilton v. Scarborough (Lord) (1714) ...	262	—— v. Hayley (1856) ...	135
Hinde v. Evans (1908) ...	415, 416, 425, 437	—— v. Surrey & V. V. & E. Ry. Co. (Can.) ...	451
Hinton Avenue, Ottawa, <i>Re</i> (Can.) ...	479	—— v. Surrey Corp'n. (Can.) ...	449
Hirst v. Halifax Local Board (1870) ...	361	Hopkins v. Smethwick Local Board of Health (1890) ...	564
—— v. Taylor (1885) ...	477	—— v. Thorogood (1831) ...	341, 342
—— v. West Riding Union Banking Co. (1901) ...	33	Horn v. Widlake (1608) ...	318
Hitchcock v. Humfrey (1843) ...	70, 93	Hornby v. Cardwell (1881) ...	237, 238
Hitchings & Coulthurst Co. v. Northern Leather Co. of America & Doushness (1914) ...	58	Horne v. Ramsdale (1842) ...	73
Hitchman v. Stewart (1855) ...	144, 145, 146	Horner v. Cadman (1886) ...	416, 427
—— v. Watt (1894) ...	423, 444	—— v. Whitechapel Board of Works (1885) ...	516
Hoad v. Grace (1861) ...	53, 60, 93	Hornsey (Inhabitants) Case (1691) ...	380
Hoare v. Kearley (1885) ...	441	Hornsey Corp'n. v. Birkbeck Freehold Land Society (1906) ...	522
Hoare & Co., Ltd. v. Lewisham Corp'n. (1901) ...	300, 310	Hornsey District Council v. Smith (1897) ...	523, 537
—— v. ——— (1902) ...	300, 310, 488	Hornsey Local Board v. Brewis (1890) ...	522, 523
Hobbs v. Wayet (1887) ...	129	—— v. Davis (1893) ...	528, 529
Hobnan v. Greenwich District Board of Works (1894) ...	497	—— v. Monarch Investment Building Society (1889) ...	535, 537
Hobson v. Bass (1871) ...	89	Hornsey Urban Council v. Hennell (1902) ...	522
Hocken v. Browne (1838) ...	133	Horridge v. Makinson (1915) ...	542
Hodges v. Delhi & London Bank (Ind.) ...	174, 175	Horwood v. Goodall (1872) ...	430
—— v. Lawrance (1854) ...	321	—— v. Hill (1872) ...	430
Hodgson v. Anderson (1825) ...	35, 42	—— v. Powell (1861) ...	350
—— v. Hodgson (1837) ...	244	Hough v. Warr (1824) ...	204, 205
—— v. Nugent (1793) ...	179	Houghton v. Butler (1791) ...	569
—— v. Shaw (1834) ...	114, 122	Houlditch v. Milne (1800) ...	43
Hodson v. Lee (1847) ...	18, 24	Houston's Executors v. Speirs (Scot.) ...	157
Hoener v. Merner (Can.) ...	34	Howard v. Bradberry (1834) ...	182
Hogg v. Brooke Township (Can.) ...	389	—— v. Lovegrove (1870) ...	239
Holborn & Frascati, Ltd. v. London County Council (1916) ...	480	Howden v. Lake Simcoe Ice Co. (Can.) ...	437
		Howe, <i>Re</i> , <i>Ex p.</i> Brett (1871) ...	113
		Howee v. Mills (Can.) ...	180
		Howell v. Jones (1834) ...	177, 178

## TABLE OF CASES.

lv

	PAGE		PAGE
Howell v. Wilton Rural Municipality, No. 472 (Can.) ... ..	408	Irvine v. Nicholson (Can.) ... ..	57
Howes v. Bishop (1909) ... ..	15, 16, 218	Irving v. Burns (Scot.) ... ..	32
— v. Martin (1794) ... ..	42	— v. Carlisle Rural District Council (1907) ... ..	403, 404
Howse v. Southwold Township (Can.) ... ..	398	Irwin v. Bradford Village (Can.) ... ..	519
Hoyle, <i>Re</i> , Hoyle v. Hoyle (1893) ... ..	41, 44, 50	Isbell Dean Co. v. Avery (Can.) ... ..	22
Hozier v. Hawthorne, etc. (Scot.) ... ..	281	Isle of Thanet Rural Sanitary Authority, <i>Ex p.</i> (1884) ... ..	267
Hubert v. Groves (1794) ... ..	453, 454, 456	Isle of Wight Highway Comrs., <i>Re</i> (1895) ... ..	280
— v. Yarmouth Township (Can.) ... ..	294	Isle of Wight Rural District Council & Isle of Wight County Council, <i>Re</i> (1900) ... ..	280, 281
Hudson v. Bray (1917) ... ..	416, 427	Iveson v. Moore (1699) ... ..	427, 452, 454
— v. Carmichael (1854) ... ..	121, 122		
— v. Short (1860) ... ..	342		
Huffman v. Bayham Township (Can.) ... ..	403		
Hughes v. Boakes (N.Z.) ... ..	294		
— v. Brand (1751) ... ..	356		
Hughes-Hallett v. Indian Mammoth Gold Mines Co. (1882) ... ..	128, 241		
Hull v. London County Council (1901) ... ..	503, 509		
Hull Corpn. v. North-Eastern Ry. Co. (1916) ... ..	298		
Hull Local Board of Health v. Jones (1856) ... ..	520, 549		
Hulme v. Coles (1827) ... ..	179		
Hume v. Hinton (1651) ... ..	24		
Humphreys v. Jones (1845) ... ..	106		
— v. Mears (1827) ... ..	409		
Hunt, <i>Re</i> , Harvey's Claim (1902) ... ..	146		
Huntley v. Sanderson (1833) ... ..	241		
Huron Corpn. v. Armstrong (Can.) ... ..	72		
Huron County v. Kerr (Can.) ... ..	30, 48		
Hurst v. Taylor (1885) ... ..	477		
Hutchinson v. Baby (Can.) ... ..	174		
— v. Boyd (Ir.) ... ..	53, 83		
— v. Sydney (1854) ... ..	244		
Hutchison v. Hooker (N.Z.) ... ..	58		
Huth v. Windsor (City) (Can.) ... ..	404		
Hutson v. Regina (City) (Can.) ... ..	403, 404		
Hutt v. Gilleland (Can.) ... ..	104		
— v. Keith (Can.) ... ..	104		
Hutton v. Hamboro (1860) ... ..	312		
— v. Stonehenge Rural Municipality (Can.) ... ..	403		
— v. Wanzer (Can.) ... ..	240		
— v. Windsor Town (Can.) ... ..	446		
Hyams v. Webster (1868) ... ..	460		
Hyde v. Entwistle (1884) ... ..	450		
I.			
Ianson & Reach Township Corpn., <i>Re</i> (Can.) ... ..	480		
Ibbett v. De La Salle (1860) ... ..	235		
Ikin v. Brook (1830) ... ..	232		
Illingworth v. Bulmer East Highway Board (1883) ... ..	384, 385		
— v. Bulmer East Highway Board (1884) ... ..	384, 385		
— v. Montgomery (1859) ... ..	296		
Imperial Bank v. London & St. Katharine Docks Co. (1877) ... ..	135		
Imperial Bank of Canada v. Hill (Can.) ... ..	174		
Imperial Cold Storage & Supply Co., Ltd. v. Weil & Co. (S. Af.) ... ..	84		
Imperial Roofing Co. v. Dick (Can.) ... ..	10		
Ince v. Toronto Corpn. (Can.) ... ..	389		
Inglis v. Macdougall (1817) ... ..	195		
Inglis Co. & Toronto (City) Corpn., <i>Re</i> (Can.) ... ..	479, 480, 554, 555		
Ingoldby v. Plumstead Board of Works (1873) ... ..	496		
Ingram v. Thorp (1848) ... ..	98		
International Life Assurance Society & Hercules Insurance Co., <i>Re</i> , <i>Ex p.</i> Blood (1870) ... ..	10		
Ipswich & Stowmarket Navigation & East Suffolk County Council, <i>Re</i> (1897) ... ..	580		
Irish Society v. Needham (1786) ... ..	81		
		J.	
		J., <i>Re</i> (1909) ... ..	229
		J. It. Watkins Medical Co. v. Ice (Can.) ... ..	200, 216
		Jackman v. Mitchell (1807) ... ..	26, 213
		Jackson v. Curwen (1826) ... ..	341
		— v. Digby (1854) ... ..	71
		— v. Hobhouse (1817) ... ..	212
		— v. Stonewall Town (Can.) ... ..	288
		Jackson (Thomas) & Co., Ltd. v. Henderson, Craig & Co., Ltd. (1916) ... ..	238, 239
		Jackson & North Vancouver Corpn., <i>Re</i> (Can.) ... ..	336
		Jacobs, Hart & Co. v. Brown (1884) ... ..	227
		Jacomb v. Dodgson (1863) ... ..	535
		Jagadindra Nath Roy v. Chandra Nath Poddar (Ind.) ... ..	23
		James v. Balfour (Can.) ... ..	34
		— v. Dickenson (1863) ... ..	312, 343
		— v. Hayward (1630) ... ..	419, 448, 569
		— v. Johnson (1877) ... ..	338
		Jamieson & Lanark County, <i>Re</i> (Can.) ... ..	583, 584
		Jarnain v. Algar (1826) ... ..	39
		Jarrow Local Board v. Kennedy (1870) ... ..	523, 524, 530, 533
		Jays, Ltd. v. Sala (1898) ... ..	15
		Jeffery v. St. Pancras Vestry (1894) ... ..	432
		Jeffery's Policy, <i>Re</i> (1872) ... ..	134, 135
		Jenkins v. Merthyr Tydvil Urban District Council (1899) ... ..	562
		— v. Robertson (1854) ... ..	183
		— v. Ruttan (Can.) ... ..	59
		Jenkins & Sons v. Coomber (1898) ... ..	45
		Jenkins, etc. v. Murray (Scot.) ... ..	295, 296
		Jenney v. Brook (1844) ... ..	387, 388
		Jennings v. Harley (1902) ... ..	24
		Jephson v. Howkins (1841) ... ..	66
		— v. Maunsell (Ir.) ... ..	187
		Jeveson v. Moor (1699) ... ..	427, 452
		Johannesburg Council v. Stewart (Scot.) ... ..	67
		Johnson, <i>Ex p.</i> (1886) ... ..	385
		—, <i>Ex p.</i> , <i>Re</i> Bulmer (1853) ... ..	120
		— v. Baker (1821) ... ..	74
		— v. Cocksedge (1858) ... ..	342
		— v. Fitzgerald (Can.) ... ..	17
		— v. Morgan (1600) ... ..	12
		— v. Royal Mail Steam Packet Co. (1867) ... ..	225, 226
		— v. Smith (1865) ... ..	484
		— v. Whitecott (1639) ... ..	25
		— v. Wild (1890) ... ..	244
		Johnson Co. v. Imperial Fisheries, Ltd. (Can.) ... ..	17
		Johnston v. Boyle (Can.) ... ..	302
		— v. Dulmage (Can.) ... ..	237
		— v. Fraser (Can.) ... ..	49
		— v. Nelson Township (Can.) ... ..	583
		— v. Nicholls (1845) ... ..	19, 21
		Johnston & Carswell Co. v. Despard (Can.) ... ..	448
		Joint v. Mostyn (Ir.) ... ..	49
		Jones, <i>Ex p.</i> , Jones v. Young (1863) ... ..	186
		—, <i>Re</i> (1863) ... ..	186



	PAGE		PAGE
<i>Jones v. Ashburnham</i> (1804) ...	17, 23	<i>Kenney v. Employers' Liability Assurance Corp'n. (Ir.)</i> ...	99
— <i>v. Beach</i> (1852) ...	87	<i>Kensington Surveyors v. Whyte</i> (1837) ...	301
— <i>v. Cooper</i> (1774) ...	36	<i>Kent v. Worthing Local Board</i> (1882) ...	410, 411, 445
— <i>v. Davids</i> (1828) ...	122	<i>Kent County Council v. Folkestone Corp'n.</i> (1905) ...	469, 472, 473, 474
— <i>v. Dunbar</i> (Can.) ...	174	— <i>v. Gerard</i> (Lord) (1897) ...	467
— <i>v. Fleeming</i> (1827) ...	138	— <i>v. Kent Coal Concessions, Ltd.</i> (1909) ...	468
— <i>v. Hill</i> (Aus.) ...	113	— <i>v. Vidler</i> (1895) ...	467
— <i>v. Kearns</i> (1844) ...	18	<i>Kepp v. Wiggett</i> (1850) ...	66, 82, 103
— <i>v. Mason</i> (Aus.) ...	53	<i>Ker v. Mitchell</i> (1786) ...	243
— <i>v. Matthews</i> (1885) ...	423, 444	<i>Kerr v. Cameron</i> (Can.) ...	180
— <i>v. Merionethshire Permanent Benefit Building Society</i> (1891) ...	27	— <i>v. Preston Corp'n.</i> (1876) ...	559, 562
— <i>v. Merionethshire Permanent Benefit Building Society</i> (1892) ...	27	— <i>v. Saskatchewan Realty &amp; Improvement Co. (Can.)</i> ...	223
— <i>v. Mossop</i> (1844) ...	138	<i>Kerry County Council v. Fletcher</i> (Ir.) ...	462
— <i>v. Owen</i> (1823) ...	437, 438	<i>Kershaw v. Sheffield Corp'n.</i> (1887) ...	529
— <i>v. Rew</i> (1910) ...	412	<i>Kessowji Tulsids v. Hurjivan Mulji &amp; Shamkuvarvahu</i> (Ind.) ...	27
— <i>v. Short</i> (1900) ...	274	<i>Keyes v. Elkins</i> (1864) ...	190
— <i>v. Swift Current Town</i> (Can.) ...	520	<i>Kilbeck v. Vander Vyver</i> (1847) ...	52
— <i>v. Tuckersmith Township</i> (Can.) ...	555	<i>King v. Atkins</i> (1870) ...	213
— <i>v. Waite</i> (1839) ...	232	— <i>v. Cole</i> (1848) ...	59
— <i>v. ———</i> (1842) ...	232	— <i>v. Federal Life Assurance Co. (Can.)</i> ...	239, 240
— <i>v. Westminster (City) Council</i> (1915) ...	409	— <i>v. Gough</i> (1773) ...	344
— <i>v. Williams</i> (1841) ...	41, 45	— <i>v. Greenhill</i> (1843) ...	86
— <i>v. Young, Ex p. Jones</i> (1863) ...	186	— <i>v. Hoare</i> (1844) ...	201, 202
— <i>v. ———, Re Chaplin</i> (1863) ...	186	— <i>v. Kings Municipality</i> (Can.) ...	389
<i>Jordon Hill School District v. Gactz</i> (Can.) ...	103	<i>King's Lynn Rural District Council v. Blade</i> (1914) ...	300
<i>Josselson v. Weiler</i> (1911) ...	264	<i>Kingston (City) Corp'n. v. Drennan</i> (Can.) ...	389
<i>Jowett v. Idle Local Board</i> (1888) ...	270, 271	<i>Kingston-upon-Hull Corp'n. v. Harding</i> (1892) ...	188
<i>Joy v. McKinn &amp; Guesz</i> (Can.) ...	445	<i>Kingston-upon-Hull Corp'n. v. North Eastern Ry. Co.</i> (1916) ...	208
<i>Joyce v. Halifax Street Ry. Co. (Can.)</i> ...	419	<i>Kingston-upon-Hull Corp'n. v. Turner</i> (1892) ...	188
<i>Judd, Ex p., Re Gooch</i> (1921) ...	45, 46	<i>Kingston-upon-Thames Corp'n. v. Baverstock</i> (1909) ...	486
K.		<i>Kinnaird v. Webster</i> (1878) ...	154, 155
<i>Kanai Prosad Bose v. Jotindra Kumar Roy Chowdhry</i> (Ind.) ...	160	<i>Kinnealy v. St. John Corp'n. (Can.)</i> ...	389
<i>Kandasami Mudali v. Subroya Mudali</i> (Ind.) ...	318	<i>Kinnis v. Graves</i> (1898) ...	562
<i>Kankkunen v. Korah Township</i> (Can.) ...	392, 393	<i>Kipling v. Turner</i> (1821) ...	207
<i>Kastner v. Winstanley</i> (Can.) ...	53	<i>Kirby v. Chessum &amp; Sons, Works Comrs., Third Parties</i> (1914) ...	224
<i>Kay v. Groves</i> (1829) ...	93	— <i>v. Marlborough</i> (Duke) (1813) ...	94, 152
<i>Kaye v. Bolton</i> (1795) ...	26	— <i>v. Paignton Urban Council</i> (1913) ...	297, 298, 301, 449
<i>Kayley v. Hothersall</i> (1925) ...	148	<i>Kirkham v. Marter</i> (1819) ...	29, 30, 39
<i>Keachie v. Toronto Corp'n. (Can.)</i> ...	447	<i>Kirkwood's Estate, Re</i> (Ir.) ...	113
<i>Keane v. Reynolds</i> (1853) ...	449	<i>Kissock v. Woodward</i> (Can.) ...	35
<i>Kearney v. London, Brighton &amp; South Coast Ry. Co.</i> (1871) ...	587	<i>Kitchin, Re, Ex p. Young</i> (1881) ...	103, 138
<i>Kearsley v. Cole</i> (1816) ...	131, 190	<i>Kitson v. Julian</i> (1855) ...	55, 166
<i>Keate v. Temple</i> (1797) ...	37	<i>Knight v. Hughes</i> (1828) ...	144, 146
<i>Keech v. Smith's Falls Town</i> (Can.) ...	404, 405	— <i>v. Medora &amp; Wood United Townships</i> (Can.) ...	520
<i>Keen v. Reynolds</i> (1853) ...	449	<i>Knight &amp; McLennan v. National Mortgage &amp; Agency Co. &amp; Ashton</i> (N.Z.) ...	388
<i>Keep v. Alexander</i> (1900) ...	459	<i>Knott v. Hamilton &amp; Flamborough Road Co. (Can.)</i> ...	343
— <i>v. St. Mary's, Newington, Vestry</i> (1894) ...	424	<i>Knowles v. Bartlett</i> (1806) ...	241
<i>Keily v. Murphy</i> (Ir.) ...	84	<i>Korczynski v. Cockshutt Plow Co. (Can.)</i> ...	78
<i>Keith v. Fenelon Falls, Union School Section</i> (Can.) ...	51, 55	<i>Koster v. Blake</i> (S. Af.) ...	29, 30
<i>Kelly v. Barrett</i> (1924) ...	326	<i>Kowai Road Board District</i> (Inhabitants) <i>v. Ashby</i> (N.Z.) ...	367
— <i>v. Whitchurch Township</i> (Can.) ...	403	<i>Krishto Kishori Chowdhraim v. Radha Romun Munshi</i> (Ind.) ...	106
<i>Kelly, Douglas &amp; Co. v. Locklin</i> (Can.) ...	48	<i>Kroon v. Enschede</i> (S. Af.) ...	139
<i>Nelson, Tritton &amp; Co., Re, Ex p. Wiseman</i> (1871) ...	240, 241	<i>Kruger &amp; Co., Ltd. v. Moel Tryvan Ship Co., Ltd.</i> (1907) ...	224
<i>Kembles, Masterman &amp; Johnston v. Mitchell</i> (Scot.) ...	227		
<i>Kemp v. Allan</i> (Scot.) ...	208, 209		
— <i>v. Finden</i> (1844) ...	145, 146, 147		
<i>Kempson v. Ashbee</i> (1874) ...	217, 218		
<i>Kendal, Ex p., Re Dawes</i> (1811) ...	111		
— <i>v. Lewisham Corp'n.</i> (1903) ...	497		
<i>Kendall, Ex p. (1811)</i> ...	111		
— <i>v. Hamilton</i> (1879) ...	201		
<i>Kennaway v. Treleavan</i> (1839) ...	22		
<i>Kennedy v. Campbell</i> (Ir.) ...	117		
— <i>v. Portage La Prairie</i> (Can.) ...	402, 403		

# TABLE OF CASES.

lvii

L.		PAGE		PAGE
Labalmondiere v. Addison (1858) ...	...	518	Leach & Toronto (City), <i>Re</i> (Can.) ...	551
Lacey v. Hill, <i>Re</i> Bailey's Claim (1872) ...	...	132	Leader v. Moxon (1773) ...	549
— v. Hill, Crowley's Claim (1874) ...	129, 242		Leadley v. Evans (1824) ...	166, 172
Lacy, <i>Re</i> , <i>Ex p.</i> De Souza (1853) ...	...	155	Leaf v. Gibbs (1830) ...	72
— v. Hill, Crowley's Claim (1871) ...	...	129	Leary v. Saunders (Can.) ...	286
— v. McNeile (1824) ...	...	36	Leather v. Simpson (1871) ...	227, 228
Ladbrook v. Hewett (1832) ...	...	180	Leathley v. Spyer (1870) ...	80, 81, 165
Ladd v. Garrod (1897) ...	...	243	Le Blanch v. Wilson (1873) ...	137
Lade v. Shepherd (1735) ...	...	325, 329	Lechmere v. Fletcher (1833) ...	201
Lafferty v. Stock (Can.) ...	...	552	Leckhampton Quarries Co., Ltd. v. Ballinger & Cheltenham Rural District Council (1904) ...	287, 301
Laird v. Adams (Can.) ...	...	61	Leckhampton Quarries Co., Ltd. v. Ballinger & Cheltenham Rural District Council (1905) ...	287, 301
Lake v. Bruton (1856) ...	...	115	Ledbury Rural Council v. Somerset (1915) ...	403, 408
Lakeman v. Mountstephen (1874) ...	29, 35, 37, 38		Ledbury Rural District Council v. Colwall Park Granite Quarries Co., Ltd. (1913) ...	471, 472, 475
Lamb v. Vice (1840) ...	...	100	Leddell v. McDougal (1881) ...	99
Lambert v. Lowestoft Corpn. (1901) ...	...	411	Ledgard, <i>Re</i> , Attenborough v. Ledgard (1922) ...	128
Lamley v. East Retford Corpn. (1891) ...	390, 393, 419, 445, 570		Lee v. Binns, <i>Re</i> Binns (1896) ...	123, 124
Lampard v. Sewers Comrs. (1884) ...	...	399	— v. Ellis (Can.) ...	126
Lanarkshire (Middle Ward) Trustees v. Belhaven's (Lord) Trustees (Scot.) ...	449, 150		— v. Fisher (1861) ...	162
Lancashire & Yorkshire Ry. Co. v. Bolton Union Assessment Committee & Great Lever Overseers (1890) ...	...	391	— v. Jones (1861) ...	215
Lancashire & Yorkshire Ry. Co. v. Bury Corpn. (1888) ...	...	586, 587	— v. Nixey (1890) ...	417, 418
Lancashire & Yorkshire Ry. Co. v. Bury Corpn. (1889) ...	...	586, 587	— v. Nixon (1834) ...	87, 102
Lancashire & Yorkshire Ry. Co. v. Davenport (1906) ...	...	291, 292	— v. Patrick (1864) ...	261, 476
Lancashire, Derbyshire & East Coast Railway Acts, 1891 to 1896, <i>Re</i> , <i>Re</i> Lincoln & East Coast Railway Acts, 1897 to 1902 (1903) ...	...	137	— v. Rook (1730) ...	124
Lancashire Exchequer Contribution Account, <i>Re</i> , <i>R. v.</i> Dolby (1892) ...	...	396	Lee & Cameron v. Mitchell (Can.) ...	33, 34
Lancashire J.J. v. Rochdale Corpn. (1883) ...	...	266	Leeds v. Lancashire (1809) ...	50, 51
Lancaster v. Evors (1846) ...	...	123	Leeds & Whitehall Roads Case, <i>R. v.</i> West Riding of Yorkshire J.J. (1834) ...	311, 312
— v. — (1847) ...	...	136	Leeds Corpn. v. Armitage (1899) ...	524
— v. Harlech Highway Board (1888) ...	...	471	— v. Robshaw (1887) ...	552
— v. Harrison (1830) ...	...	71	Leek Improvement Comrs. v. Stafford J.J. (1888) ...	395
— v. West Ham Local Board (1886) ...	...	410	Lees v. Stone (1919) ...	434
Lancaster County J.J. of the Peace v. Newton in Makerfield Improvement Comrs. (1886) ...	...	267	Legh's Settled Estate, <i>Re</i> (1902) ...	539
Lancaster Rural Council v. Fisher & Le Fanu (1907) ...	...	473, 474	Leicester Corpn. v. Brown (1892) ...	500
Landrock v. Metropolitan District Ry. Co. (1886) ...	...	321, 322	Leicester Urban Sanitary Authority v. Holland (1888) ...	308, 444, 458
Lane, <i>Ex p.</i> , <i>Re</i> London & London (1846) ...	...	35	Leicestershire Banking Co., Ltd. v. Hawkins (1900) ...	116
— v. Burghart (1841) ...	...	30	Leigh v. Dickeson (1884) ...	123, 223
Langdale v. Parry (1823) ...	...	157, 158	— v. Jack (1879) ...	320, 322
Langforth Bridge Case (1834) ...	...	583	— v. Taylor (1827) ...	81
Lapthorn v. Harvey (1885) ...	...	467	Leigh Urban District Council v. King (1901) ...	363, 487
Latouche v. Pallas (Ir.) ...	...	150	Leiser & Co. v. Canadian Pacific Timber & Logging Co., Ltd. (Can.) ...	35
Latter v. White (1871) ...	...	75	Leith Magistrates & Town Council v. Gibbs (Scot.) ...	522
— v. — (1872) ...	...	75	Le Jeune v. Sparrow (Can.) ...	180
Laurie v. Scholefield (1860) ...	53, 94, 95, 104		London & London, <i>Re</i> , <i>Ex p.</i> Lane (1846) ...	35
Lavy v. London County Council (1895) ...	503, 507		Le Neve v. Mile End Old Town Vestry (1858) ...	423, 443
Law v. East India Co. (1799) ...	...	193	Leney v. Hill (1872) ...	132
Law Courts Chambers Co., Ltd., <i>Re</i> (1889) ...	126		Leslie (R.), Ltd. v. Reliable Advertising & Addressing Agency, Ltd. (1915) ...	225
Law Guarantee Trust & Accident Society, Ltd., <i>Re</i> , Liverpool Mortgage Insurance Co.'s Case (1914) ...	11, 12		Lethbridge v. Winter (1808) ...	302
Lawder v. Lawder (Ir.) ...	214, 215		Lever v. Pearce (1888) ...	146
Lawrence v. Harris (1902) ...	...	73	Levy, <i>Re</i> , <i>Ex p.</i> Walton (1881) ...	195
— v. Hitch (1868) ...	423, 442		Lewin, <i>Ex p.</i> , <i>R. v.</i> Surrey J.J. & Wells (1892) ...	481
— v. King (1868) ...	...	429	Lewis, <i>Ex p.</i> (1888) ...	318
— v. Walmsley (1862) ...	67, 68, 70, 71, 180		— v. Anstruther (Scot.) ...	204
Lawrie v. Stewart (Scot.) ...	...	141	— v. Cardiff Urban Sanitary Authority (1878) ...	534, 535
Lawson v. Alliston Village (Can.) ...	431, 432		— v. D'Entremont (Can.) ...	204
— v. Weston (Aus.) ...	286, 294, 319		— v. Hoare (1881) ...	78
— v. Wright (1786) ...	136, 137, 148		— v. Jones (1825) ...	213
Layer v. Nelson (1687) ...	131, 139		— v. Smith (1850) ...	236
			— v. Toronto (City) Corpn. (Can.) ...	386
			Lexington (Lord) v. Clarke (1689) ...	30

	PAGE		PAGE
Leycester, <i>Ex p.</i> (1816) ... ..	76	London & Provincial Marine Insurance Co. v. Davies (1878) ... ..	217
Leyton Local Board v. Causton (1893) ... ..	561	London Assurance Co. v. Bold (1844) ... ..	53, 57, 58
Leyton Urban Council v. Chew (1907) ... ..	555	----- v. Buckle (1820) ... ..	91, 187
Licences Insurance Corpn. & Guarantee Fund, Ltd. v. Denton, <i>Re</i> Denton's Estate (1904) ... ..	10, 11, 45, 139, 142	London, Brighton & South Coast Ry. Co. v. Goodwin (1849) ... ..	173
Lichfield Union Guardians v. Greene (1857) ... ..	152	London, Brighton & South Coast Ry. Co. v. St. Giles, Camberwell (1879) ... ..	494
Lighthound v. Higher Bebbington Local Board (1885) ... ..	522	London Chartered Bank of Australia, <i>Re</i> (1893) ... ..	194, 199
----- v. Warnock (Can.) ... ..	29	London, Chatham & Dover Ry. Co. v. London Corpn. (1868) ... ..	269
Lightbown v. M'Myn, <i>Re</i> M'Myn (1886) ... ..	116	London Corpn. v. Barnes (1896) ... ..	372
Lilley v. Hewitt (1822) ... ..	67	----- v. Galloway (1866) ... ..	268, 269
----- v. London County Council (1910) ... ..	507	London (City) Corpn. v. Goldsmith (Can.) ... ..	406
Lincoln & East Coast Railway Acts, 1897 to 1902, <i>Re</i> , <i>Re</i> Lancashire, Derbyshire & East Coast Railway Acts, 1891 to 1896 (1903) ... ..	137	London County Council v. Aylesbury Dairy Co. (1898) ... ..	510
Lincoln County & North Grimsby Township v. South Grimsby Township (Can.) ... ..	366	----- v. Best & Co. (1893) ... ..	501
Lindell v. Victoria (City) Corpn. (Can.) ... ..	400, 402	----- v. Clode (1915) ... ..	505
Lindsay v. Downes (Lord) (Ir.) ... ..	199	----- v. Coal Co-operative Society, Ltd. (1907) ... ..	508
----- v. Rose (Can.) ... ..	12	----- v. Collins (1905) ... ..	511
----- v. Stevenson (L.) & Sons, Ltd. (Aus.) ... ..	12	----- v. Cross (1892) ... ..	509
Li Po Hung v. Yik Lung Bank, Li Po Lung, Li Po Yung, Li Ling Shi & Li Pak (Hong Kong) ... ..	141	----- v. Davis (1895) ... ..	273
Little v. Dundas & Waterloo Macadamised Road Co. (Can.) ... ..	339, 340, 341	----- v. ----- (1897) ... ..	510
Little Bolton (Inhabitants) v. R. (1843) ... ..	306	----- v. ----- (1904) ... ..	274
Little Hulton Urban District Council v. Jackson (1904) ... ..	470	----- v. Dixon (1899) ... ..	511
Littlejohn, <i>Ex p.</i> , <i>Re</i> Duncan (1843) ... ..	20	----- v. Edmondson & Sons (1892) ... ..	512
Liverpool Borough Bank v. Eccles (1859) ... ..	49	----- v. Galsworthy (1918) ... ..	506
----- v. Logan (1860) ... ..	146	----- v. Hancock & James (1907) ... ..	502, 503
Liverpool Mortgage Insurance Co.'s Case, <i>Re</i> Law Guarantee Trust & Accident Society, Ltd. (1914) ... ..	11, 12	----- v. Heathman (1905) ... ..	511, 512
Liverpool Waterworks Co. v. Atkinson (1805) ... ..	54	----- v. Illuminated Advertisements Co. (1904) ... ..	503
Liversey, <i>Ex p.</i> , <i>R. v.</i> Fulwood Local Board (1895) ... ..	501, 502	----- v. King (1905) ... ..	511, 512
Llandudno Urban Council v. Woods (1899) ... ..	202	----- v. Laurance & Sons (1893) ... ..	514, 515
Lloyd v. Blackburn (1851) ... ..	75	----- v. London Hydraulic Co. (1898) ... ..	517
----- v. Dimmack (1877) ... ..	240	----- v. London School Board (1892) ... ..	508
Lloyd's v. Harper (1880) ... ..	53, 80, 172, 205, 208	----- v. Metropolitan Ry. Co., Ltd. (1907) ... ..	507
Loaring v. Stone (1824) ... ..	340, 341	----- v. Metropolitan Ry. Co. (1909) ... ..	505
Local Government Board v. Street (1908) ... ..	556	----- v. Metropolitan Ry. Co. (1919) ... ..	506, 507
Lock v. Reid (Can.) ... ..	49	----- v. Mitchell (1894) ... ..	273, 509, 510
----- v. Sellwood (1841) ... ..	485	----- v. Patman & Fotheringham (1903) ... ..	510
Locke-King, <i>Ex p.</i> , <i>R. v.</i> Surrey J.J. (1908) ... ..	483	----- v. Pryor (1896) ... ..	502
----- v. Woking Urban District Council (1897) ... ..	313, 314	----- v. Rowton House Co. (1897) ... ..	510
Lockey, <i>Re</i> (1845) ... ..	82, 84	----- v. Schewzik (1905) ... ..	503
Lockhart v. Reilly (1857) ... ..	116	----- v. Wandsworth & Putney Gas Co. (1900) ... ..	510
Lockley v. Eldridge (1874) ... ..	209	----- v. Wandsworth Borough Council (1903) ... ..	492, 493
Lodder v. Slowey (1904) ... ..	66	----- v. Worley (1894) ... ..	515
Lodge v. Huddersfield Corpn. (1898) ... ..	510	London County Council & London Building Act, 1894, <i>Re</i> (1904) ... ..	506, 507
Lodge Holes Colliery Co., Ltd. v. Wednesbury Corpn. (1908) ... ..	331, 353, 456	London General Omnibus Co., Ltd. v. Holloway (1912) ... ..	214, 215
Londesborough's (Lord) Case, <i>Re</i> Dover & Deal Ry., Cinque Ports, Thanet & Coast Junction Co. (1854) ... ..	17, 105	London Guarantee & Accident Co. v. Cornish (Can.) ... ..	17
London (City) v. Citizens' Insurance Co. (Can.) ... ..	85, 203	London Guarantee Co. v. Fearnley (1880) ... ..	71
----- v. Torn (1737) ... ..	339	London (City) Land Tax Comrs. v. Central London Ry. Co. (1913) ... ..	321
London & Blackwall Ry. Co. v. Limehouse District Board of Works (1856) ... ..	507, 508		
London & County Banking Co., <i>Ex p.</i> , Burgess v. Eve (1872) ... ..	96		
London & County Banking Co. v. Terry, <i>Re</i> Sherry (1884) ... ..	91, 154		
London & Midland Bank v. Forrest (Scot.) ... ..	68		
London & North-Western Ry. Co. v. St. Pancras Vestry (1868) ... ..	493, 494		
London & North Western Ry. Co. v. Whinray (1854) ... ..	56		

## lix

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	PAGE		PAGE
M'Taggart v. Watson (1836) ...	188, 189	Marshland Smeeth & Fen District Comrs. & Marshland Rural District Council, <i>Re</i> (1895) ...	279, 280
Madden v. M'Mullen (Ir.) ...	189	Martin v. Arthur (Can.) ...	232
Maddison v. Alderson (1883) ...	30, 31	— v. Brecknell (1813) ...	154
Maddock v. Wallasey Local Board (1886) ...	299	— v. Court (1788) ...	127
Madill v. Caledon Township (Can.) ...	402	— v. London County Council (1899) ...	454
Madox v. Jackson (1746) ...	101	— v. Wright (1845) ...	52, 92
Magee v. London & Port Stanley Ry. Co. (Can.) ...	452	Mason, <i>Ex p.</i> , <i>Re</i> Errington (1894) ...	35
Maggs v. Ames (1828) ...	36, 39	—, <i>Re, Ex p.</i> Sharp (1844) ...	155
Magill v. Moore Township (Can.) ...	447	— v. Pritchard (1810) ...	53, 92
Magnus v. Hale (1843) ...	20	Massey-Harris v. Baptiste (Can.) ...	70
Magor v. Wilks (1827) ...	67	Masters v. Hampshire County Council (1915) ...	404
Maguire v. Leigh-on-Sea Urban District Council (1900) ...	545	— v. Marriot (1893) ...	41, 42
— v. Liverpool Corpn. (1905) ...	400, 401	— v. Pontypool Local Government Board (1878) ...	503, 504
Maharaj Bahadur Singh v. Paresh Nath Singh (Ind.) ...	325, 329	Mather v. Bank of Ottawa (Can.) ...	58, 130
Maingay v. Lewis (Ir.) ...	174	Mathews v. Saurin (Ir.) ...	126
Maitland's Case, <i>Re</i> National Financial Co., Ltd. (1868) ...	240	Matson v. Booth (1816) ...	218, 219
Malahaide Township & Elgin County, <i>Re</i> (Can.) ...	571, 572	— v. Wharam (1877) ...	37
Mallet v. Bateman (1865) ...	29	Matthews v. Bloxsome (1864) ...	210
Malling Union v. Graham (1870) ...	167	— v. West London Water Works Co. (1813) ...	420
Maloney v. Campbell (Can.) ...	231	Maude v. Baildon Local Board (1883) ...	269, 270
Malthy v. Carstairs (1828) ...	199	Maunsell v. Egan (Ir.) ...	84, 85
Manchester Corpn. v. Chapman (1868) ...	332, 550	Maure v. Harrison (1692) ...	104
— v. Hampson (1886) ...	526, 530	Maurice v. Marsden (1850) ...	349, 350
— v. — (1887) ...	526, 530	Maw v. King & Albion Townships (Can.) ...	447, 448
Manisty v. Churchill, <i>Re</i> Churchill (Lord) (1888) ...	130	Mawbrey v. Cunningham (1773) ...	36
Manley v. St. Helens Canal & Ry. Co. (1858) ...	422, 581	Maxse v. Cubitt (1873) ...	282
Mann v. Beeny (1843) ...	217	Maxwell v. British Thomson Houston Co. (1904) ...	237, 240
— v. Brodie (1885) ...	281, 288, 297, n.	— v. Clarke Township (Can.) ...	403
— v. Stennett (1845) ...	156	— v. Jameson (1818) ...	129
Mannada Mudali v. Nallaya Gounden (Ind.) ...	294, 318	Maxwell's Creditors & Heron's Trustees (Scot.) ...	130
Manning v. Eastern Counties Ry. Co. (1843) ...	486	May v. Harman (1709) ...	217
— v. Mills (Can.) ...	49	Mayer v. Isaac (1840) ...	53, 93
Mansel v. Webb (1918) ...	431	— v. Underhill (1863) ...	133
Mansfield Corpn. v. Butterworth (1898) ...	544	Mayhew v. Crickett (1818) ...	115, 142, 183, 186, 190, 200
Mansfield Union Guardians v. Wright (1882) ...	189	— v. Wardley (1863) ...	317
Mantle Lamp Co. v. Deveau (Can.) ...	92, 93	Maynell v. Saltmarsh (1664) ...	453
Mantle Lamp Co. of America v. Nixon (Can.) ...	211	Mayor, <i>Re, Ex p.</i> Whitworth (1841) ...	69
Manvers (Earl) & Browne v. Bartholomew (1878) ...	356	Maytag Co. v. Kolb (Can.) ...	87
Mapes v. Sidney (1624) ...	25	Mead v. Etobicoke Township & Grand Trunk Ry. Co. (Can.) ...	581, 582
Mappin Brothers v. Liberty & Co., Ltd. (1903) ...	321, 322	Mead & Bigott's Case (1590) ...	230
Mara v. Ryan (Ir.) ...	130	Meadows, <i>Re</i> (1859) ...	95
Margrett v. Gregory (1862) ...	192	Meaford Town v. Lang (Can.) ...	214
Maria Anna & Steinbank Coal & Coke Co., <i>Re, McKewan's Case</i> (1877) ...	136	Mears v. Green (1846) ...	240
Marion v. Montcalm (Can.) ...	588	Mechanics' Whale Fishing Co. v. Whitney (Can.) ...	69
Marks, <i>Ex p.</i> , <i>Re</i> Colnaghi (1838) ...	64	Medewe's Trust, <i>Re</i> (1859) ...	95
— v. Ford (1880) ...	269	Medmenham Case (undated) ...	264
— v. Scott (Can.) ...	49	Meek v. Langdon (1862) ...	393
Marlborough Town Council v. Wilts County Council (1894) ...	396	— v. Wallis (1872) ...	86
Marr v. Greenwich Board of Works (1880) ...	499	Meeling v. St. Mary, Newington, Vestry (1893) ...	404, 406
Marriott v. East Grinstead Gas & Water Co. (1900) ...	327	Mein, <i>Ex p.</i> , R. v. Jones & Barry Urban District Council (1907) ...	542
— v. Stanley (1840) ...	447	Melksham Urban District Council v. Gay (1902) ...	486
Marryatts v. White (1817) ...	153	Mellor v. Heywood Corpn. (1884) ...	392
Marsan v. Grand Trunk Pacific Ry. Co. (Can.) ...	309	— v. Lees (1865) ...	350
Marsden & Son v. Capital & Counties Newspaper Co., Ltd. (1901) ...	15, 48	— v. Walmesley (1905) ...	323
Marsh, <i>Ex p.</i> , <i>Re</i> Carill (1815) ...	171	Melton, <i>Re, Milk v. Towers</i> (1918) ...	124
Marshall, <i>Ex p.</i> , <i>Re</i> Garway (1751) ...	137	Melvill v. Glendining (1816) ...	180, 182
— v. Ulleswater Steam Navigation Co. (1871) ...	332, 333	Melville v. Doidge (1848) ...	66, 81
— v. Wilson (Ir.) ...	35	Mercantile Bank of Sydney v. Taylor (1893) ...	203
		Mercer v. Woodgate (1869) ...	417, 444
		Merchants Bank v. Sparkes (Can.) ...	101
		Merchants Bank of Canada v. Guthrie (Can.) ...	203
		— v. McKay (Can.) ...	184

# TABLE OF CASES.

lxi

	PAGE		PAGE
Merchants Bank of London v. Maud (1870)	190	Minns v. Omemee Village (Can.)	398
— v. — (1871)	190	Mist v. Metropolitan Water Board & Creamilk, Ltd. (1915)	418, 419
Meredith v. Chute (1702)	18, 19	Mitchell, Re, Freeloove (or Truelove) v. Mitchell (1913)	126, 127, 128
— v. Peer (Can.)	439	— v. Winnipeg (City) (Can.)	404
— v. Short (1702)	18, 19	Mockett v. Ames (1871)	20
Merivale v. Exeter Turnpike Road Trustees (1868)	387	Moel Tryvan Ship Co. v. Kruger & Co. (1907)	224
Merle v. Wells (1810)	92	Moile v. Roberts (Lord) (1629)	176
Merrett v. Bridges (1883)	305	Moir v. Loxton (Aus.)	61
— v. Charlton Kings Urban District Council (1903)	559, 560	Molsons Bank v. Cranston (Can.)	17
Merrittton Village v. Lincoln County (Can.)	519	— v. Turley (Can.)	215
Messenger v. Bridgetown Town (Can.)	447	Monk v. Smith (Aus.)	150
Metcalf v. Bruin (1810)	173	Montagu v. Goole Local Board (1888)	520
Metropolitan Bank of England & Wales v. Coppee (1896)	198	Montefiore v. Lloyd (1863)	170, 171
Metropolitan Board of Works v. Clever (1868)	512	Montforts v. Marsden (1895)	245, 246
— v. Cox (1865)	512	Montreal (City) v. Montreal Street Ry. Co. (Can.)	439
— v. Lathay (1884)	513	— v. Mulclair (Can.)	398
— v. Nathan (1885)	273	Montreal & Ottawa Ry. Co. v. Ottawa Corp'n. (Can.)	351, 352
— v. Steed Brothers (1881)	512	Montreal Harbour Comrs. v. Guarantee Co. of North America (Can.)	69
Metropolitan District Ry. Co. v. Fulham Parish Vestry (1895)	498, 499	Moody v. Woollahra Municipality (Aus.)	447
Metropolitan Electric Supply Co., Ltd. v. London County Council (1904)	512, 513	Moor v. Roberts (1858)	66
Metropolitan Ry. Co. v. London County Council (1911)	505	Moorabbin (Shire) v. Abbott (Aus.)	550
Meyers v. Maybee (Can.)	100	Moore v. Andrew (Can.)	156
Meyrick v. A.-G., Re Christchurch Inclosure Act (1894)	523	— v. Bowmaker (1816)	109
Micklethwait v. Newlay Bridge Co. (1886)	321, 322	— v. Cornwall (Can.)	398
Middleburg Divisional Council v. Close (S. Af.)	83	— v. Death (Can.)	226, 227
Middlesex County v. Peters (Can.)	102	— v. Esquesing Township (Can.)	281
Middlesex County Corp'n. v. Smallman (Can.)	169, 170	— v. Fulham Vestry (1895)	500
Middlesex County Council v. Willesden & Hendon Urban District Councils (1896)	280, 372, 396	— v. Great Southern & Western Ry. Co. (Ir.)	335
Middleton v. Brewer (1790)	28	— v. Woodstock Woollen Mills Co. (Can.)	282
Midland Banking Co., Ex p., Re Sellers (1878)	120	Moorhouse v. Kidd (Can.)	150
— v. Chambers (1869)	120	Moose Jaw Bread Co., Ltd. v. Moose Jaw (City) (Can.)	406
Midland Ry. Co. v. Silvester, Re Silvester (1895)	205, 208	Morant v. Bolton, Re Bolton (1892)	40
— v. Watton (1886)	267, 270, 530, 533, 538	— v. Chamberlin (1861)	441, 442, 443
— v. West Ham Local Board (1886)	269	Morgan v. Hill, Re Parker (1894)	113
Mikulasik v. Scouten (Can.)	431	— v. Leach (1842)	413, 458
Mildred v. Weaver (1862)	265, 299, 301, 303	— v. Seymour (1638)	113, 143
Mill End Vestry v. Whitechapel Union (1876)	497	Morin v. Hammond Lumber Co. (Can.)	221
Miles, Ex p., Re Porter (1848)	120	Morison v. Balfour (Scot.)	186, 187
— v. New Zealand Alford Estate Co. (1886)	18, 24, 25	Morley v. Boothby (1825)	18
Milk v. Towers, Re Melton (1918)	124	— v. Inglis (1837)	104
Mill v. Hawker (1875)	450	— v. St. Alban (1805)	114
Millar v. O'Dowd (N.Z.)	429	— v. Tinkler (1835)	14
Millard v. Balby-with-Hexthorpe Urban Council (1905)	533	Morpeth Rural Council v. Bullocks Hall Colliery Co., Ltd. (1913)	471
Miller v. McKeon (Aus.)	386	Morrell v. Cowan (1877)	19, 20, 53
— v. Munro (Can.)	242	Morrice v. Redwyn (1731)	130
— v. Palmer & Carr (Can.)	303	Morris v. Jeffries (1866)	429
Milligan v. Glen (Scot.)	150	— v. Marsden (1850)	349
Mills v. Alderbury Union (1849)	112, 164	— v. Stacey (1816)	46
Millwall, The, Gaselee v. Darling (1905)	235, 236	Morris Township Corp'n. v. Huron County Corp'n. (Can.)	572
Milne v. Smith (Scot.)	262, 263	Morrison, Ex p. (Can.)	459
Milne & Co. v. Aberdeen District Committee (Scot.)	471	— v. Barking Chemicals Co., Ltd. (1919)	128
Milton Comrs. v. Faversham District Highway Board (1867)	281	— v. Graham (1827)	134
Milward v. Redditch Local Board of Health (1873)	334	— v. Sheffield Corp'n. (1917)	445
Minet, Ex p. (1807)	18	— v. Toronto (City) (Can.)	403
		— v. Trenchard (1842)	102
		Mors-Le-Blanch v. Wilson (1873)	137
		Morten v. Marshall (1863)	15, 78, 79
		Mortgage Insurance Corp'n., Ltd. v. Pound (1895)	87, 103, 105
		Morton v. Benjamin & Phippen (Can.)	67, 68
		Morton & St. Thomas Corp'n., Re (Can.)	294
		Moseley v. Ely Local Board of Health (1856)	396, 397
		Moser v. Ambleside Urban District Council (1925)	264, 294, 299

	PAGE		PAGE
Mosley v. Inglis (1837) ... ..	104	Neel Comal Mookerjee v. Bipro Dass Mookerjee (Ind.) ... ..	172
Moss, <i>Re, Ex p. Hallet</i> (1905) ... ..	85	Neeld v. Hendon Urban District Council (1899) ... ..	314
— v. Christchurch Rural Council (1925) ... ..	432	Nellis v. Wilkes (Can.) ... ..	407
Mott v. Shoolbred (1875) ... ..	423, 454	Nelson v. Lanarkshire Lower Ward County Council (Scot.) ... ..	406
Moubray, Rowan & Hicks v. Drew (Aus.) ... ..	518	Nerot v. Wallace (1789) ... ..	24, 26
Moul v. Croydon Corp'n. (1918) ... ..	401, 402	Nesbitt v. Greenwich District Board of Works (1875) ... ..	498
— v. Tilling (Thomas), Ltd. (1918) ... ..	401, 402, 407	Nevill's Case, <i>Re</i> Natal Investment Co. (1870) ... ..	192, 193, 200
Mould v. Williams (1844) ... ..	458	Neville v. Joseph (Can.) ... ..	23
Moulton & Canborough Townships Corpns. & Haldimind County Corp'n., <i>Re</i> (Can.) ... ..	375	New Bedford Bridge & Old Bedford Bridge Cases (1850) ... ..	572, 575, 580
Mountague v. Tidcombe (1705) ... ..	188	New Hamburg Village Corp'n. v. Waterloo County Corp'n. (Can.) ... ..	573
Mountstephen v. Lakeman (1871) ... ..	29, 37, 38	New Westminster (Bp.) v. Vancouver (City) (Can.) ... ..	335, 336
Mowat v. Switzer (Can.) ... ..	179	New Westminster (City) Corp'n. v. Brighthouse (Can.) ... ..	334
Mowatt & Elliott's Case, <i>Re</i> Dover & Deal Ry., Cinque Ports, Thanet & Coast Junction Co. (1853) ... ..	105	New Windsor Corp'n. v. Taylor (1899) ... ..	352
Mozley v. Tinkler (1835) ... ..	14, 15	New Zealand Loan & Mercantile Agency Co., Ltd. v. Loach (N.Z.) ... ..	111
Mud Lake Bridge, <i>Re</i> (Can.) ... ..	571	New Zealand Loan & Mercantile Agency Co., Ltd. v. Willis (N.Z.) ... ..	53
Muhammad Rustam Ali Khan v. Karual City, Municipal Committee (Ind.) ... ..	287	Newborough (Lord) v. Schroder (1849) ... ..	245
Mulholland v. Smith (Aus.) ... ..	69	Newbury v. Armstrong (1829) ... ..	22
Mullan v. Forrester (Ir.) ... ..	434	Newell v. Moose Jaw (City) (Can.) ... ..	404
Mullis v. Hubbard (1903) ... ..	559, 563	Newhaven Local Board v. Newhaven School Board (1885) ... ..	563, 564
Mulso v. Shere (1718) ... ..	65	Newmarket Ry. Co. v. Foster (1854) ... ..	348
Municipal Council v. Stabb (Nfld.) ... ..	551	Newport v. Spivey (1862) ... ..	14
Munnings v. Bury (1829) ... ..	134, 135	Newport Bridge, <i>Re</i> (1859) ... ..	589
Munroe v. O'Neil (Can.) ... ..	178	Newport Urban Sanitary Authority v. Graham (1882) ... ..	522
Munster & Leinster Bank v. France (Ir.) ... ..	179	Newquay Urban Council v. Rickard (1911) ... ..	541
Mure, <i>Ex p.</i> (1788) ... ..	190	Newton v. Chorlton (1853) ... ..	108, 115, 130, 191
Murley Brothers v. Grove (1882) ... ..	420, 421	— v. Egmont (Earl) (1831) ... ..	119
Murphy v. Glass (1869) ... ..	110, 111	Newton Abbot Rural District Council v. Wills (1913) ... ..	392
Murray v. Epsom Local Board (1897) ... ..	391	Newton in Makerfield Improvement Comrs. v. Lancashire JJ. (1884) ... ..	267
— v. Gibson (Can.) ... ..	143	Newton-in-Makerfield Urban Council v. Lyon (1900) ... ..	348, 349
— v. King (1821) ... ..	69, 70	Newton-in-Makerfield Urban District Council v. Brown (1900) ... ..	348, 349
Murrell v. Fysh (1883) ... ..	235	Newton-in-Makerfield Urban District Council v. Lynn (1900) ... ..	348, 349
Musgrave v. Newton (1835) ... ..	102	Niagara & Ontario Construction Co. v. Wyse & U.S. Fidelity & Guaranty Co. (Can.) ... ..	164
— v. Vick (1827) ... ..	101, 102	Niagara District Fruit Growers' Stock Co. v. Walker (Can.) ... ..	69
Musket (or Mushet) v. Cliffe (1846) ... ..	245	Niagara Navigation Co. v. Niagara (Can.) ... ..	294
— v. Rogers (1839) ... ..	71, 78, 187	Niblett v. Pottow (1834) ... ..	342
Mutual Loan Fund Assocn. v. Sudlow (1855) ... ..	190	Nicholas v. King & Garside (Can.) ... ..	9
Myers v. Edge (1797) ... ..	171	— v. Ridley (1904) ... ..	118
Mytton v. Duck (Can.) ... ..	296	Nicholl v. Allen (1862) ... ..	578
N.		Nichols v. Norris (1831) ... ..	182
		Nicholson, <i>Ex p.</i> , <i>Re</i> Sheppard (1840) ... ..	52
Napier v. Bruce (1842) ... ..	55, 56	— v. Paget (1832) ... ..	53, 61, 93
Napier's Trustees v. Morison (Scot.) ... ..	296, 297	— v. Revill (1830) ... ..	202
Nares v. Howles (1811) ... ..	69, 82	Nicol v. Beaumont (1883) ... ..	312, 420, 441
Narracan (Shire) President, etc. v. Leviston (Aus.) ... ..	288	Nicolson v. Revell (1836) ... ..	202
Nash v. Glover (Can.) ... ..	281, 282	Nicolsons v. Burt (Scot.) ... ..	160, 161
— v. Rochford Rural Council (1917) ... ..	405	Niel & Co. v. Quin & O'Hea (S. Af.) ... ..	14
— v. Spencer (1896) ... ..	13	Nield v. Carson (1917) ... ..	415
Natal Investment Co., <i>Re</i> , Nevill's Case (1870) ... ..	192, 193, 200	Nihal Chand v. Azmat Ali Khan (Ind.) ... ..	319, 323
Nathan v. Metropolitan Board of Works (1886) ... ..	501	Nisbet v. Greenwich District Board of Works (1875) ... ..	498
Nathanson v. Dennill (S. Af.) ... ..	164	— v. Hamilton (Scot.) ... ..	558
National Bank of New Zealand v. Mee & Reid (N.Z.) ... ..	151, 152, 197	— v. Smith (1789) ... ..	127, 129, 180
National Bank of South Africa v. Graaff (S. Af.) ... ..	86	Nixey v. London County Council (1894) ... ..	506
National Financial Co., <i>Re, Ex p.</i> Oriental Commercial Bank (1868) ... ..	240	Noble v. Carr (1872) ... ..	300
National Financial Co., Ltd., <i>Re</i> , Maitland's Case (1868) ... ..	240	— v. Turtle Mountain Municipality (Can.) ... ..	588
National Provincial Bank of England, <i>Ex p.</i> , <i>Re</i> Rees (1881) ... ..	120		
National Provincial Bank of England, <i>Ex p.</i> , <i>Re</i> Sass (1896) ... ..	90		
National Provincial Bank of England v. Brackenbury (1906) ... ..	73		
National Provincial Bank of England, Ltd. v. Glanusk (1913) ... ..	215		

## TABLE OF CASES.

lxiii

	PAGE		PAGE
Nokes v. Thompson (1853) ... ..	48	Offin v. Rochford Rural Council (1906)	313, 314
Norfolk County Council v. Bittering Highway Surveyor (1894) ... ..	354	Offley & Johnson's Case (1584) ... ..	139
— v. Green (1904) ... ..	466, 474	Offord v. Davies (1862) ... ..	13, 205
Norman v. Bolt (1883) ... ..	183	O'Gara v. Union Bank of Canada (Can.) ...	165
Normanton Gas Co. v. Pope & Pearson, Ltd. (1883) ... ..	327, 328	Ogden v. Aspinall (1826) ... ..	79
Norris v. Jeffries (1866) ... ..	429	Ogilvie v. Crowell (Can.) ... ..	294
— v. Poate (1825) ... ..	341	— v. Norton (S. Af.) ... ..	66
North v. Wakefield (1849) ... ..	199	Ogle v. Hay (1910) ... ..	124
North British Insurance Co. v. Lloyd (1854)	210,	Ogloff v. Sliding Hills Rural Municipality No. 273 (Can.) ... ..	308
211, 212, 213		Ogston v. Aberdeen District Tramways Co. (1897) ... ..	439
North British Mercantile Insurance Co. v. Kean (Can.) ... ..	201, 205	O'Hara v. Foley (Can.) ... ..	340
North British Ry. Co. v. Holme Cultram Local Board (1889) ... ..	534, 536	Ohrby v. Ryde Comrs. (1864) ... ..	399, 401
North Dorchester Township v. Middlesex County (Can.) ... ..	573	Okanagan Telephone Co. v. Summerland Telephone Co., Ltd. (Can.) ... ..	448
North Eastern Ry. Co. v. Dalton Overseers (1899) ... ..	370	O'Keefe v. Edinburgh Corp'n. (Scot.) ...	389
North London Ry. Co. v. St. Mary, Islington, Vestry (1872) ... ..	276	Old Bedford Bridge & New Bedford Bridge Cases (1850) ... ..	572, 575, 580
North Staffordshire Ry. Co. v. Hanley Corp'n. (1909) ... ..	305, 380, 574, 575, 584, 585	Oldershaw v. King (1857) ... ..	22, 25
North Western Ry. Co. v. Whinray (1854)	56, 108	Oldham v. Allen (1784) ... ..	10, 14
Northam Bridge & Roads Co. v. London & Southampton Ry. Co. (1840) ... ..	208	Oliver v. Bank of England (1902) ... ..	228
Northam Bridge & Roads Co. v. South Stoneham Rural District Council (1907) ...	324	— v. Horsham Local Board (1894) ... ..	400, 402, 411
Northam Bridge Co. v. R. (1886) ... ..	343, 344	Omnium Insurance Corp'n., Ltd. v. United London & Scottish Insurance Co., Ltd. (1920) ... ..	85
Northbrook (Lord) v. Plumstead Board of Works (1871) ... ..	277, 278, 494, 495	O'Neil v. Harper (Can.) ... ..	284, 286, 296
Northern Crown Bank v. Elford (Can.) ...	18	O'Neill, <i>Re</i> (Ir.) ... ..	79
Norton v. Powell (1842) ... ..	15, 50	— v. Carter (Can.) ... ..	197
Nosworthy v. Yorke (S. Af.) ... ..	139	Ong v. Truelock (Ir.) ... ..	146
Nottingham County Council v. Manchester, Sheffield & Lincolnshire Ry. Co. (1894) ...	586	Ontario Corp'n. (County of) v. Paxton (Can.)	169
Nottingham Hide, Skin & Fat Market Co. v. Bottrill (1873) ... ..	94	Openshaw v. Pickering (1912) ... ..	296, 297, 301, 444, 458
Noverre v. Toronto (City) (Can.) ... ..	389	Oran v. Gait (1860) ... ..	346
Noye v. Reed (1827) ... ..	320, 321	Orchis, <i>The</i> (1890) ... ..	226
Noyes, Third Party, Sherry & Tait v. Rail- ways Comr. (Aus.) ... ..	223	Organ v. Toronto (City) (Can.) ... ..	389
Nugent's Estate, <i>Re</i> (Ir.) ... ..	81	Oriental Commercial Bank, <i>Ex p.</i> , <i>Re</i> National Financial Co. (1868) ... ..	240
Nuttall v. Pickering (1913) ... ..	438	Oriental Financial Corp'n. v. Overend, Gurney & Co. (1871) ... ..	177, 184
Nutter v. Accrington Local Board of Health (1878) ... ..	335	Original Hartlepool Collieries Co. v. Gibb (1877) ... ..	426
O.		Orme v. Young (1815) ... ..	179, 185
Oakeley v. Pasheller (1836) ... ..	173, 174, 181	Orr Ewing v. Colquhoun (1877) ... ..	316
Oakford v. European & American Steam Shipping Co., Ltd. (1863) ... ..	174	Orrell v. Coppock (1856) ... ..	42
Oakland Township v. Proper (Can.) ... ..	81	Osborn v. Metropolitan Water Board (1910)	418
Oakley v. Merthyr Tydfil Corp'n. (1922)	541, 543	Osborn & Bradshaw v. Churchman (1606) ...	130
Oakville Town v. Cranston (Can.) ... ..	402	Osborne v. Kingston (City) Corp'n. (Can.)	330, 389
Oastler v. Pound (1863) ... ..	80	Osmond v. Widdicombe (1818) ... ..	345
O'Brien v. Allen (Can.) ... ..	337	Ostrander v. Jarvis (Can.) ... ..	141
— v. Corbett (Can.) ... ..	460	Ostrom & Sydney Corp'n., <i>Re</i> (Can.) ...	553, 554
— v. Trenton Municipal Council (Can.)	294	Oswald v. Berwick-upon-Tweed Corp'n. (1856)	56, 57, 169
O'Callaghan, <i>Re</i> (Ir.) ... ..	151	Other v. Iveson (1855) ... ..	87, 101, 207
O'Carroll's Case (1745) ... ..	114, 133	Ottawa (City) v. Grand Trunk Rty. Co. (Can.)	282, 288, 289
O'Connor v. Clements (Can.) ... ..	99, 100	— v. Ottawa & New York Ry. Co. (Can.) ... ..	282, 288, 289
— v. Hamilton (City) (Can.) ... ..	411	Ottawa Agricultural Insurance Co. v. Canada Guarantee Co. (Can.) ... ..	214
— v. Malone (Ir.) ... ..	121	Ottawa & Gloucester Road Co. v. Ottawa (City) (Can.) ... ..	573
— v. Nova Scotia Telephone Co. (Can.) ... ..	320	Ovenstone v. Dundee District Committee of Forfar County Council (Scot.) ... ..	356
— v. Otonabee Corp'n. & Down Town- ship Corp'n. (Can.) ... ..	401	Over Darwen Corp'n. v. Lancashire J.J. (1884)	395, 396
Oddy v. Hallett (1885) ... ..	116	— v. Lancaster County J.J. (1887) ... ..	396
Odhams Brothers v. Brunning (1896) ...	53, 54	Overend, Gurney & Co. (Liquidators) v. Oriental Financial Corp'n. (Liquidators) (1874) ... ..	46, 174, 177, 183, 184
Official Receiver, <i>Ex p.</i> , <i>Re</i> Errington (1894)	35	Overton v. Freeman (1852) ... ..	410
—, <i>Ex p.</i> , <i>Re</i> Wells & Croft (1895) ... ..	239	Owen v. Homan (1851) ... ..	210
		Owen & Gutch v. Homan (1853) ... ..	183, 210



	PAGE		PAGE
Oxenhope District Local Board v. Bradford Corp'n. (1882) ...	397	Paton v. Wilkes (Can.) ...	108
Oxford Township v. Cair (Can.) ...	204	Patterson v. Aldborough Township (Can.) ...	447
Oxley v. Young (1795) ...	185	Pattison v. Belford Union Guardians (1856) ...	81
— v. — (1796) ...	185	Paul v. James (1841) ...	302, 487
P.		Payne v. Coughell (or Caughell) (Can.) ...	222, 337
Paddington Vestry v. Bramwell (1880) ...	495	— v. Grey, <i>Re</i> Stamford & Warrington (Earl) (1911) ...	368, 371, 372, 374
— v. North Metropolitan Railway & Canal Co. (1894) ...	498	— v. Ives (1823) ...	185
— v. Snow (1881) ...	507, 509	— v. Partridge (1691) ...	452
Padwick v. Knight (1852) ...	355	— v. Wilson (1827) ...	24, 25
— v. Stanley (1852) ...	128	Paynter v. Watson (1898) ...	510
Paerson v. Brokenhead Municipality (Can.) ...	576	Peachey v. Rowland (1853) ...	421
Page v. Bussell (1814) ...	133	Peacock v. Harris (1808) ...	339
Pagiatide v. Davis (Can.) ...	143	— v. Pursell (1863) ...	152
Paine v. Partrich (1691) ...	343, 452	Pearce v. Blagrove (1855) ...	34, 35
Palace Co., <i>Ex p.</i> , R. v. Demnan (1907) ...	504	— v. Maidenhead Corp'n. (1907) ...	545
Paley v. Field (1806) ...	88	Pearl v. Deacon (1857) ...	116, 155
Palmatier v. McKibbin (Can.) ...	294	Pears (A. & F.), Ltd. v. London County Council (1911) ...	504
Palmer v. Baker (Can.) ...	34	Pearsall v. Brierley Hill Local Board (1883) ...	336
— v. Neave (1805) ...	231	Pearse v. Morrice (1834) ...	97
— v. Sheridan-Bickers (1910) ...	71	Pearson v. Calder (Can.) ...	39
— v. Sparshott (1842) ...	138, 242	— v. Seligman (1883) ...	32
Palsgrave v. Murphy (Can.) ...	17, 49	— v. Tazewell (1805) ...	347
Panloty v. Dwarka Mohun Dass (Ind.) ...	79	— v. York County Corp'n. (Can.) ...	393
Pappin v. Maynard (1863) ...	422	Pearson's Appeal, <i>Re</i> , <i>It. v.</i> West Riding of Yorkshire JJ. (1862) ...	485
Papworth v. Battersea Corp'n. (1915) ...	308, 410	Pease v. Hirst (1829) ...	100, 100, 171
— v. — (No. 2) (1916) ...	398, 410, 412	— v. Paver (1875) ...	439
— v. Johnson (1613) ...	22, 23	Peckham v. Faria (1781) ...	30, 37
Parfitt v. Lawless (1872) ...	217	Pedlow v. Renfrew Town (Can.) ...	309
Paris v. Lynton Rural District Council (1911) ...	293	Peek v. Gurney (1871) ...	241, 242
Paris & Dundas Road Co. v. Babcock (Can.) ...	344	— v. — (1873) ...	241, 242
Paris Board of Education v. Citizens Insurance & Investment Co. (Can.) ...	160	— v. Waterloo Board of Health (1863) ...	524
Park v. Gould & Co. (Scot.) ...	227	Peel v. Tatlock (1799) ...	69, 214
Parke v. Foster (1858) ...	547	Peers v. Oxford (Can.) ...	214
Parker, <i>Re</i> , Morgan v. Hill (1894) ...	113	Peirs v. Peirs (1750) ...	124
— v. Lewis (1873) ...	243	Pelham (Lord) v. Pickersgill (1787) ...	307
— v. London General Omnibus Co., Ltd. (1909) ...	433	Pemberton v. Oakes (1827) ...	154, 206
— v. Wise (1817) ...	53, 76	Pembroke Township & Renfrew County, <i>Re</i> (Can.) ...	573
Parkins v. Moravia (1824) ...	38	Pendlebury v. Greenhalgh (1875) ...	410
Parkinson, <i>Re</i> , <i>Ex p.</i> Sergeant (1822) ...	129	— v. Walker (1841) ...	108, 109, 142, 213
— <i>Re</i> , <i>Ex p.</i> — (1825) ...	129	Penny v. Foy (1828) ...	127
— v. Blackburn Corp'n. (1859) ...	518	— v. Wimbledon Urban Council (1898) ...	410
— v. West Riding of Yorkshire County Council (1922) ...	409	— v. — (1899) ...	410
Parlee, <i>Ex p.</i> (Can.) ...	476	People's Bank of Halifax v. Johnson (Can.) ...	97
Parr's Banking Co. v. Yates (1898) ...	80, 87	Pepin v. Chunder Seekur Mookerjee (Ind.) ...	235, 236
Parsons v. Barclay & Co., Ltd. & Goddard (1910) ...	32	Peppin v. Cooper (1819) ...	55
— v. Blandy (1810) ...	339, 340	Perchard & Hamerton v. Tindall (1795) ...	102
— v. St. Mathew, Bethnal Green (1867) ...	399	Perfect v. Musgrave (1818) ...	186, 187
— v. Tanner (1844) ...	296	Perkins, <i>Re</i> , Poyser v. Beyfus (1898) ...	231
Parsons & Cole v. Briddock (1708) ...	113, 114	Perley v. Dibble (Can.) ...	316
Partick Police Comrs. v. Great Western Steam Laundry Co., Ltd. (Scot.) ...	564, 565	Perrie v. Roberts (1081) ...	152
Partridge v. North Sydney Town (Can.) ...	558	Perrin v. Bingham (Can.) ...	49
Pascoe v. Port Levy Road District (Inhabitants) (N.Z.) ...	308	Perry v. National Provincial Bank of England (1910) ...	163, 198
Pasheller v. Hammett (1832) ...	173, 174, 181	Perth County Council Highland District Committee v. Rattray (Scot.) ...	471
Pasley v. Freeman (1789) ...	31	Peter v. Rich (1629) ...	144
Passant v. Aitcham District Council (1902) ...	301	Peterborough Municipal Corp'n. v. Grand Trunk Ry. Co. (Can.) ...	588
Paterson, <i>Re</i> (1832) ...	28	Peters v. Bryson (Can.) ...	161, 162
— v. Bonar (Scot.) ...	72	Peterson v. Bitulithic & Contracting Co. (Can.) ...	331
— v. Calder (Scot.) ...	170, 171	Pethick Brothers v. Dorset County Council (1898) ...	407
— v. St. Andrews Provost (1881) ...	292	Petipas v. Sparks (Nfld.) ...	588
Pathe Freres Phonograph Co. of Canada, <i>Re</i> (Can.) ...	130	Petre v. Duncombe (1851) ...	136, 137
		Petrie v. Hunter (Can.) ...	86
		— v. Nuttall (1850) ...	304, 305
		Pettman v. Keble (1850) ...	134
		Petty v. Cooke (1871) ...	152, 181, 184
		Phillips v. Astling (1809) ...	69, 79, 164

# TABLE OF CASES.

lxv

	PAGE
Philips v. Sackford (1595) ... ..	25
— v. Turner (1801) ... ..	19
Phillipps v. Bateman (1812) ... ..	12, 13
Phillips v. Britannia Hygienic Laundry Co. (1923) ... ..	433
— v. Dickson (1860) ... ..	116
— v. Fordyce (1779) ... ..	69
— v. Foxall (1872) ... ..	214
— v. Hartley Wintney Rural District Council (1899) ... ..	286, 288, 296, 302
Philp v. Ryan (1901) ... ..	83
Philpot v. Briant (1828) ... ..	175, 176
Philpott v. Bryant (1827) ... ..	175, 176
Phipson v. Harvett (1834) ... ..	351, 352
Phythian v. Baxendale (1895) ... ..	437
Pickering Lythe East Highway Board v. Barry (1881) ... ..	400, 463
Pickford v. Davis (1834) ... ..	349
Pickles v. Thornton (1875) ... ..	164
Pictor v. Hoskins (1880) ... ..	461
Pictou Municipality v. Geldert (1893) ... ..	400
Pidcock v. Bishop (1825) ... ..	213
Pierce v. Williams (1854) ... ..	137
Pierce v. Fauconberg (Lord) (1757) ... ..	306
Piggott v. Goldstraw (1901) ... ..	299, 300
Pillans & Rose v. Van Mierop & Hopkins (1905) ... ..	17
Pipe v. Fulcher (1858) ... ..	303
Pipi Te Ngahuru v. Mercer Road Board (N.Z.) ... ..	318, 319
Pitt v. Purssord (1841) ... ..	143
Pitts v. Kingsbridge Highway Board (1871) ... ..	355
Pizzi, <i>Re</i> , Scrivener v. Aldridge (1907) ... ..	546
Place v. Delegal (1838) ... ..	242
Plant v. Normanby & Minto (Can.) ... ..	390, 402
Plastic Decoration & Papier-Mâché Co., Ltd. v. Massey-Mainwaring (1895) ... ..	61
Pledge v. Buss (1860) ... ..	115, 191, 212
Plimmer v. Loughrey (N.Z.) ... ..	435
Plomer v. Long (1816) ... ..	153
Plumbe v. Sandys (1818) ... ..	114
Plumbley v. Lock (1902) ... ..	324, 430
Plumstead Board of Works v. British Land Co. (1875) ... ..	495
Plumstead Board of Works v. Ingoldby (1872) ... ..	499
Plumstead Board of Works v. Ingoldby (1873) ... ..	496, 499
Plumstead Board of Works v. Spackman (1834) ... ..	505
Plumstead District Board of Works v. Ecclesiastical Comrs. for England (1891) ... ..	491
Plumstead District Board of Works v. Planet Building Society (1872) ... ..	499
Plymouth, Stonehouse & Devonport Tramways Co. v. General Tolls Co., Ltd. (1898) ... ..	348
Polak v. Everett (1876) ... ..	157, 162, 163
Pollard v. Scott (1790) ... ..	303
Pontifex v. Foord (1884) ... ..	238
Pontypridd Urban District Council v. Jones (1911) ... ..	546
Pool Highway Board v. Gunning (1882) ... ..	471
Poole v. Huskinson (1843) ... ..	286, 288, 307, 325
Pooley v. Harradine (1857) ... ..	107, 108
Pope, <i>Ex p.</i> , R. v. Adams (1923) ... ..	356
— v. Andrews (1840) ... ..	14, 15
— v. Carroll (Can.) ... ..	137, 138
— v. Langworthy (1833) ... ..	350
Poplar Board of Works v. Love (1874) ... ..	491, 496
— v. North Metropolitan Tramways Co. (1879) ... ..	501
Poplar Corp'n. v. Millwall Dock Co. (1904) ... ..	326, 330
Port Elgin Public School Board v. Eby (Can.) ... ..	67
Port Whitby, Scugog, Simcoe & Huron Road Co. v. Whitby Town (Can.) ... ..	519

	PAGE
Porter, <i>Re</i> , <i>Ex p.</i> Miles (1848) ... ..	120
Porthcawl Urban District Council v. Brogden (1917) ... ..	547
Portland Town v. Griffiths (Can.) ... ..	448
Portsea Island Union Guardians v. Whillier (1860) ... ..	170
Portsmouth Bridge Co. v. Nance (1843) ... ..	344
Portsmouth Corp'n. v. Hall (1907) ... ..	271, 374, 521, 522
— v. Smith (1883) ... ..	274, 275, 519, 520
— v. — (1885) ... ..	274, 275, 519, 520
Potter v. London County Council (1905) ... ..	237
Poucher v. Treahy (Can.) ... ..	34
Poulter, <i>Re</i> , Poulter v. Poulter, Edwards v. Poulter (1912) ... ..	244
Pouncey, <i>Ex p.</i> , R. v. Finchley Surveyors (1854) ... ..	485
Pound v. Plumstead Board of Works (1871) ... ..	277, 278, 404, 495
Powell, <i>Ex p.</i> , <i>Re</i> Lorymer (1830) ... ..	204
— v. Dale & Hood (1911) ... ..	116, 192
— v. Eason (1831) ... ..	133
— v. Fall (1880) ... ..	431
Power v. Hunt (Nfld.) ... ..	457, 458
Powers v. Bathurst (1880) ... ..	293, 294, 295
Poyser v. Beyfus, <i>Re</i> Perkins (1898) ... ..	231
Praed v. Gardiner (1788) ... ..	111
Pratt v. Brown (1838) ... ..	344, 345
— v. Stratford Corp'n. (Can.) ... ..	588, 589
Prendergast v. Devey (1821) ... ..	175
Prescott v. Nicholson (1889) ... ..	500
Preston Corp'n. v. Fullwood Local Board (1885) ... ..	440, 441
Pretty v. Bickmore (1873) ... ..	417
Price v. Barker (1855) ... ..	195, 196
— v. Burva (1857) ... ..	134
— v. Carter (1845) ... ..	149
— v. Kirkham (1864) ... ..	165, 180, 187
Priddle, <i>Re</i> (Aus.) ... ..	321
Priest v. Manchester Corp'n. (1915) ... ..	427, 445
Primrose v. Bromley (1739) ... ..	208
Prince of Wales Dry Dock Co. (Swansea), Ltd. v. Fownes Forge & Engineering Co., Ltd. (1904) ... ..	238
Pring (Doe d.) v. Pearsey (1827) ... ..	320, 323
Pritchard v. Hitchcock (1843) ... ..	151, 152
Property Exchange, Ltd. v. Wandsworth Board of Works (1902) ... ..	277, 498
Prouse v. Glenny (Can.) ... ..	294
Provincial Bank of Ireland v. Fisher (Ir.) ... ..	180
Pryor v. Petre (1894) ... ..	322
— v. Pryor (1872) ... ..	287, 288
Pugh v. Stringfield (1858) ... ..	100
Pulkrabek v. Russell Rural Municipality (Can.) ... ..	330, 331
Puller v. Taylor (1837) ... ..	516
Pullin v. Deffel (1891) ... ..	315, 316
— v. Stokes (1794) ... ..	24
Punchanun (Ghose v. Daly (Ind.) ... ..	177
Purdy v. Smith (1859) ... ..	347
Pybus v. Gibb (1856) ... ..	161, 168
Pyers v. Turner (1592) ... ..	22

## Q.

Quillinan v. Canada Southern Ry. Co. (Can.)	332
Quinton v. Bristol Corp'n. (1874) ... ..	386

## R.

R. v. — JJ. (1819) ... ..	483
— v. Adams (1817) ... ..	344
— v. —, <i>Ex p.</i> Pope (1923) ... ..	356

	PAGE		PAGE
<b>R. v. Adderbury East (Inhabitants) (1843) ...</b>	<b>577,</b>	<b>R. v. Buckingham County (1878) ...</b>	<b>574, 589</b>
— <b>v. Adey (1835) ...</b>	<b>583, 584, 589</b>	— <b>v. Bucklugh (Duchess) (1704) ...</b>	<b>368</b>
— <b>v. Alberta Railway &amp; Irrigation Co. (Can.) ...</b>	<b>485</b>	— <b>v. Bucknall (1704) ...</b>	<b>308</b>
— <b>v. Aldborough (1853) ...</b>	<b>581</b>	— <b>v. Bucks (Inhabitants) (1810) ...</b>	<b>571, 572, 575, 585</b>
— <b>v. All Saints &amp; St. Mary (Inhabitants) (1735) ...</b>	<b>264, 265</b>	— <b>v. ———, Re Great Marlow Bridge (1828) ...</b>	<b>584, 585</b>
— <b>v. All Saints, Derby (Inhabitants) (1739) ...</b>	<b>377</b>	— <b>v. Burgess (1760) ...</b>	<b>265</b>
— <b>v. Allanson (1827) ...</b>	<b>370</b>	— <b>v. Burn in Easingwold (Owners &amp; Occupiers) (1778) ...</b>	<b>377</b>
— <b>v. Archibald (Can.) ...</b>	<b>438</b>	— <b>v. Burnett (1815) ...</b>	<b>434</b>
— <b>v. Ardsley (Inhabitants) (1878) ...</b>	<b>364, 365, 379</b>	— <b>v. Burney (1875) ...</b>	<b>264</b>
— <b>v. Arnould (1857) ...</b>	<b>383</b>	— <b>(on the prosecution of Cleckheaton Local Board of Health) v. Burnup (1880) ...</b>	<b>270, 534</b>
— <b>v. Ashby Folville (Inhabitants) (1800) ...</b>	<b>364, 365, 368</b>	— <b>v. Burrell (1867) ...</b>	<b>441</b>
— <b>v. Askerton Parish (1865) ...</b>	<b>383, 384</b>	— <b>v. Burt (1870) ...</b>	<b>414, 419, 445</b>
— <b>v. Attercliffe cum Darnall (Inhabitants) (1849) ...</b>	<b>304, 367, 379</b>	— <b>v. Bury (1844) ...</b>	<b>312</b>
— <b>v. Bagge, etc. (Norfolk JJ.) (1874) ...</b>	<b>363</b>	— <b>v. Bury &amp; Stratton Roads Trustees (1825) ...</b>	<b>337</b>
— <b>v. Bagshaw (1797) ...</b>	<b>387</b>	— <b>v. Bury Improvement Comrs. (1870) ...</b>	<b>378</b>
— <b>v. Bailey (Ir.) ...</b>	<b>117, 130</b>	— <b>v. Caister (Can.) ...</b>	<b>350</b>
— <b>v. Baker (1870) ...</b>	<b>512</b>	— <b>v. Cambridgeshire JJ. (1822) ...</b>	<b>349, 350</b>
— <b>v. Bamber (1843) ...</b>	<b>371</b>	— <b>v. ——— (1835) ...</b>	<b>481, 482</b>
— <b>v. Barker (1890) ...</b>	<b>369, 371</b>	— <b>v. Campion (Can.) ...</b>	<b>340</b>
— <b>v. Barnard Castle (Inhabitants) (1840) ...</b>	<b>381</b>	— <b>v. Carlile (1834) ...</b>	<b>428</b>
— <b>v. ——— (1841) ...</b>	<b>381</b>	— <b>v. Casson (1823) ...</b>	<b>459</b>
— <b>v. Barnes (1884) ...</b>	<b>329, 570</b>	— <b>v. Central Wingland (Inhabitants) (1877) ...</b>	<b>363</b>
— <b>v. Barnoldswick (Inhabitants) (1843) ...</b>	<b>363, 364, 379</b>	— <b>v. Charlesworth (1851) ...</b>	<b>414, 419, 444</b>
— <b>v. Barnsey (1725) ...</b>	<b>583</b>	— <b>v. Chart &amp; Longbridge (Inhabitants) (1870) ...</b>	<b>571, 577</b>
— <b>v. Barr (1814) ...</b>	<b>293</b>	— <b>v. Cheshire JJ. (1883) ...</b>	<b>385</b>
— <b>v. Bartholomew (1908) ...</b>	<b>423, 446</b>	— <b>v. ———, Ex p. Vyner (1909) ...</b>	<b>542</b>
— <b>v. Barton (Inhabitants) (1840) ...</b>	<b>360</b>	— <b>v. Chipman (Can.) ...</b>	<b>556, 557</b>
— <b>v. Bateman (1847) ...</b>	<b>479</b>	— <b>v. Chiswick Urban District Council, Ex p. Brickell (1908) ...</b>	<b>559</b>
— <b>v. Bath County Court Judge &amp; Midland Ry. Co., Ex p. Bath Rural Council (1908) ...</b>	<b>474, 475</b>	— <b>v. Chittenden (1885) ...</b>	<b>426, 430</b>
— <b>v. Bedfordshire (Inhabitants) (1855) ...</b>	<b>584</b>	— <b>v. Chorley (1848) ...</b>	<b>304, 306</b>
— <b>v. Bedfordshire JJ., Re Foster (1839) ...</b>	<b>460</b>	— <b>v. Clare County Council (Ir.) ...</b>	<b>375</b>
— <b>v. Beeby (1839) ...</b>	<b>368</b>	— <b>v. Clark (1883) ...</b>	<b>429</b>
— <b>v. Belper Local Board (1881) ...</b>	<b>397</b>	— <b>v. Claxby (Inhabitants) (1855) ...</b>	<b>352, 353, 367, 381, 382</b>
— <b>v. Berks JJ. (1857) ...</b>	<b>383</b>	— <b>v. Clifton (Inhabitants) (1794) ...</b>	<b>376, 377, 378</b>
— <b>v. Betterton (1695) ...</b>	<b>427, 428</b>	— <b>v. Cloete, etc. JJ. (1890) ...</b>	<b>500, 501</b>
— <b>v. Biggleswade Rural District Council (1900) ...</b>	<b>384</b>	— <b>v. Cluworth (Inhabitants) (1704) ...</b>	<b>352, 382</b>
— <b>v. Birmingham &amp; Gloucester Ry. Co. (1840) ...</b>	<b>378, 381</b>	— <b>v. Colling (1847) ...</b>	<b>378</b>
— <b>v. Birmingham &amp; Gloucester Ry. Co. (1842) ...</b>	<b>378, 381</b>	— <b>v. Cottingham (Inhabitants) (1794) ...</b>	<b>359</b>
— <b>v. Birmingham JJ. (1838) ...</b>	<b>483</b>	— <b>v. Cotton (1813) ...</b>	<b>369, 379</b>
— <b>v. Bishop Auckland (Inhabitants) (1834) ...</b>	<b>364, 368</b>	— <b>(Darcy) v. County Carlisle JJ. (Ir.) ...</b>	<b>356</b>
— <b>v. Blakemore (1850) ...</b>	<b>368, 379, 381</b>	— <b>v. Crewe (1823) ...</b>	<b>479</b>
— <b>v. ——— (1852) ...</b>	<b>368, 379</b>	— <b>v. Cricklade St. Sampson (Inhabitants) (1850) ...</b>	<b>359</b>
— <b>v. Bonter (Can.) ...</b>	<b>69</b>	— <b>v. Crompton Urban District Council (1902) ...</b>	<b>377</b>
— <b>v. Bowles (1861) ...</b>	<b>456</b>	— <b>v. Cross (1812) ...</b>	<b>425, 426</b>
— <b>v. Bradfield (Inhabitants) (1874) ...</b>	<b>295, 299, 305, 359</b>	— <b>v. Cumberworth (Inhabitants) (1832) ...</b>	<b>311, 360</b>
— <b>v. Bradford, Ex p. Chambers (1908) ...</b>	<b>350</b>	— <b>v. ——— (1836) ...</b>	<b>311, 312, 360</b>
— <b>v. Bradley (1894) ...</b>	<b>435, 458</b>	— <b>v. Cunningsham Graham &amp; Burns (1888) ...</b>	<b>317, 318</b>
— <b>v. Brailsford (Inhabitants) (1860) ...</b>	<b>307</b>	— <b>v. Davis (Can.) ...</b>	<b>413, 425, 433</b>
— <b>v. Brecon (Inhabitants) (1849) ...</b>	<b>582, 583</b>	— <b>v. Dawson (1864) ...</b>	<b>367</b>
— <b>v. Bridekirk (Inhabitants) (1809) ...</b>	<b>381</b>	— <b>v. Dayman (1857) ...</b>	<b>275</b>
— <b>v. Brighton Corp., Ex p. Shoosmith (1907) ...</b>	<b>386, 398, 519</b>	— <b>v. Deane (Can.) ...</b>	<b>290</b>
— <b>v. Brightside Bierlow (Inhabitants) (1849) ...</b>	<b>304, 367, 379</b>	— <b>v. Denbighshire JJ. (1822) ...</b>	<b>479</b>
— <b>v. Brittain (Can.) ...</b>	<b>450</b>	— <b>v. Denman, Ex p. Palace Co. (1907) ...</b>	<b>504</b>
— <b>v. Broke (1859) ...</b>	<b>301</b>	— <b>v. Dennis (Ir.) ...</b>	<b>117, 130</b>
— <b>v. Brown (1710) ...</b>	<b>381</b>	— <b>v. Denton (Inhabitants) (1852) ...</b>	<b>368, 382</b>
— <b>v. ——— (Can.) ...</b>	<b>261, 343</b>	— <b>v. Derby County (Inhabitants) (1832) ...</b>	<b>574, 576</b>
— <b>v. Bubwith (Inhabitants) (1813) ...</b>	<b>337</b>	— <b>v. Derby JJ. (1917) ...</b>	<b>480</b>
— <b>v. Buchanan (Can.) ...</b>	<b>294</b>	— <b>v. Derbyshire (Inhabitants) (1842) ...</b>	<b>573</b>
— <b>v. Buckeridge (1691) ...</b>	<b>369</b>	— <b>v. Derbyshire JJ. (1858) ...</b>	<b>363</b>
— <b>v. Buckingham (Marquis) (1815) ...</b>	<b>307, 583</b>	— <b>v. ———, Ex p. Glossop Corp., (1917) ...</b>	<b>480</b>
		— <b>v. Desjardins Canal Co. (Can.) ...</b>	<b>584</b>

# TABLE OF CASES.

lxvii

	PAGE		PAGE
R. v. Devon (Inhabitants) (1811) ...	585	R. v. Great Broughton (Inhabitants) (1771) ...	358,
— v. — (1824) ...	572	— v. — (1841) ...	365
— v. — (1825) ...	585	— v. Great North of England Ry. Co. (1840) ...	445,
— v. — (1833) ...	576	— v. — (1840) ...	446, 456
— v. D'Eyncourt (1901) ...	509	— v. Great Western Ry. Co. (1859) ...	519
— v. Dixon & Hollis (1698) ...	376	— v. — (1867) ...	582
— v. Dolby, <i>Re</i> Lancashire Exchequer Con- tribution Account (1892) ...	396	— v. — (Can.) ...	261, 262, 308,
— v. Dorset (Inhabitants) (1881) ...	574	— v. — (Can.) ...	440, 444
— v. Dorset County Council (1902) ...	385	— v. Greaves (Can.) ...	330, 337
— v. Dorset JJ. (1812) ...	588	— v. Greenhow (Inhabitants) (1870) ...	371, 373
— v. Dorsetshire JJ. (1844) ...	483	— v. Gregory (1833) ...	458
— v. Doughty (1702) ...	130	— v. Hackney Board of Works (1873) ...	490
— v. Dover Recorder (1884) ...	267	— v. Haldimand County Corpn. (Can.) ...	572, 573
— v. Downshire (Marquis) (1830) ...	482	— v. Hall (Can.) ...	169, 262
— v. Drayton Highway Board (1876) ...	354	— v. Hammond (1717) ...	262
— v. Dublin County JJ. (Ir.) ...	457	— v. — (Can.) ...	67, 69
— v. Dukinfield (Inhabitants) (1863) ...	362	— v. Hampshire (Inhabitants) (1887) ...	575
— v. Dunn (1857) ...	393, 394	— v. Hamworth, Staffordshire (Inhabitants) (1731) ...	583
— v. Dunraven (Earl) (1837) ...	457	— v. Hants (Inhabitants) (1880) ...	586
— v. Eardisland (1810) ...	379	— v. Hants JJ. (1830) ...	340
— (on the prosecution of Poplar Board of Works) v. East & West India Dock Co. (1888) ...	581	— v. Hartford (Inhabitants) (1779) ...	377, 378
— v. East & West India Docks, etc. Ry. Co. (1853) ...	268	— v. Harvey (1874) ...	482, 483
— v. East Hagbourne (Inhabitants) (1859) ...	359	— v. Hatfield (Inhabitants) (1736) ...	265, 377
— v. East Lidford (Inhabitants) (1756) ...	377,	— v. — (1820) ...	358, 365
— v. East Mark (Inhabitants) (1848) ...	288, 289,	— v. — (1835) ...	359
— v. Eastbourne Corpn. (1900) ...	293	— v. Haughton (Inhabitants) (1853) ...	379
— v. Eastington (Inhabitants) (1836) ...	559	— v. Hawkhurst (Inhabitants) (1802) ...	309
— v. Ecclesfield (Inhabitants) (1816) ...	381	— v. Hayman (1829) ...	579, 580
— v. — (1818) ...	358, 363,	— v. Haystead (Can.) ...	319, 350
— v. Edge Lane (Inhabitants) (1836) ...	312, 360	— v. Heage (Inhabitants) (1841) ...	378, 380
— v. Edmonton (Inhabitants) (1831) ...	309	— v. Heath (1866) ...	370, 371
— v. Edwards (1816) ...	441	— v. Heaven (1813) ...	358, 366
— v. Ellis (1882) ...	461	— v. Heaviside (Can.) ...	479
— v. Ely (Inhabitants) (1871) ...	577	— v. Helaugh (Inhabitants) (1863) ...	569
— v. Enfield (Inhabitants) (1819) ...	260	— v. Hendon (Inhabitants) (1833) ...	577
— v. Epsom Urban District Council, <i>Ex p.</i> Course (1912) ...	539	— v. Henley (Inhabitants) (1817) ...	352
— v. Essex JJ. (1826) ...	484, 485	— v. Henson (1852) ...	435
— v. — (1888) ...	395	— v. Herron & Montgomery (Ir.) ...	168
— v. Eynsham Parish Ratepayers (1849) ...	393	— v. Hertfordshire JJ. (1815) ...	483
— v. Farrer (1866) ...	384	— v. Hicking (Inhabitants) (1845) ...	373, 379, 383
— v. Fay (Ir.) ...	185	— v. High Halden (Inhabitants) (1859) ...	353
— v. Finchley Surveyors, <i>Ex p.</i> Pouncey (1851) ...	485	— v. Holt (Vice-Registrar of Office of Land Registry) (1889) ...	537, 538
— v. Flecknow (Inhabitants) (1758) ...	372	— v. Horley (Inhabitants) (1863) ...	305
— v. Fralick (Can.) ...	413	— v. Horner (1831) ...	480
— v. Frampton (1844) ...	371	— v. Hornsea (Inhabitants) (1854) ...	372, 373
— v. Francis, <i>Ex p.</i> Walton (1899) ...	424	— v. Hornsey (Inhabitants) (1691) ...	380
— v. Franklin (1839) ...	369	— v. Huber (Can.) ...	459
— v. Freke (1856) ...	345	— v. Hudson (1732) ...	296
— v. French (1879) ...	268, 312, 360	— v. Huntingdonshire County Council (1902) ...	385
— v. Frodsham JJ. & Edwards (1893) ...	394	— v. Huntingdonshire JJ. (1865) ...	484, 485
— v. Fullford (1864) ...	269, 275	— v. Hutchings (1881) ...	533, 534
— v. Fulwood Local Board, <i>Ex p.</i> Livesey (1895) ...	561, 562	— v. Ifield (Inhabitants) (1856) ...	485
— v. Gaisford (1892) ...	457, 458	— v. Incedon (1810) ...	457
— v. Garrett (1907) ...	500	— v. Ireton (Inhabitants) (1696) ...	380
— v. Glamorgan (Inhabitants) (1788) ...	575	— v. Irving (1848) ...	319
— v. Glamorgan JJ. (1872) ...	439	— v. Isle of Ely (Inhabitants), Old Bedford Bridge & New Bedford Bridge Cases (1850) ...	572, 575, 580
— v. Gloucester (Inhabitants) (1829) ...	585	— v. James (1863) ...	281
— v. — (1842) ...	573	— v. James (Judge) & Midland Ry. Co., <i>Ex p.</i> Bath Rural Council (1908) ...	474, 475
— v. Gloucestershire JJ. (1836) ...	479	— v. Johnson (1859) ...	313
— v. Glover (1830) ...	481	— v. — (1860) ...	313
— v. Goole Local Board (1891) ...	270, 553	— v. — (1865) ...	383, 384
— v. Gordon (Can.) ...	294	— v. Johnston Parish Highways Comrs. (Can.) ...	480, 481
— v. Grand Trunk Ry. Co. (Can.) ...	456, 457,	— v. Jones (1812) ...	423
— v. — (1814) ...	479	— v. — (1840) ...	482
		— v. Jones & Barry Urban District Council, <i>Ex p.</i> Mein (1907) ...	542
		— v. Justin (Can.) ...	438
		— v. Kent (Inhabitants) (1814) ...	575, 580

	PAGE		PAGE
R. v. Kent JJ. (1823) ... ..	479	R. v. Malcolm (Can.) ... ..	334
— v. ——— (1830) ... ..	481, 483	— v. Malty (1858) ... ..	345
— v. ——— (1905) ... ..	479, 481	— v. Manning (1757) ... ..	356
— v. Kenyon (1827) ... ..	481, 483	— v. Marsham (1892) ... ..	498
— v. Kerrison (1815) ... ..	581	— v. Martin (1843) ... ..	383
— v. King's Newton (Inhabitants) (1831) ...	364	— v. Mathias (1861) ... ..	329, 413, 426, 448, 449
— v. Kingsmoor (Inhabitants) (1823) ...	363, 378	— v. Maule (1871) ... ..	483, 484
— v. Kirk (1822) ... ..	479	— v. Mawbey (1796) ... ..	382
— v. Knight (1860) ... ..	444	— v. Mawgan (Inhabitants) (1838) ...	382
— v. Lancashire (Inhabitants) (1831) ...	575, 576	— v. Maybury (1864) ... ..	457
— v. Lancashire JJ. (1810) ... ..	382	— v. Mellor (1830) ... ..	282, 305, 309, 360, 361
— v. ——— (1857) ... ..	484	— v. Merionethshire (Inhabitants) (1844) ...	583, 590
— v. Lancaster County (Inhabitants) (1808) ...	573	— v. Middlesbrough Corpn. (1890) ...	272
— v. Land (Can.) ... ..	147	— v. Middlesex (Inhabitants) (1813) ...	584
— v. Land Registry Office (Vice-Registrar) (1889) ...	537, 538	— v. ——— (1832) ... ..	580, 589
— v. Landulph (Inhabitants) (1834) ...	353	— v. Middlesex JJ. (1836) ... ..	478
— v. Leake (Inhabitants) (1833) ...	290, 309, 358, 444	— v. ——— (1854) ... ..	485
— v. Leeming (Applegarths' Executors) (Can.) ...	208	— v. ——— (1882) ... ..	509
— v. Lepine (1866) ... ..	446	— v. ——— (1900) ... ..	481, 483
— v. Lewes Corpn. (1880) ... ..	457	— v. Midgley (1864) ... ..	478, 484
— v. Lincoln Corpn. (1838) ... ..	586	— v. Midville (Inhabitants) (1843) ...	359, 360, 363
— v. Lincombe (1816) ... ..	381, 382	— v. Miller (Can.) ... ..	165
— v. Lindsey (Inhabitants) (1811) ...	580, 581	— v. Mills (Can.) ... ..	376
— v. Lister & Biggs (1857) ... ..	434	— v. Milton (Inhabitants) (1843) ...	380
— v. Liverpool Corpn. (1802) ...	304, 378	— v. Milverton (Inhabitants) (1836) ...	476, 482
— v. ——— (1857) ... ..	316	— v. Minister of Health, <i>Ex p.</i> Aldridge (1925) ...	545
— v. ——— (1859) ... ..	381	— v. Monmouthshire JJ. (1859) ...	589
— v. Livesey (1870) ... ..	550	— v. Montague (1825) ... ..	262, 263
— v. Llandilo Roads Comrs. (1788) ...	389	— v. Moore (1832) ... ..	428
— v. Lloyd (1808) ... ..	263	— v. Moran (Can.) ... ..	81
— v. Local Government Board (1882) ...	532, 533, 538	— v. Morris (1830) ... ..	419, 440
— v. ——— (1885) ... ..	268	— v. Morse (1904) ... ..	385
— v. Local Government Board, <i>Ex p.</i> Hackney Borough Council (1908) ...	366, 488	— v. Morton, Dorset (Inhabitants) (1850) ...	381
— v. Local Government Board, <i>Ex p.</i> Street (1908) ...	556	— v. Moss (Can.) ... ..	296
— v. London (City) Corpn. (Can.) ...	456	— v. Mowat (Can.) ... ..	165
— v. London County Council, <i>Ex p.</i> Webster (1897) ...	510	— v. Mutters (1864) ... ..	434
— v. London County Keepers of the Peace & JJ. (1890) ...	460	— v. Nether Hallam (Inhabitants) (1854) ...	379
— v. London JJ., <i>Ex p.</i> Fulham Vestry (1890) ...	400	— v. Netherthong (Inhabitants) (1818) ...	366
— v. London Local Board (1879) ...	533	— v. New Sarum (Inhabitants) (1845) ...	572, 576, 582
— v. London Sewers Comrs., <i>Ex p.</i> Brass (1870) ...	516, 517	— v. Newbold (Inhabitants) (1869) ...	378
— v. Londonderry JJ. (Ir.) ... ..	440	— v. Newmarket Ry. Co. (1850) ...	478, 479
— v. Long, etc. JJ. (1888) ... ..	416, 456	— v. Newport Local Board of Health (1863) ...	522, 530
— v. Longton Gas Co. (1860) ... ..	420, 444, 456	— v. Nimmons (Can.) ... ..	413
— v. Lord (1855) ... ..	345	— v. Norfolk County Council (1891) ...	267, 268
— v. Lordsmere (Inhabitants) (1850) ...	262, 312, 360	— v. ——— (1901) ... ..	391
— v. ——— (1886) ... ..	304, 375, 379, 380	— v. ——— (1909) ... ..	381
— v. Louth Corpn. (Can.) ... ..	518, 519	— v. ——— (1910) ... ..	304, 381, 583, 584
— v. Lovibond (1871) ... ..	508	—, <i>Ex p.</i> Green (1901) ...	391
— v. Lower Heyford (Inhabitants) (1840) ...	584	— v. North Eastern Ry. Co. (1901) ...	456, 457
— v. Lurgashall (1854) ... ..	380	— v. Northampton (Inhabitants) (1814) ...	306, 307, 375
— v. Lynn & Debney (1825) ... ..	265	— v. Norwich & Watton Road Trustees (1836) ...	387
— v. Lyon (1825) ... ..	265, 311	— v. Norwich City (Inhabitants) (1719) ...	582, 583
— v. MacArthur (Can.) ... ..	335	— v. Novak (Can.) ... ..	39, 185
— v. McCullough (Can.) ... ..	81	— v. O'Callaghan (Ir.) ... ..	82
— v. McGowan (Can.) ... ..	556	— v. Odell (Inhabitants) (1869) ...	384
— v. Machynlleth (Inhabitants) (1821) ...	583	— v. Old Malton (Inhabitants) (1794) ...	382
— v. ——— (1823) ... ..	577, 579	— v. Oldreeve (1868) ... ..	319
— v. McLean (Can.) ... ..	459, 460	— v. Ormesby Local Board of Health (1894) ...	561
— v. McRae (Can.) ... ..	165, 166	— v. Oswestry (Inhabitants) (1817) ...	577
— v. Magill (Ir.) ... ..	457	— v. Ottawa & Gloucester Road Co. (Can.) ...	376, 377
— v. Maidstone JJ. (1852) ... ..	279	— v. Ouellette (Can.) ... ..	294
— v. Mainwaring, etc. (Stafford County JJ.) & Drayton in Wales Highway Board (1876) ...	354	— v. Oxford & Witney Turnpike Roads Trustees (1840) ...	375

# TABLE OF CASES.

	PAGE		PAGE
<b>R. v. Oxfordshire (Inhabitants) (1812)</b> ...	579	<b>R. v. Sheffield Recorder (1883)</b> ...	538
— <b>v. — (1825)</b> ...	573, 574	— <b>v. Shell (1884)</b> ...	275
— <b>v. — (1827)</b> ...	572	— <b>v. Shelderton (Inhabitants) (1867)</b> ...	420
— <b>v. — (1830)</b> ...	572, 573	— <b>v. Shiles (1841)</b> ...	478
— <b>v. Paget (1862)</b> ...	457	— <b>v. Shipley Parish Council (1897)</b> ...	370, 377
— <b>v. Pappineau (or Papinian) (1726)</b> ...	450, 457	— <b>v. Shoreditch (Inhabitants) (1830)</b> ...	358, 365
— <b>v. Patton (Can.)</b> ...	81	— <b>v. Shropshire J.J. (1840)</b> ...	365
— <b>v. Paul (Inhabitants) (1840)</b> ...	370	— <b>v. Silvertown Parish (1751)</b> ...	382
— <b>v. Paynter (1849)</b> ...	279	— <b>v. Siviter (1835)</b> ...	367
— <b>v. Pearson (1838)</b> ...	340	— <b>v. Skinner (1805)</b> ...	367
— <b>v. Pease (1832)</b> ...	436	— <b>v. Slater, <i>Ex p.</i> Bowler (1903)</b> ...	559
— <b>v. Pegg (1856)</b> ...	316	— <b>v. Smith (1802)</b> ...	423, 411
— <b>v. Pembridge (Inhabitants) (1841)</b> ...	365	— <b>v. Smith &amp; Pritchard (1883)</b> ...	458
— <b>v. — (1842)</b> ...	365	— <b>v. Somers, <i>Ex p.</i> General Estates Co. (1906)</b> ...	374
— <b>v. Penderryn (Inhabitants) (1788)</b> ...	378	— <b>v. Somerset (Inhabitants) (1812)</b> ...	589
— <b>v. Perkins (1849)</b> ...	373, 374	— <b>v. Somerset (1878)</b> ...	574
— <b>v. Perth County (Can.)</b> ...	372	— <b>v. Somersetshire J.J. (1860)</b> ...	383
— <b>v. Petrie (1855)</b> ...	284, 288, 293, 294	— <b>v. South-Eastern Ry. Co. (1850)</b> ...	295
— <b>v. Phillimore (1884)</b> ...	458	— <b>v. Southampton (Inhabitants) (1818)</b> ...	584
— <b>v. Phillips (1866)</b> ...	477, 478	— <b>v. Southampton County (Inhabitants) (1880)</b> ...	583, 580
— <b>v. Pickering Township (1877)</b> ...	371	— <b>v. Southampton County (Inhabitants) (1887)</b> ...	575, 580
— <b>v. Pilling (1884)</b> ...	458	— <b>v. Southampton County (Inhabitants), Black Bridge, Sandown Bridge &amp; Tinker's Bridge Cases (1852)</b> ...	572, 580
— <b>v. Platts (1880)</b> ...	275, 476, 519	— <b>v. Southport Corp'n. (1900)</b> ...	385
— <b>v. Plummer (Can.)</b> ...	438	— <b>v. Staffordshire J.J. &amp; Kingswinford Overseers (1851)</b> ...	394
— <b>v. Poole Corp'n. (1887)</b> ...	376	— <b>v. Stainhall (Inhabitants) (1858)</b> ...	378
— <b>v. Powell (1873)</b> ...	479, 480	— <b>v. Starkey (1837)</b> ...	423
— <b>v. Pratt (1855)</b> ...	317	— <b>v. Staughton (1670)</b> ...	380, 381
— <b>v. — (1867)</b> ...	438	— <b>v. Stead (1799)</b> ...	457
— <b>v. Preston (Inhabitants) (1838)</b> ...	366	— <b>v. Stoughton (1670)</b> ...	380, 381
— <b>v. Pringle (Can.)</b> ...	188	— <b>v. Strand Board of Works (1864)</b> ...	321, 374, 487
— <b>(De Vesci) v. Queen's County J.J. (Ir.)</b> ...	350	— <b>v. Stratford (or Stretford) (Inhabitants) (1705)</b> ...	378, 380, 389, 398
— <b>v. Ramsdale (1851)</b> ...	379	— <b>v. Stratford-upon-Avon Corp'n. (1811)</b> ...	577, 579
— <b>v. Ramsden (1858)</b> ...	372	— <b>v. Stratton (Inhabitants) (1705)</b> ...	380
— <b>v. Rankin (Can.)</b> ...	288, 457	— <b>v. Sudbury Recorder (1851)</b> ...	483, 484, 485
— <b>v. Rathmines &amp; Rathgar Improvement Comrs. (Ir.)</b> ...	262	— <b>v. Suffolk J.J. (1848)</b> ...	484
— <b>v. Reynolds (1893)</b> ...	394	— <b>v. Surgashall (1854)</b> ...	371
— <b>v. — (Can.)</b> ...	456	— <b>v. Surrey (Inhabitants) (1810)</b> ...	571, 588
— <b>v. Richards (1800)</b> ...	359, 376	— <b>v. Surrey J.J. (1826)</b> ...	481
— <b>v. Richardson (1896)</b> ...	429	— <b>v. — (1852)</b> ...	383
— <b>v. Richmond (Surrey) J.J. (1860)</b> ...	449, 457	— <b>v. — (1861)</b> ...	362
— <b>v. Richmond (Yorks) J.J. (1871)</b> ...	435	— <b>v. — (1869)</b> ...	373
— <b>v. Robinson (1855)</b> ...	117	— <b>v. — (1870)</b> ...	480, 481
— <b>v. Rogers (1828)</b> ...	482	— <b>v. — (1872)</b> ...	479
— <b>v. Rollett (1875)</b> ...	365, 366	— <b>v. — (1892)</b> ...	481
— <b>v. Ruscoe (1838)</b> ...	346, 347	— <b>v. —, <i>Ex p.</i> Locke-King (1908)</b> ...	483
— <b>v. Russell (1805)</b> ...	425	— <b>v. —, <i>Re</i> Abinger (Inhabitants) (1852)</b> ...	383
— <b>v. — (1827)</b> ...	476	— <b>v. Surrey J.J. &amp; Wells, <i>Ex p.</i> Lewin (1892)</b> ...	481
— <b>v. — (1854)</b> ...	416	— <b>v. Sussex J.J. (1857)</b> ...	393, 394
— <b>v. Rye J.J. (1864)</b> ...	394	— <b>v. Sutton (1833)</b> ...	382, 383
— <b>v. St. Andrews, Holbourn (1674)</b> ...	380	— <b>v. — (1835)</b> ...	580
— <b>v. St. Benedict, Cambridge (Inhabitants) (1821)</b> ...	301, 305, 361	— <b>v. — (Lady) (1838)</b> ...	580, 584
— <b>v. St. George, Hanover Square (Inhabitants) (1812)</b> ...	360, 380	— <b>v. Swindon Local Board (1879)</b> ...	533
— <b>v. St. Giles', Cambridge (Inhabitants) (1810)</b> ...	365, 367	— <b>v. — (1880)</b> ...	533
— <b>v. St. Issey (Inhabitants) (1849)</b> ...	201	— <b>v. Taunton, St. Mary (Inhabitants) (1815)</b> ...	380
— <b>v. St. John Corp'n. (Can.)</b> ...	378	— <b>v. Taylor (Can.)</b> ...	427, 457
— <b>v. St. Mary, Islington, Vestry (1858)</b> ...	515	— <b>v. Terrel (1694)</b> ...	380
— <b>v. St. Pancras (Inhabitants) (1794)</b> ...	378, 379	— <b>v. Thomas (1857)</b> ...	309, 361
— <b>v. St. Peter's, York J.J. (1706)</b> ...	582	— <b>v. Tinsley (Inhabitants) (1849)</b> ...	304, 367, 379
— <b>v. St. Leonard's (Inhabitants) (1834)</b> ...	377	— <b>v. Townshend (1780)</b> ...	381
— <b>v. Saintiff (1704)</b> ...	262, 265, 583	— <b>v. Train (1862)</b> ...	414, 419, 420, 440
— <b>v. Salisbury (Marquis) (1838)</b> ...	338	— <b>v. Trenchard (1846)</b> ...	457
— <b>v. Salop County (Inhabitants) (1810)</b> ...	262, 572	— <b>v. Turweston (Inhabitants) (1850)</b> ...	377
— <b>v. Salter (1856)</b> ...	117	— <b>v. Tynemouth Corp'n., <i>Ex p.</i> Cowper (1911)</b> ...	556, 558
— <b>v. Sarmon (1758)</b> ...	428	— <b>v. Tynemouth Rural District Council (1896)</b> ...	554, 556
— <b>v. Scarisbrick (Inhabitants) (1837)</b> ...	365		
— <b>v. Scott (1842)</b> ...	445, 456, 476		
— <b>v. Severn &amp; Wye Ry. Co. (1819)</b> ...	265		
— <b>v. Shaw (Aus.)</b> ...	110, 111		
— <b>v. Sheffield (Inhabitants) (1787)</b> ...	358		
— <b>v. Sheffield Canal Co. (1849)</b> ...	367, 368		
— <b>v. Sheffield Gas Consumers' Co. (1853)</b> ...	440		

	PAGE		PAGE
R. v. United Kingdom Electric Telegraph Co., Ltd. (1862) ...	313, 414	R. v. Yorkville Village (Can.) ...	576
— v. Upton-on-Severn (Inhabitants) (1833) ...	378	— v. Young & White (1883) ...	452
— v. Vail (Can.) ...	294, 295	Radcliffe v. Marsden Urban District Council (1908) ...	353, 568, 570
— v. Vantandillo (1815) ...	434	— v. Pattinson (1860) ...	500
— v. Wadhurst (1864) ...	381	Rac v. Rae (Ir.) ...	28
— v. Wakefield (Corpn. (1888) ...	385	— v. Trim (Can.) ...	...
— v. Wallace (1879) ...	482	Raglan Highway Board v. Monmouth Steam Co. (1881) ...	46
— v. Wallasey Local Board of Health (1869) ...	335	Raikes v. Todd (1838) ...	2
— v. Waller (1875) ...	486	Railton v. Mathews (1844) ...	211, 21
— v. Walton (1735) ...	130	— v. Matthews & Leonard (Scot.) ...	...
— v. Walton (Inhabitants) (1840) ...	382	Rainbow v. Juggins (1880) ...	191, 192
— v. Wandsworth (Inhabitants) (1817) ...	309, 382, 383	Rainey v. Dickson (Can.) ...	61
— v. Warde & Lyme (1632) ...	476	Rains v. Storry (1827) ...	37
— v. Warwick (Corpn. (1682) ...	378	Ram Gopal Mookerjee v. Masseyk (Ind.) ...	53
— v. Walford (Inhabitants) (1847) ...	383	Ramsbottom v. Davis (1839) ...	51
— v. Watson (1703) ...	433	— v. Gosden (1839) ...	51
— v. Watts (1703) ...	433	Ramsden v. Lancashire & Yorkshire Ry. Co. (1888) ...	437
— v. Waverton (Inhabitants) (1851) ...	378	— v. Manchester, South Junction & Altrincham Ry. Co. (1848) ...	326, 327
— v. Wavertree (Inhabitants) (1841) ...	369	— v. Oldfield & Appleyard (1720) ...	241
— v. Webber (1718) ...	130	— v. Yeates (1881) ...	356
— v. West Riding of Yorkshire (Inhabitants) (1770) ...	575, 577, 588	Ramsey v. West Vancouver (Can.) ...	476
— v. West Riding of Yorkshire (Inhabitants) (1787) ...	575, 577, 589	Ramskill v. Edwards (1885) ...	113, 140, 141, 209
— v. West Riding of Yorkshire (Inhabitants) (1802) ...	573, 575	Ramuz v. Southend Local Board (1892) ...	333, 334
— v. West Riding of Yorkshire (Inhabitants) (1806) ...	585	Randal v. Cockran (1718) ...	113
— v. West Riding of Yorkshire (Inhabitants) (1821) ...	586	Ranelagh (Earl) v. Hayes (1683) ...	127, 240
— v. West Riding of Yorkshire JJ. (1828) ...	485	Rangeley v. Midland Ry. Co. (1868) ...	316, 317
— v. ——— (1833) ...	484, 485	Rangiora (Mayor, etc.) v. Ashley Road District (N.Z.) ...	571, 576, 577
— v. West Riding of Yorkshire JJ., <i>Re</i> Pearson's Appeal (1862) ...	485	Ranking v. Forbes (1869) ...	435, 459
— v. West Riding of Yorkshire JJ. & Ripley (1862) ...	485	Raphael v. Goodman (1837) ...	231
— v. West Riding of Yorkshire JJ., Leeds & Whitehall Roads Case (1834) ...	311, 312	— v. ——— (1838) ...	231
— v. West Sussex County Council, <i>Ex p.</i> Arundel Corpn. (1921) ...	293	Rapley v. Richards (1864) ...	346
— v. Westhoe Highways Overseers (1846) ...	360	Rastall v. A.-G. (Can.) ...	66
— v. Westmark, Tithing (1840) ...	361	Ratcliffe v. Graves (1683) ...	62
— v. Weston (1770) ...	376, 377	Rattee v. Norwich Electric Tramway Co. (1902) ...	432
— v. White, Waterborough Comr. (Can.) ...	476	Rattenbury v. Fenton (1833) ...	18
— v. Whitney (Inhabitants) (1835) ...	374, 379, 573	— v. ——— (1834) ...	18
— (Hewson) v. Wicklow County Council (Ir.) ...	375	Ravensthorpe Local Board v. Hinchcliffe (1889) ...	561
— v. Wigan JJ. (1879) ...	209	Rawdon Corpn. v. Ward (Can.) ...	81
— v. Williams (1891) ...	416, 456	Rawstone v. Parr (1827) ...	63, 64, 66
— v. Williamson (1796) ...	484	Ray v. Burchell (Nfld.) ...	408
— v. ——— (1881) ...	463	Raymond v. Bosanquet Township (Can.) ...	587, 588
— v. Wilson (1852) ...	363	— v. Cooper (Can.) ...	63
— v. Wilts (Inhabitants) (1704) ...	572, 575, 583, 588	Rea v. London County Council (1911) ...	510
— v. Wiltshire JJ. (1840) ...	383	Read v. Nash (1751) ...	39
— v. Winter (1828) ...	478	— v. Perrett (1876) ...	513
— v. Wismer (Can.) ...	289	Reade v. Lowndes (1857) ...	174, 175, 191, 192
— v. Witney (Inhabitants) (1837) ...	382	Reader v. Kingham (1862) ...	40
— v. Wolverhampton (Inhabitants) (1845) ...	366, 367	Rede v. Farr (1817) ...	67
— v. Woodstock & Derham Plank & Gravel Road Co. (Can.) ...	444	Redhead v. Cator (1815) ...	40
— v. Worcestershire JJ. (1818) ...	480, 483	Redman v. Gery (1875) ...	324
— v. ——— (1828) ...	482	Reed v. Norris (1837) ...	134
— v. ——— (1853) ...	350	Rees, <i>Re, Ex p.</i> National Provincial Bank of England (1881) ...	120
— v. ——— (1854) ...	482, 484	— v. Berrington (1795) ...	178
— v. Wright (1832) ...	283, 284, 305, 315, 359	Regent's Canal & Dock Co. v. London County Council (1909) ...	514
— v. ——— (1863) ...	478	Regent's Canal & Docks Co. v. Gibbons (1925) ...	579
— v. Yarenton (Inhabitants) (1663) ...	380	Regina (City) & Canadian Pacific Ry. Co., <i>Re</i> (Can.) ...	331
— v. Yarkhill (Inhabitants) (1839) ...	384	Regina Cartage Co., Ltd. v. Regina (City) (Can.) ...	419, 420
— v. Yarton (Inhabitants) (1663) ...	380	Reid v. Darlington Highway Board (1877) ...	410
— v. Yeadon (1888) ...	485	Reigate Rural District Council v. Sutton District Water Co. (1907) ...	469
		Reigate Rural District Council v. Sutton District Water Co. (1908) ...	469

	PAGE		PAGE
Reigate Rural District Council v. Sutton District Water Co. (1909) ...	469, 473, 474	Robson, <i>Ex p.</i> , <i>Re</i> Fitzgeorge (1905) ...	87
Reilly v. Lockhart (1857) ...	116	Rochdale Corpn. v. Lancashire J.J. (1881) ...	200
Rein v. Lane (1867) ...	51	— v. Leach (1909) ...	549, 550
Rendall v. Morpew (1914) ...	231	Roche v. Ryan (Can.) ...	331
Renou v. Walcott (S. Af.) ...	11	Rochford v. Essex County Council (1915) ...	407
Renton, <i>Re</i> , <i>Ex p.</i> Glendinning (1819) ...	193, 198	Rockleys, Ltd. v. Pritchard (1909) ...	587
— v. Berwick-on-Tweed Corpn. (1856) ...	56, 57	Rodgers v. Maw (1846) ...	129, 138
Repair of Bridges, Highways, etc. Case (1609) ...	367, 387	Roe v. Lucknow Village (Can.) ...	430
Retford Corpn. v. Manchester, Sheffield & Lincolnshire Ry. Co. (1887) ...	284	— v. Wellesley Township (Can.) ...	352, 353
Reynolds v. Barnes (1909) ...	353, 362, 363, 372	Rogers, <i>Re</i> , <i>Ex p.</i> Rogers (1835) ...	112
— v. Doyle (1840) ...	241	— v. Christchurch Rural Council (1925) ...	432
— v. Presteign Urban District Council (1890) ...	449	— v. Great Northern Ry. Co. (1889) ...	446
Rhodes, <i>Re</i> , Rhodes v. Rhodes (1890) ...	220	Rogerson, N. O. v. Meyer & Berning (S. Af.) ...	67
— v. Perusse (Can.) ...	287	Rollett v. Corringham Overseers (1875) ...	365, 366
— v. Rhodes, <i>Re</i> Rhodes (1890) ...	220		
— v. Wish, <i>Re</i> Seaman (1881) ...	233	Rolls v. St. George the Martyr, Southwark, Vestry (1880) ...	330, 331, 486
Rhymney Ry. Co. v. Glamorganshire Canal Navigation Co. (1904) ...	585	Rolsten v. St. John (Can.) ...	404
Rice v. Gordon (1848) ...	74	Rolston v. Red River Bridge Co. (Can.) ...	444, 445
— v. Whitby Town Corpn. (Can.) ...	393		
Richard v. Stillwell (Can.) ...	34	Rolt v. Cozens (1856) ...	22, 23, 77
Richards v. Kessick (1888) ...	271, 277, 371, 520	Romford Union Guardians v. British Guarantee Asscn. (1852) ...	214, 215
Richardson v. Harvey (Scot.) ...	180	Roper v. Cox (Ir.) ...	210
— v. Horton (1843) ...	207	Rose v. West Wawanosh Township (Can.) ...	353
Richens v. Wiggins (1863) ...	315	Rosenbaum v. Metropolitan Water Board (1910) ...	418
Riches v. London General Omnibus Co. No. 2 (1916) ...	239	Ross v. Burton (Can.) ...	61, 92, 180
Rickaby v. Lewis (1905) ...	67	— v. Greig (Scot.) ...	64, 65
Rickey v. Toronto Corpn. (Can.) ...	402	— v. Jones (Can.) ...	101
Rideout v. Howlett (Can.) ...	284, 312	— v. Lindsay & Adams (Scot.) ...	227
Ridge v. Garlick (1818) ...	349	— v. Moss (1907) ...	232
Ridgway v. Wharton (1857) ...	47, 48	Rotherham Corpn. v. Fullerton (1884) ...	374, 390, 567
Ridler, <i>Re</i> , Ridler v. Ridler (1882) ...	63		
Riess v. Oxford, Ltd., The (1893) ...	428	Rounce v. Woodyard (1816) ...	34
Rigby v. Macnamara (1795) ...	136	Rounds v. May (Can.) ...	34
Ringland v. Toronto (City) (Can.) ...	388	— v. Stratford Town (Can.) ...	403
Rink v. March & Donawel (Can.) ...	30, 31	Rouse v. Bardin (1790) ...	316
Ripon Rural Council v. Armitage & Hodgson (1919) ...	474	— v. Bradford Banking Co. (1894) ...	108, 174, 176, 177, 181, 184
Rishton v. Haslingden Corpn. (1898) ...	543, 545	Routley v. Gorman & O'ran (Can.) ...	192
Ritchie v. Smith (1848) ...	27	Rowe v. Leeds & Grenville Corpn. (Can.) ...	452
Robbins v. Jones (1863) ...	375, 418, 442, 575	— v. Rochester Township (Can.) ...	445, 446
Roberts, <i>Re</i> , <i>Ex p.</i> Allen & Cazenove (1858) ...	129, 132	Rowland v. Edmonton (City) (Can.) ...	380, 387
— v. Hunt (1850) ...	309, 362, 363	Rowley v. Tottenham Urban District Council (1914) ...	308, 333
— v. Karr (1808) ...	302	Royal v. Yaxley (1872) ...	343
— v. — (1809) ...	302	Royal Bank of Canada v. Sterns (Can.) ...	156
— v. Lewis (1879) ...	346	Royal Bank of Scotland v. Christie (1841) ...	154, 207
— v. Richards (1890) ...	555, 558		
Roberts & Lovell v. James (1903) ...	284	Royal Bank of Scotland v. Greenshields (Scot.) ...	211
Robertson v. Birkett (1858) ...	438	Royal Bank of Scotland v. Ranken (Scot.) ...	211
— v. Bristol Corpn. (1900) ...	527	Royal Canadian Bank v. European Assurance Society (Can.) ...	69
— v. Broadfoot (Can.) ...	230	Royal Canadian Bank v. Yates (Can.) ...	166
— v. Sherwood Rural Municipality (Can.) ...	260	Rudland v. Sunderland Corpn. (1884) ...	554
Robinson, <i>Re</i> , <i>Ex p.</i> Burrell (1876) ...	122, 123	Rugby Charity Trustees v. Merryweather (1790) ...	296, 301
— v. Barton - Eccles Local Board (1883) ...	269, 277, 553, 554, 555, 558	Rumball v. Schmidt (1882) ...	562
— v. Cowpen Local Board (1893) ...	300	Rumley v. Leighton (Can.) ...	78, 79
— v. Ford (No. 2) (Can.) ...	146	Rundle v. Hearle (1898) ...	369, 370, 569
— v. Harkin (1896) ...	147	Rushforth, <i>Ex p.</i> (1805) ...	70, 88
— v. Larkins (1824) ...	122	Russell, <i>Re</i> , Russell v. Shoolbred (1885) ...	117, 191
— v. London General Omnibus Co., Ltd. (1910) ...	432	— v. Men of Devon (1788) ...	587, 588
— v. Murdoch (1881) ...	223	— (Earl) v. Midhurst Rural District Council (1908) ...	355, 356
— v. National Bank of Scotland (Scot.) ...	32	— v. Shoolbred, <i>Re</i> Russell (1885) ...	117, 191
— v. Robinson (1854) ...	127, 128	— v. Trickett (1865) ...	210
— v. Stevenitt (1878) ...	413	Ruthenian Farmers Elevator Co. v. Hrycak (Can.) ...	214, 215
— v. Wilson (1814) ...	114	Ryan v. Tipperary North Riding County Council (Ir.) ...	406
		Rylatt v. Marfleet (1845) ...	353



	PAGE		PAGE
Saanich Corp'n. v. McFadden (Can.)...	286, 311	Sass, <i>Re, Ex p.</i> National Provincial Bank of England (1896) ...	90
Sadagopa Chariar v. Krishnamoorthy Rao (Ind.)...	318	Saunders v. Churchill & Smith (1613) ...	176
Sadagopa Chariar v. Rama Rao (Ind.)	317, 318	- v. Holborn District Board of Works (1895) ...	389, 413
Sadler v. Henlock (1855) ...	420	— v. Taylor (1829) ...	82
— v. Johnson (1847) ...	52	— v. Wakefield (1821)...	17
St. Andrew's, Holborn, Parish Case (1674)	380	Savage v. Norton (1908) ...	229
St. George the Martyr, Southwark, Vestry v. Pethebridge (1867) ...	489	Savin v. Oswestry Highway Board (1880) ...	475
St. George's Local Board v. Ballard (1895)...	557	Sawyer v. Paddington Vestry (1870) ...	272, 277
St. George's Vestry v. Sparrow (1864) ...	502, 504	Scandinavian American National Bank of Minneapolis v. Kneeland (Can.) ...	72, 76, 202
St. Giles, Camberwell, Vestry v. Crystal Palace Co. (1892) ...	278	Schell v. McCallum & Vannatter (Can.) ...	61
St. Giles, Camberwell, Vestry v. Greenwich District Board of Works (1887) ...	487, 488	Schmidt v. Gavriloff (Can.) ...	161
St. Giles, Camberwell, Vestry v. Hunt (1887)...	490	Schofield-Holden Machine Co. v. Toronto Corp'n. (Can.) ...	402
St. Giles, Camberwell, Vestry v. London Cemetery Co. (1894) ...	492	Scholesfield v. Templer (1859)...	192
St. Giles, Camberwell, Vestry v. Weller (1809)...	272	Scholes v. Hampson & Merriot (1806) ...	42
St. Helen's Corp'n. v. Kirkham (1885) ...	551	Schofield v. Londesborough (Earl) (1896) ...	219
— v. Riley (1883) ...	550, 551	Schulze v. Galashiels Corp'n. (Scot.)...	565
St. Ives Corp'n. v. Wadsworth (1908) ...	261	Schweder v. Worthing Gas Light & Coke Co. (No. 2) (1913) ...	308, 327
St. John (City) v. Campbell (Can.) ...	400, 402	Schwinge v. Dowell (1862) ...	299
St. John, Hampstead, Vestry v. Cotton (1886)...	273	Scoones v. Morrell (1839) ...	323
St. John, Hampstead, Vestry v. Hoopel (1885)...	273, 488, 489	Scot v. Bell (1672) ...	122
St. Lawrence Steel & Wire Co. v. Leys (Can.)...	93, 94	Scott v. Carritt (1900) ...	502
St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co. (1899)...	328	— v. Investors' Property Corp'n. (1904) ...	495
St. Mary, Battersea, Vestry v. Palmer (1897)...	275, 276, 277, 278	— v. Knox (Ir.) ...	112
St. Mary, Islington, Vestry v. Barrett (1874)...	276	— v. Lowe (1902) ...	497
St. Mary, Islington, Vestry v. Cobbett (1895)...	492, 499	— v. New Minerva Syndicate, Ltd. (S. Af.)	447
St. Mary, Islington, Vestry v. Goodman (1880)...	513	— v. Towyn Rural District Council (1907)...	355
St. Mary, Islington, Vestry v. Goodman (1894)...	500	Scottish Provincial Assurance Co. v. Pringle (Scot.) ...	72
St. Mary, Newington, Vestry v. Jacobs (1871)...	307, 325, 333, 419	Scrivenor v. Aldridge, <i>Re Pizzi</i> (1907) ...	546
St. Pancras Vestry v. Batterbury (1857) ...	499	Seabrooke v. Grays Thurrock Local Board (1891)...	534
— v. Morgan (1857) ...	551	Seaman, <i>Re, Rhodes v. Wish</i> (1881)...	233
St. Saviour's, Southwark (Wardens) v. Bostock (1800) ...	165, 166	Sear v. Freebody (1858) ...	501
St. Thomas Rural District Council v. Siemens Brothers (1910) ...	468	Seaton v. Burnand (1899) 9, 10, 12, 45, 210, 212, 213	
St. Vincent Corp'n. v. Greenfield (Can.) ...	294, 553	— v. — (1900) ...	9, 212, 213
St. Vital Rural Municipality v. Mager (Can.)...	386	— v. Heath (1899) 9, 10, 12, 45, 210, 212, 213	
Salford Corp'n. v. Ackers (1846) ...	548, 551	Secretary of State for War v. Middlesex County Council (1923) ...	569
Salisbury (Marquis) v. Great Northern Ry. Co. (1858) ...	319, 320, 321, 322, 324	Sedgwick v. Daniell (1857) ...	147
Salkeld v. Abbott (Ir.) ...	146	See v. Farey (Aus.) ...	61
Salt Union, Ltd. v. Harvey (J. P.) & Co. (1897)...	320, 326, 330	— v. London Guarantee & Accident Co. (Can.)...	157
Salting, <i>Ex p., Re Stratton</i> (1883) ...	11, 111, 112	Seed v. McConnell (Ir.) ...	35
Sampson v. Burton (1820) ...	62	Selby v. Crystal Palace Gas Co. (1862) ...	263, 299
Samuell v. Howarth (1817) 62, 175, 176, 180, 181		— v. Whitbread & Co. (1917) ...	307
Sanderson v. Aston (1873) ...	108, 160, 170, 214	Seller v. Jones (1846) ...	75, 79
Sandgate District Local Board of Health v. Keene (1892) ...	530, 531, 532	Sellers, <i>Re, Ex p.</i> Midland Banking Co. (1878) ...	120
Sandgate Urban District Council v. Kent County Council (1898) ...	265, 375	Sellers v. Matlock Bath Local Board (1885) ...	332, 333, 334
Sandown Bridge, Tinker's Bridge & Black Bridge Cases (1852)...	572, 589	Selwyn County Council, <i>Re</i> (N.Z.) ...	387
Saskatoon (City) v. Temperance Colonization Society (Can.) ...	558	Seiple v. Pink (1847)...	25, 26
		Sen v. Bank of Bengal (Ind.)...	61, 62
		Sergeant, <i>Ex p., Re Parkinson</i> (1822) ...	129
		— <i>Ex p., Re</i> — (1825) ...	129
		Severn Comrs. v. Charity Trustees & Worcester-shire County Council, <i>Re Hall's Charity</i> (1911) ...	578, 579
		Shackel v. Marlborough (Duke) (1844) ...	131, 147
		Shackell v. Rosier (1836) ...	224
		Shamsh-ul-Jahan Begam v. Ahmad Wali Khan (Ind.) ...	57
		Shanklin Local Board v. Millar (1880) ...	522, 530
		Sharp, <i>Ex p., Re Mason</i> (1844) ...	155
		— v. Fields (1864)...	343
		— v. Turnbull (Aus.) ...	78
		Sharpley v. Bear (1903) ...	524, 525
		Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G. (1915) ...	581, 582

# TABLE OF CASES.

	PAGE		PAGE
Shaver v. Allison (Can.) ... ..	163	Simpson, <i>Ex p.</i> , <i>Re</i> Sudell (1834) ... ..	10
— v. Sproule (Can.) ... ..	242	— v. A.-G. (1904) ... ..	201, 263, 287, 308
Shaw v. Caughell (Can.) ... ..	58, 60	— v. Dendy (1800) ... ..	323
— v. Pictou (1825) ... ..	153	— v. Denison (1852) ... ..	336, 337
— v. Royce, Ltd. (1911) ... ..	10, 209	— v. Field (1679) ... ..	62
— v. Woodcock (1827) ... ..	28, 29	— v. Manley (1831) ... ..	61, 104
Shaw (M. T.) & Co., Ltd. v. Holland (1913)	45	— v. Metropolitan Water Board (1917)	446
Shaw & Shaw v. Vandusen (Can.) ... ..	92	— v. Penton (1834) ... ..	37
Shea v. Lindsay & Co. (Can.) ... ..	34	— v. Smith (1871) ... ..	504, 505, 504
Shearburn v. Chertsey Rural District Council		— v. Teignmouth & Shaldon Bridge	
(1914) ... ..	303	Co. (1903) ... ..	348
Sheers v. Thimbleby & Son (1897) ... ..	46, 47, 49	— v. Vaughan (1730) ... ..	208
Sheffield v. Castleton (Lord) (1700) ... ..	17	— v. Wells (1872) ... ..	441, 458
— v. Fulham Board of Works (1876) ... ..	272, 273	Simpson & Miller v. British Industries Trust,	
Sheffield Banking Co. v. Clayton, <i>Re</i> Walker		Ltd. (1923) ... ..	239, 240
(1892) ... ..	104	Simpson's Claim, <i>Re</i> Cunningham & Co.,	
Sheffield Corpn. v. Alexander (1894) ... ..	544	Ltd. (1887) ... ..	16
— v. Anderson (1894) ... ..	544	Sims v. Robertson (Aus.) ... ..	48
— v. Barclay (1905) ... ..	228	Simson v. Cooke (1824) ... ..	207
Sheffield United Gas Co. v. Sheffield Gas		Sinclair v. Baby (Can.) ... ..	104
Consumers Co. (1853) ... ..	450	— v. Peters (Can.) ... ..	281
Sheldon & Ackhoff v. Milligan (Scot.) ... ..	67	Singer v. Elliott (1888) ... ..	45
Shepherd v. Bray (1906) ... ..	140, 141	Singleton v. Selwyn (1863) ... ..	240, 243
— v. — (1907) ... ..	140, 141	Sivewright v. Archibald (1851) ... ..	44
Shepherd v. Beecher (1725) ... ..	188	Skelton v. Thompson (Can.) ... ..	439
Sheppard, <i>Re</i> , <i>Ex p.</i> Nicholson (1840) ... ..	52	Skewis v. Kamloops Town (Can.) ... ..	406
— v. Glossop Corpn. (1921) ... ..	392, 393	Skillett v. Fletcher (1866) ... ..	167, 168
Shepton Mallet Rural District Council		— v. — (1867) ... ..	167, 168
v. Wainwright (John) & Co. (1908) ... ..	465	Skinner v. Visger (1873) ... ..	345, 346
Sherborn v. Wells (1863) ... ..	429	Skip v. Edwards (1744) ... ..	197
Sheriff v. Ferguson (Scot.) ... ..	568	— v. Lucy (1741) ... ..	197
Sheringham Urban District Council v. Holsey		Skutzsky v. Transton (Can.) ... ..	282, 309
(1904) ... ..	300, 426, 441, 570	Slade, <i>Re</i> , <i>Ex p.</i> Carstairs (1820) ... ..	198, 203
Sherry, <i>Re</i> , London & County Banking Co.		Slaney v. Sydney (City) (Can.) ... ..	388
v. Terry (1884) ... ..	91, 154	Slater, <i>Ex p.</i> (1801) ... ..	200
Sherry & Tait v. Railways Comr., Noyes,		— v. McLellan (Scot.) ... ..	431
Third Party (Aus.) ... ..	223	Slee v. Bradford Corpn. (1863) ... ..	563
Sherwood v. Woodward (1599) ... ..	19	Small v. Currie (1854) ... ..	177, 211, 216, 217
Shewfelt v. Kincardine Township (Can.) ... ..	155	— v. Thompson (Can.) ... ..	229
Shirebrook Colliery Co., Ltd. v. Burke		Smart v. Flood & Co. (1883) ... ..	82
(1898) ... ..	318	Smith, <i>Ex p.</i> , <i>Re</i> Hilliard (1845) ... ..	28
Shoeburyness Urban District Council v.		— v. Ancaster Township Corpn. (Can.) ... ..	519
Burges (1924) ... ..	531	— v. Bank of Scotland (1813) ... ..	213, 214
Shoosmith, <i>Ex p.</i> , R. v. Brighton Corpn.		— v. — (Scot.) ... ..	214
(1907) ... ..	386, 398, 519	— v. Chorley Rural Council (1897) ... ..	556, 558
Shooster v. Cooper (1847) ... ..	93	— v. Compton (1832) ... ..	134, 237, 239
Shore v. Shore (1847) ... ..	197	— v. Harris (1817) ... ..	31
Shoreditch Corpn. v. Bull (1904) ... ..	412, 421	— v. Howden (1863) ... ..	320
Short v. Hammersmith Corpn. (1910) ... ..	401, 404	— v. Howell (1851) ... ..	233, 234
— v. Hubbard (1824) ... ..	230	— v. Kynnersley (1903) ... ..	348
— v. Hudson (1860) ... ..	342	— v. Olding (1884) ... ..	119
Shortrede v. Cheek (1834) ... ..	58, 103	— v. Passman (Aus.) ... ..	60
Shuff v. Holdaway (1857) ... ..	156	— v. Pears (Can.) ... ..	229, 230
Shupe & De Sutter v. Langenburg Rural		— v. Perry (1906) ... ..	414, 415
Municipality No. 181 (Can.) ... ..	283	— v. Rudhall (1862) ... ..	37
Sicklemore v. Thistleton (1817) ... ..	68	— v. Shepherd (1599) ... ..	338, 339
Sidenham & Worlington's Case (1585) ... ..	28	— v. Stocks (1869) ... ..	354
Sidnam v. Worthington (1585) ... ..	28	— v. Stocks Municipal District No. 343	
Sidney Road Co. v. Holmes & Davis (Can.)		(Can.) ... ..	389
Sievewright v. Archibald (1851) ... ..	44	— v. Stokes (1863) ... ..	437
Siffken v. Wray (1805) ... ..	125	— v. Vancouver (City) (Can.) ... ..	406
Silverton v. Marriott (1888) ... ..	433	— v. Watson (1864) ... ..	348
Silvester, <i>Re</i> , Midland Ry. Co. v. Silvester		— v. White (1866) ... ..	230
(1895) ... ..	205, 208	— v. Wilson (Ir.) ... ..	453
Simcox v. Handsworth Local Board (1881)		— v. Winder (1858) ... ..	217
(1905) ... ..	524, 530, 532, 535	— v. Winter (1838) ... ..	157, 182
— v. Yardley Rural District Council		Smith (James) & Co. v. West Derby Local	
(1905) ... ..	315	Board (1878) ... ..	407, 408, 410, 411
Simkin v. London & North Western Ry. Co.		Smith (W. H.) & Son v. Clinton & Harris	
(1888) ... ..	436	(1908) ... ..	224, 225
Simmonds Brothers, Ltd. v. Fulham Vestry		Smith, Fleming & Co., <i>Re</i> , <i>Ex p.</i> Harding	
(1900) ... ..	209, 273, 279	(1879) ... ..	50
Simmons v. Keating (1818) ... ..	19	Smith's Settled Estates, <i>Re</i> (1901) ... ..	539
Simkins v. Boulton (1924) ... ..	192	Snaddon v. London, Edinburgh & Glasgow	
		Assurance Co. (Scot.) ... ..	108

	PAGE		PAGE
Snell, <i>Re, Ex p.</i> Coplestone (1830) ...	88	Starkey v. Bank of England (1903) ...	228
Snowdon, <i>Re, Ex p.</i> Snowdon (1881) ...	144	Stead v. Liddard (1823) ...	47, 51
Snure v. Great Western Ry. Co. (Can.) ...	445	Steeden v. Walden (1910) ...	238
Snushall v. Kaikoura County Council (N.Z.) ...	455	Steel v. Dartford Local Board (1891) ...	399, 400, 410, 412
Solicitor-General v. Bartlett (N.Z.) ...	450, 457	— v. Dixon (1881) ...	150
Solly v. Forbes (1820) ...	203	— v. Prickett (1819) ...	310, 323, 372
Solvency Mutual Guarantee Co. v. Freeman (1861) ...	165, 171, 172, 207	Steele v. Hoe (1849) ...	59, 60
Solvency Mutual Guarantee Co. v. Froane (1861) ...	205	Steer's Estate v. Steer (S. Af.) ...	147, 148
Sombra Township v. Moore Township (Can.) ...	402	Steggall v. Lymburner (Aus.) ...	38
Somersetshire Drainage Comrs. v. Langport Drainage District Board (1919) ...	579	Stephen v. Thurso Police Comrs. (Scot.) ...	409
Sooby v. St. Mary Abbots, Kensington, Vestry (1871) ...	517	Stephens, <i>Ex p., Re</i> Barned's Banking Co. (1868) ...	100
Sorby v. Gordon (1874) ...	13	— v. Pell (1834) ...	39
Souch v. East London Ry. Co. (1873) ...	297	— v. Squire (1690) ...	42
— v. — (1874) ...	297	Stepney Corp'n. v. Gingell, Son & Foskett, Ltd. (1909) ...	423, 443
Soule v. Grand Trunk Ry. Co. (Can.) ...	419	Stevens v. Squire (1696) ...	42
South v. Bloxam (1865) ...	118	— v. Whistler (1809) ...	320, 329
South African Bank v. Forde (S. Af.) ...	70	Stevenson v. Lee (Scot.) ...	557
South Eastern & Chatham Ry. Co.'s Managing Committee v. London County Council (1907) ...	507	— v. McLean (Can.) ...	100
South Eastern Ry. Co. v. Warr (1923) ...	291, 303	— v. Roche (1829) ...	179
South Mims (Parish Officers), <i>Ex p.</i> (1852) ...	304	Stewart v. McKean (1855) ...	160
Southampton Corp'n. v. Lord (1903) ...	543	— v. Scott (Scot.) ...	227
Southampton County Council v. Inland Revenue Comrs. (1905) ...	357	Stewart & McDonald v. Young (1894) ...	161
Southwark & Vauxhall Water Co. v. Wandsworth Board of Works (1898) ...	488	Stewart, Moir & Muir v. Brown (Scot.) ...	161
Sowerby v. Wadsworth (1863) ...	318	Stiff v. Eastbourne Local Board (1869) ...	213
Spackman v. Plumstead Board of Works (1885) ...	505	Stinson v. Browning (1866) ...	436
Spark v. Heslop (1859) ...	84	Stirling v. Burdett (1911) ...	144, 146
Sparrow v. Sowgate (1921) ...	207	— v. Forrester (1821) ...	112, 139, 140, 141, 146, 208
Spedding v. Fitzpatrick (1888) ...	293	Stirrup v. Whiston (1846) ...	51
Spence v. Hector (Can.) ...	234, 235	Stock v. Meakin (1900) ...	545, 546
Spencer, <i>Re</i> (1870) ...	227	Stockport & Hyde Division of Macclesfield Hundred, Highway Board v. Grant (1882) ...	375
— v. Handley (1842) ...	211, 212	Stockport & Hyde Highway Board v. Chester County Council (1891) ...	280
— v. London & Birmingham Ry. Co. (1836) ...	453	Stockport Corp'n. v. Cheetham (1860) ...	549
Spencer, Turner & Boldero v. Lotz (1916) ...	75, 76	— v. Davenport (1860) ...	549
Sperry v. Dransfield (N.Z.) ...	81, 82	— v. Rollinson (1910) ...	567
Spice v. Peacock (1875) ...	423, 443	Stoke Parish Council v. Price (1890) ...	455
Spiers v. Houston (1820) ...	154, 171	Stoker & Morpeth Corp'n., <i>Re</i> (1915) ...	530, 531, 532
Sporle v. Whayman (1855) ...	122	Stokes v. Clendon (1790) ...	119
Spring Hill Mining Co. v. Sharp (Can.) ...	82	Stokesleigh Guardians v. Stoddart (1853) ...	215
Springer v. Exchange Bank of Canada (Can.) ...	168	Stokesley Union Guardians v. Strother (1853) ...	215
Springfield, <i>Ex p., Re</i> Blakely, <i>Ex p.</i> Harvey (1854) ...	157, 198	Stone v. Compton (1838) ...	215, 216
Spyer v. Caspar (1837) ...	182	— v. Hoskins (1880) ...	461
— v. Herschell (1837) ...	182	Storr v. Scott (1833) ...	37
Squire v. Campbell (1836) ...	413	Storry v. Sheard (1892) ...	470
— v. Whifton (1848) ...	13, 216, 217	— v. Story (1843) ...	131
Stacey v. Hill (1901) ...	195	Stotesbury v. St. Giles, Camberwell, Vestry (1888) ...	498
Stadt v. Lill (1908) ...	19	Stott v. Clegg (1863) ...	337
Stafford (Marquis) v. Coyney (1827) ...	307	— v. North Norfolk Municipality (Can.) ...	398, 402, 404
Staffordshire & Derbyshire County Councils, <i>Re</i> (1890) ...	582, 583	Stoughton v. Day (1647) ...	54
Stagg, Mantle & Co. v. Brodrick (1895) ...	46	Stourbridge Urban Council v. Butler & Grove (1909) ...	522, 525
Stanford & Warrington (Earl), <i>Re</i> , Payne v. Grey (1911) ...	368, 371, 372, 374	— v. Higley (1909) ...	525
Stanford, Spalding & Boston Banking Co. v. Ball (1862) ...	79	Stoveld v. Upton (1836) ...	190
Stamp v. Sweetland (1845) ...	340	Stowell v. Geraldine County Council (N.Z.) ...	352
Standard Bank v. Coetzee (S. Af.) ...	211	Strachan v. Aberdeen District Committee of Aberdeen County Council (Scot.) ...	390
— v. Du Plooy (S. Af.) ...	211	— v. Edinburgh Improvement Comrs. (Scot.) ...	332
Standard Bank of Canada v. McCrossan (Can.) ...	79	Strange v. Fooks (1863) ...	190, 192
Standring v. Bexhill Corp'n. (1909) ...	539, 540, 542, 543	— v. Lee (1803) ...	154, 205
Stanley v. Mortlock (1870) ...	351	Stratford Bridge Case (1316) ...	579, 580
Stapp v. Lill (1808) ...	19	Stratford Fuel, Ice & Construction Co., <i>Re</i> , Coughlin & Irwin's Claim (Can.) ...	88
Starkey, <i>Re, Ex p.</i> Freen & Morrice (1827) ...	104, 135	Straton v. Rastall (1788) ...	53, 190
		Stratton, <i>Re, Ex p.</i> Salting (1883) ...	11, 111, 112
		Street, <i>Ex p., R. v.</i> Local Government Board (1908) ...	556

	PAGE		PAGE
Stretford Urban District Council v. Manchester South Junction & Altrincham Ry. Co. (1903) ...	271, 523, 527	Tatton v. Wade (1856) ...	32, 33
Strong v. Foster (1855) ...	107, 187	Tatum v. Evans (1885) ...	165, 177
Stroud v. Wandsworth District Board of Works (1894) ...	498, 500	Tayleur v. Wildin (1808) ...	83, 195
Struthers v. Henry (Can.) ...	95, 96	Taylor v. Bank of New South Wales (1886) ...	152, 191
Styles v. Victoria (City) Corp'n. (Can.) ...	476	— v. Clanwilliam Rural Municipality (Can.) ...	288
Sudell, <i>Re</i> , <i>Ex p.</i> Simpson (1834) ...	10	— v. Goodwin (1879) ...	438
Suffield (Lord) v. Bruce (1817) ...	232	— v. Greenhalgh (1874) ...	409, 410
Sulin v. Jarvinen (Can.) ...	22	— v. — (1876) ...	409, 410
Summers v. Holborn Board of Works (1893) ...	424	— v. Harris (Can.) ...	19
Summer v. Powell (1816) ...	222	— v. Higgins (1802) ...	133
— v. — (1823) ...	222	— v. Hilary (1835) ...	204
Sundaram Ayyar v. Madura Municipal Council (Ind.) ...	330	— v. Metropolitan Board of Works (1867) ...	510, 511, 512
Sunderland Corp'n. v. Alcock (1882) ...	537	— v. New Windsor Corp'n. (1898) ...	352
— v. Brown (1880) ...	550	— v. Oldham Corp'n. (1870) ...	269, 270
— v. Charlton (1912) ...	502	— v. Portage La Prairie (Can.) ...	404
— v. Skinner (1889) ...	556	— v. St. Mary Abbots, Kensington, Vestry (1886) ...	400, 406
Surbiton Improvement Comrs. v. Metcalf (1888) ...	448	Taylor & Belle River Village, <i>Re</i> (Can.) ...	476
Surman v. Bruce (1834) ...	179, 182	Tear v. Freebody (1858) ...	501, 504
Surrey Municipality & Great Northern Ry. Co., <i>Re</i> (Can.) ...	420	Teddington Urban District Council v. London & South Western Ry. Co. (1910) ...	576, 577
Surtees v. Woodhouse (1903) ...	546	Teddington Urban District Council v. Vile (1906) ...	547
Surveyor General v. Kean (Nfld.) ...	308	Teede v. Johnson (1856) ...	194
Sutcliffe v. Sowerby Highways Surveyors (1859) ...	329, 419, 569	Temple v. Pink (1847) ...	25, 26
Sutherland v. Low (Scot.) ...	216	Tempson v. Knowles (1849) ...	24
— v. McCaskill (Can.) ...	99	Tendring Union Guardians v. Dowton (1891) ...	537
— v. Thomson (Scot.) ...	568, 569	Tennant & Co. v. Bunton (Scot.) ...	93
Sutton & Co. v. Grey (1894) ...	41, 42, 43	Terry v. Ashton (1876) ...	433
Sutton Local Board v. Hoare (1891) ...	501	Thackwell v. Gardiner (1851) ...	21
Swain v. Wall (1641) ...	145	Thames Conservators v. Dennis (1902) ...	313
Swan v. Bank of Scotland (1836) ...	97	Thew v. Wingate (1862) ...	353, 354
Swan's Estate, <i>Re</i> (Ir.) ...	116	Thomas v. Annapolis Town (Can.) ...	403
Swann v. Phillips (1838) ...	32	— v. Cook (1828) ...	40, 232
Swansea Improvement & Tramways Co. v. County Roads Board for Glamorganshire (1879) ...	358	— v. Hendon Rural District Council (1910) ...	532
Swarne v. Phillips (1838) ...	32	— v. Roberts (1878) ...	271
Sweeting v. Asplin (1840) ...	34	— v. Williams (1830) ...	30, 38
Swift v. Jewsbury (1874) ...	33	— v. — (1860) ...	309, 310
— v. Lancashire J.J. (1873) ...	484	Thompson, <i>Ex p.</i> , <i>Re</i> Wyatt & Thompson (1832) ...	64, 67
— v. Winterbotham (1873) ...	33	— v. Bradford Corp'n. & Tinsley (1915) ...	406
Swire v. Redman (1876) ...	108, 130, 132, 180	— v. Brighton Corp'n. (1894) ...	400, 402, 411
Sydney Municipal Council v. Bourke (1895) ...	400	— v. Cummings (Can.) ...	49
— v. Young (Aus.) ...	329, 330	— v. Failsworth Local Board (1881) ...	556
Sykes v. Huddersfield Corp'n. (1871) ...	530, 535	— v. Grand Trunk Ry. Co. of Canada (Can.) ...	429, 430
Sylvester v. Anthony (1833) ...	162, 179	— v. Lack (1846) ...	203, 204
— v. Porter (Can.) ...	58	— v. McDonald (Can.) ...	176, 177
Symmons v. Want (1818) ...	14	— v. West Somerset Mineral Ry. Co. (1857) ...	300
T.		— v. Whatley (1850) ...	209
Tabachnick & Arenson v. Chernenkoff (Can.) ...	175	Thompson & Bedford, Olden, Oso & Palmerston United Townships Corp'n., <i>Re</i> (Can.) ...	553
Taff Vale Ry. Co. v. Cardiff Local Board of Health (1857) ...	397	Thomson v. Eede (Can.) ...	44
— v. Pontypridd Urban District Council (1905) ...	291, 292	— v. Halifax Power Co. (Can.) ...	476, 477
Tait v. New Westminster (City) (Can.) ...	407	— v. Stevenson (N.Z.) ...	337
Talbot v. Von Boris (1911) ...	16	Thorne v. Carman (Can.) ...	53
Tamaki West Road Board v. Appleton (N.Z.) ...	398, 414	— v. Field (1869) ...	435
Tanner v. Bayham Township (Can.) ...	403	— v. Roberts (1909) ...	427
— v. Moore (1846) ...	25, 59	Thorner v. Field (1611) ...	28
— v. Woolmer (1853) ...	236	Thornhill v. Weeks (1913) ...	391
Tarrant v. Woking Urban Council (1914) ...	555	— v. — (No. 2) (1913) ...	391, 392
Tarry v. Ashton (1876) ...	433	— v. — (1914) ...	301
— v. Taranaki County Council (N.Z.) ...	398	— v. — (No. 3) (1915) ...	392
Tasmanian Main Line Ry. Co. v. Clark & ...	99	Thornton v. McKewen (1862) ...	89, 111
		— v. Thames Conservators (1802) ...	333
		Thorne v. Jackson (1837) ...	87, 101

	PAGE
Thurrold v. St. George's Hanover Square (1898) ... ..	392, 407
Tierney v. Loxton (Aus.) ... ..	320
Till v. Walker (1860) ... ..	518, 519
Tilling (T.), Ltd. v. Dick, Kerr & Co. (1905) ... ..	420
Timson v. Merac (1807) ... ..	79, 80
Tinker's Bridge, Black Bridge & Sandown Bridge Cases (1852) ... ..	572, 589
Tippins v. Coates (1853) ... ..	207
Titus v. Durkee (Can.) ... ..	163, 165
Toames Co-operative Agricultural & Dairy Society v. Foley (Ir.) ... ..	166
Todd v. Perry (Can.) ... ..	82
Tomlinson v. Gell (1837) ... ..	34
——— v. Gill (1756) ... ..	40, 90
Toms v. Whitby Corp'n. Township (Can.) ... ..	389
Tonbridge Highway Board v. Sevenoaks Highway Board (1884) ... ..	465
Toohy v. McCulla (Aus.) ... ..	141
Toplis v. Grane (1839) ... ..	223
Toronto Brewing & Malting Co. v. Hevey (Can.) ... ..	215
Toronto (City) Plan M. 188, <i>Re</i> (Can.) ... ..	309, 310
Toronto Ry. Co. v. Toronto (City) (Corp'n.) (Can.) ... ..	439
Toronto Street Ry. Co. v. Dollery & Jefferys (Can.) ... ..	440
Torrance v. Ilford Urban District Council (1909) ... ..	405, 409
Tottenham Local Board v. Rowell (1876) ... ..	535
——— v. Williamson (1893) ... ..	551
Tottenham Local Board of Health v. Rowell (1880) ... ..	535, 536
Tottenham Urban Council v. Nielsen & Co. (1915) ... ..	551
Tottenham Urban District Council v. Rowley (1912) ... ..	308
Tottenham Urban District Council v. Williamson & Sons (1896) ... ..	455
Touhey v. Medicine Hat (City) (Can.) ... ..	388
Toussaint v. Martinnant (1787) ... ..	123, 131
Tracey v. McCabe (Ir.) ... ..	130
Trail v. Gibbons (1861) ... ..	73
Travers v. Richardson (Aus.) ... ..	223
Traversy v. Gloucester Township (Can.) ... ..	585
Tregellas v. London County Council (1897) ... ..	403, 407
Trent Ancholine & Grimsby Ry. Co., <i>Re</i> , <i>Re</i> Brumby & Frodingham Urban District Council (1904) ... ..	354
Trent & Frankford Road Co. v. Marshall (Can.) ... ..	166
Trent Navigation Co. v. Harley (1808) ... ..	186, 188
Truelove v. Mitchell, <i>Re</i> Mitchell (1913) ... ..	128
Truman v. Walgham (1766) ... ..	339
Truro Corp'n. v. Bastian (1832) ... ..	338
——— v. Reynolds (1832) ... ..	338
Trustee, <i>Ex p.</i> , <i>Re</i> Gurwicz (1919) ... ..	231
Trusts Corp'n. of Ontario v. Hood (Can.) ... ..	57, 58, 183
Tuck v. Fyson (1829) ... ..	195
——— v. Upwell, Outwell, Denver & Welney Drainage Comrs. (1922) ... ..	579
Tucker v. Axbridge Highway Board (1888) ... ..	409, 410
——— v. Laing (1856) ... ..	176, 182
Tuke's Case (1702) ... ..	18, 19
Tullamore Urban District Council v. Robins (Ir.) ... ..	160
Tumblay v. Meyers (Can.) ... ..	11
Tunbridge Highway District Board v. Sevenoaks Highway District Board (1884) ... ..	465
Tunbridge Wells Corp'n. v. Baird (1896) ... ..	330
Tunbridge Wells Improvement Comrs. v. Southborough Local Board (1888) ... ..	292, 374
Tunbridge Wells Local Board v. Akroyd (1880) ... ..	532

	PAGE
Tunbridge Wells Local Board v. Bisshopp (1877) ... ..	434, 435
Tunmer v. Partington Advertising Co. (1904) ... ..	504
Tunstall v. Bartlett (1806) ... ..	241
Tuohey v. Great Southern & Western Ry. Co. (Ir.) ... ..	335
Turnbull v. Corbett (Can.) ... ..	460
Turnbull & Co. v. Duval (1902) ... ..	218
Turner v. Davies (1796) ... ..	143
——— v. Handsworth Urban Council (1909) ... ..	528
——— v. Pyne (1834) ... ..	156
——— v. Ringwood Highway Board (1870) ... ..	315, 316, 328, 427, 441
——— v. Walsh (1881) ... ..	288, n., 289, 294, n., 295
Turnley v. MacGregor (1843) ... ..	32
Tutill v. West Ham Local Board of Health (1873) ... ..	323
Twickenham Urban Council v. Munton (1899) ... ..	543, 544, 545
Twopenny v. Young (1824) ... ..	179, 197
Tyler v. Browning (1751) ... ..	344
——— v. Romney (Lord) (1833) ... ..	122
Tyne Improvement Comrs. v. Imrie (1899) ... ..	261, 300
Tyson v. Cox (1823) ... ..	154, 182

## U.

Ulster Banking Co. v. Mahaffy (Ir.) ... ..	46
Underhill v. Horwood (1804) ... ..	139
Union Bank of Australia, Ltd. v. Barry (Aus.) ... ..	65, 105
Union Bank of Canada v. Makepeace (Can.) ... ..	197
Union Bank of Manchester, Ltd. v. Beech (1865) ... ..	197, 198
Union Government v. Diedricks (S. Af.) ... ..	157
United Land Co. v. Tottenham Local Board (1884) ... ..	476
United States Fidelity & Guarantee Co. v. Cruickshank & Simmons (Can.) ... ..	97
United States Fidelity & Guarantee Co. v. Union Bank (Can.) ... ..	112
University College v. Oxford Corp'n. (1901) ... ..	320
Unwin v. Hanson (1891) ... ..	388
Upjohn v. Willsdon Urban Council (1914) ... ..	567
Upton v. Fergusson (1833) ... ..	227

## V.

Van Allan v. Wigle (Can.) ... ..	163
Vancouver (City) v. Canadian Pacific Ry. Co. (Can.) ... ..	288
——— v. Cummings (Can.) ... ..	404
——— v. McPhelan (Can.) ... ..	402
Vandecar v. East Oxford Corp'n. (Can.) ... ..	477, 478
Vannatta v. Uplands, Ltd. (Can.) ... ..	262
Van Oosterzee v. McRae (S. Af.) ... ..	63
Vaughan v. Richardson (Can.) ... ..	24
Veitch v. Exeter Roads Trustees (1858) ... ..	350
——— v. Murray & Co. (Scot.) ... ..	61
——— v. National Bank of Scotland (Scot.) ... ..	95
Velan Pakkiri Taragan v. Subbayan Samban (Ind.) ... ..	317
Venkappa, <i>Re</i> (Ind.) ... ..	413, 414
Vennor, <i>Ex p.</i> (1754) ... ..	476
Vernon v. St. James, Westminster, Vestry (1880) ... ..	297, 310, 440
——— v. Turley (1836) ... ..	178
Vesey v. Mantell (1842) ... ..	235
Vespra Township v. Cook (Can.) ... ..	403
Vibudapriya Thirthaswamy v. Esoof Sahib (Ind.) ... ..	294
Vickers v. Bell (1863) ... ..	50, 157
——— v. — (1864) ... ..	50, 157

## TABLE OF CASES.

lxxvii

	PAGE
Victor Varnish Co., <i>Re</i> , <i>Clare's Claim</i> (Can.)	112
Victoria (City) <i>v.</i> Bailey (Can.)	282
Victoria Corpn. <i>v.</i> Lang (Can.)	587
_____ <i>v.</i> Patterson (Can.)	587
Victoria County <i>v.</i> Peterborough County (Can.)	573
Victoria Mutual Fire Insurance Co. <i>v.</i> David- son (Can.)	159, 160
Victoria Mutual Insurance Co. <i>v.</i> Freel (Can.)	137
Vidler <i>v.</i> Kent County Council (1895)	467
Vincent <i>v.</i> Dove (1847)	194
Vine <i>v.</i> Wenham (1915)	310
Vizagapatam Municipal Council <i>v.</i> Foster (Ind.)	409
Von Mackensen <i>v.</i> Surrey (Can.)	400
Vorley <i>v.</i> Barrett (1856)	149
Vreede, The (1811)	180, 185
Vron Colliery Co., <i>Re</i> (1882)	126
Vyner, <i>Ex p.</i> , R. <i>v.</i> Cheshire JJ. (1909)	542
_____ <i>v.</i> Hopkins (1842)	184, 185
_____ <i>v.</i> Wirral Rural District Council (1909)	303

W.

Waddell v. Richardson (Can.)	...	418, 449
Wade v. Coope (1827)	...	117
— v. Tatton (1850)	...	32, 33
Wadmore v. Aries (1871)	...	337, 339
— v. Dear (1871)	...	337, 339
— v. Putney Overseers (1871)	...	339
Wadsworth v. Townley (Can.)	...	99
Wagstaff v. Edison Bell Phonograph Corp., Ltd. (1893)	...	428
Wain v. Warlters (1804)	...	40
Wairarapa North County Council v. Spackman (N.Z.)	...	390
Waite v. Garston Local Board (1867)	...	553
— v. Jones (1835)	...	232
Wake, <i>Ex p.</i> (1883)	...	538
— v. Sheffield Corpn. (1883)	...	534, 538
Wakefield Corpn. v. Cooke (1904)	...	543, 544
Wakefield Local Board v. Lee (1876)	...	522
Wakefield Sanitary Authority v. Mander (1880)	...	530
Walford v. Hackney Board of Works (1894)	...	492
Walker, <i>Ex p.</i> (1899)	...	384
—, <i>Re</i> (1907)	...	82
—, <i>Re</i> , Sheffield Banking Co. v. Clayton (1892)	...	104
— v. Bowen (Can.)	...	183, 184
— v. Bowry & Willey (Aus.)	...	144
— v. Brewster (1867)	...	428
— v. British Guarantee Assocn. (1852)	...	66
— v. Dickson (Can.)	...	228, 229
— v. Hardman (1837)	...	95
— v. Hill (1860)	...	29
— v. Horner (1875)	...	416, 427
— v. Measure (1610)	...	377
— v. Southwold Township (Can.)	...	404
— v. Taylor (1834)	...	42
— v. York Corpn. (1906)	...	484
Walker Urban District Council v. Wigham, Richardson & Co., Ltd. (1901)	328, 330,	566
Wallace v. Dundee Police Comrs. (Scot.)	...	302
— v. Gibson (Scot.)	...	10, 11
Wallace's Factor v. M'Kissock (Scot.)	...	81
Wallasey Local Board v. Gracey (1887)	...	455
Wallasey Urban District Council v. Walker (W. H.) & Co. (1906)	...	547
Waller v. Sarnia (Can.)	...	409
Wallington v. Hoskins (1880)	...	461, 466
Wallis v. Assiniboia Municipality (Can.)	...	400
— v. Swinburne (1847)	...	141

	PAGE
Wallsend Local Board v. Murphy (1889) ...	524
Walmsley v. Featherstone Urban District Council (1909) ...	310, 311, 315
Walter v. Burton (1886) ...	217
Walthamstow Local Board v. Staines (1891) ...	538
Walthamstow Urban District Council v. Sandell (1904) ...	271, 522
Walton, <i>Ex p.</i> , <i>Re</i> Levy (1881) ...	195
—, <i>Ex p.</i> , <i>R. v.</i> Francis (1899) ...	424
— v. Cook (1888) ...	75
— v. Dodson (1827) ...	90, 100
— v. Mascall (1844) ...	67
Walton-le-Dale Urban District Council v. Greenwood (1911) ...	542
Wambold v. Foote (Can.) ...	36
Wandley v. Smith (1835) ...	244
Wandsworth Board of Works v. Hall (1898) ...	507
Wandsworth Board of Works v. London & South Western Ry. Co. (1862) ...	331, 446
Wandsworth Board of Works v. Pretty (1899) ...	424
Wandsworth Board of Works v. United Telephone Co. (1884) ...	328, 329, 330
Wandsworth Borough Council v. Golds (1911) ...	489
Wandsworth District Board v. Bird (1892) ...	517, 518
Wandsworth Metropolitan Borough v. Ashcombe (Lord) (1915) ...	500
Wannamaker v. Green (Can.) ...	480
Ward v. Law Property Assurance Co. (1856) ...	70
— v. National Bank of New Zealand (1883) ...	143, 148, 157, 203
— v. National Bank of New Zealand (N.Z.) ...	94, 112, 113, 210, 211, 216, 217
Ware v. Horwood (1807) ...	130, 141, 143
Warrington v. Mosely (1694) ...	339
Warmby v. Deakin (1863) ...	345
Warminster Local Board & Wilts County Council, <i>Re</i> (1890) ...	395, 508
Warner v. Wandsworth District Board of Works (1889) ...	444
Warre v. Calvert (1837) ...	103, 104
Warren v. Mustard (1891) ...	560, 561, 562
Warrington v. Furbor (1807) ...	52, 69, 131
— v. Mosely (1694) ...	337, 338, 339
Wason v. Wareing (or Waring) (1852) ...	211
— v. Waring (1850) ...	211
Waterhouse v. Keen (1825) ...	340, 341
Waterloo County Corpn. & Brant County Corpn., <i>Re</i> (Can.) ...	261
Waterous Engine Works Co. v. Jones (Can.) ...	57
Watkins v. Perkins (1697) ...	36
— v. Reddin (1861) ...	431, 432
— v. Vince (1818) ...	50
Watkins (J. R.) Medical Co. v. Lee (Can.) ...	200, 216
Watson v. Alcock (1853) ...	185, 190
— v. Ellis (1885) ...	419
— v. Sarnia Plank Road Co. (Can.) ...	337
— v. Scott (Scot.) ...	389
Watson Manufacturing Co. v. Bowser (Can.) ...	180
Watters v. Smith (1831) ...	202
Watts v. Shuttleworth (1861) ...	186
Waugh v. Wren (1862) ...	156
Wauthier v. Wilson (1911) ...	97
— v. — (1912) ...	97
Way v. Hearn (1862) ...	246
Wealdstone Urban District Council v. Evershed (1905) ...	537
Webb v. Baldwin (1911) ...	284, 285, 288, 301
— v. Hewitt (1857) ...	183, 198
— v. James (1840) ...	83
Webber v. Sparks (1842) ...	569
Webster, <i>Ex p.</i> , <i>R. v.</i> London County Council (1897) ...	510
— v. Bakewell Rural District Council (1916) ...	312

	PAGE		PAGE
Wedmore v. Bristol Corpn. (1802) ...	334	White v. Louise Rural Municipality (Can.)	334, 335
Wedgesbury Corpn. v. Lodge Holes Colliery Co., Ltd. (1907) ...	331	— v. Wigan Local Board (1875) ...	412
Wegg-Prosser v. Evans (1895) ...	201, 202	— v. Woodward (1847) ...	20
Weir v. Amherst (Can.) ...	403	— v. — (1848) ...	20
Weir & Calgary (City), Re (Can.) ...	555	White's Charities, Re, Charity Comrs. v. London Corpn. (1898) ...	321
Welch v. Nash (1807) ...	477	Whitebread v. Sevenoaks Highway Board (1892) ...	465
Welland Corpn. v. Brown (Can.) ...	102, 103	Whitechapel Board of Works v. Crow (1901) ...	514
Wells v. Girling (1819) ...	213	Whitehouse, Re, Whitehouse v. Edwards (1887) ...	196
— v. London, Tilbury & Southend Ry. (Co. (1877) ...	261, 265, 486	— v. Hugh (1906) ...	298
Wells & Croft, Re, Ex p. Official Receiver (1895) ...	239	Whitelaw v. Taylor (Can.) ...	60, 61
Welton v. Somes (1889) ...	215	Whiteley v. Pepper (1877) ...	418
Wembley Urban District Council v. Poor Law & Local Government Officers' Mutual Guarantee Assocn., Ltd. (1901) ...	168	Whitfield v. Hodges (1836) ...	179
Wendon v. London County Council (1894) ...	501, 502, 503	— v. Merchants Bank of Canada (Can.) ...	139
West v. Ashdown (1823) ...	182	— v. Moojen (1858) ...	49, 51
— v. Downman (1880) ...	531, 532, 535	Whiting v. Burke (1871) ...	142
— v. Parkdale Town (Can.) ...	332	Whitmarsh, Ex p. (1840) ...	388
West Ham Corpn. v. Grant (1888) ...	551	— v. Grand Trunk Ry. Co. of Canada (Can.) ...	390
— v. Sharp (1907) ...	546	Whitson v. Blairgowrie District Committee (Scot.) ...	357
— v. Thomas (1908) ...	525	Whittaker, Ex p. (1859) ...	419
West Ham Local Board v. Maddams (1876) ...	535	— v. Rhodes (1881) ...	307, 423, 443, 444
West Hartlepool Corpn. v. Robinson (1897) ...	275, 547, 548, 550, 552	Whitworth, Ex p., Re Mayor (1841) ...	69
West of England Bank, Re, Ex p. Booker (1880) ...	16, 17	Whyler v. Bingham Rural Council (1901) ...	389, 406
West Riding J.J. v. R. (1883) ...	206, 267	Wickens v. McMeekin (Can.) ...	165
West Riding of Yorkshire (Inhabitants) v. R. (1813) ...	585	Wiggins v. Boddington (1828) ...	422, 454
West Riding Union Banking Co., Ltd. v. Elmore (1905) ...	73	Wigham, Richardson & Co., Ltd. v. Walker Urban District Council (1901) ...	328, 330, 566
Western Life Assurance Society, Ex p., Re Albert Life Assurance Co. (1870) ...	12	Wilcocks v. Hannington (Ir.) ...	17
Westfall v. Stewart (Can.) ...	234	Wilde v. Griffin (1804) ...	243
Westhead v. Sproson (1861) ...	13, 75	Wilders v. Stevens (1846) ...	22
Westminster Corpn. v. Fuller (1904) ...	516	Wildes v. Ludlow (1874) ...	40, 232
— v. Johnson (1904) ...	516	Wilding v. Richards (1845) ...	135
— v. London & North Western Ry. (Co. (1905) ...	516	Wilkes v. Ilungerford Market Co. (1835) ...	453, 454
Westminster Trust Co. v. Brymner & Rand (or Rand & Bremner) (Can.) ...	11, 12, 180	Wilkins v. Day (1883) ...	437
Weston v. Barton (1812) ...	205, 206	Wilkinson v. Bagshaw (1797) ...	478
— v. Middlesex County (Can.) ...	407	— v. Gray (1844) ...	393
Weston Village v. Conron (Can.) ...	83	— v. London & County Banking Co. (1884) ...	117
Weston-super-Mare Urban District Council v. Butt (Henry) & Co. (1919) ...	475	— v. Unwin (1881) ...	45, 102
Weston-super-Mare Urban District Council v. Butt (Henry) & Co., Ltd. (1921) ...	464	Wilks v. Heeley (1832) ...	71
Weston-super-Mare Urban District Council v. Butt (Henry) & Co., Ltd. (1922) ...	462	Willatts v. Kennedy (1831) ...	22
Westover v. Perkins (1859) ...	343	Willems v. Schendeler (S. Af.) ...	69
Westzinthus, Re (1833) ...	111, 125, 126	Willes v. Greenhill (No. 1) (1860) ...	135, 136
Wharton v. Walton (1845) ...	51	— v. Wallington (1863) ...	361
Wheatley v. Bastow (1855) ...	100, 191	Willesden Local Board & Wright, Re (1896) ...	532
— v. Calgary (Can.) ...	387	Williams v. Adams (1862) ...	458
Wheeler v. Ritchot Rural Municipality (Can.) ...	585	— v. Bayley (1866) ...	15, 18, 217
Whelan v. Keegan (Ir.) ...	93	— v. Buchanan, Alexander Third Party (1891) ...	146, 148
Whitby Corpn. v. Harrison (Can.) ...	82, 83	— v. Byrnes (1863) ...	48
Whitby Municipality v. Flint (Can.) ...	176	— v. Cornwall Municipal Corpn. (Can.) ...	505, 566
Whitcher v. Hall (1820) ...	157, 161, 163	— v. Davies (1880) ...	466, 467
Whitchurch v. Bevis (1780) ...	28	— v. Ellis (1880) ...	348
— v. Fulham Board of Works (1866) ...	497	— v. Evans (1876) ...	438
White v. Bank of Victoria (Aus.) ...	16	— v. Eyton (1850) ...	486, 487
— v. Colson (1881) ...	473	— v. Jones (1729) ...	165
— v. Corbett (1859) ...	108	— v. Jukes (1864) ...	130
— v. Fulham Parish Vestry (1896) ...	276, 277, 497, 498	— v. Lake (1859) ...	48
— v. Hill (1844) ...	323	— v. Lear (1872) ...	347, 348
— v. Hindley Local Board (1875) ...	375, 412	— v. Leper (1766) ...	38
		— v. Mason (1873) ...	33
		— v. Moore (1878) ...	348
		— v. Owen (1843) ...	117, 118
		— v. Portland (City) (Can.) ...	281, 447
		— v. Powning (1883) ...	557
		— v. Rawlinson (1825) ...	94, 154
		— v. Sanzar (1808) ...	340

	PAGE		PAGE
Williams v. Wallasey Local Board (1886) ...	560	Woodham v. London County Council (1898) ...	512
— v. Wandsworth Board of Works (1884) ...	495	Woodhill v. Sunderland Corpn. (1887) ...	554
— v. Wills (1863) ...	342, 343	Woods v. Craghe (Ir.) ...	143
Williamsburg Township & United Counties of Stormont, Dundas & Glengarry, <i>Re</i> (Can.) ...	571	— v. Foote (1863) ...	234
Williamson v. Goold (1823) ...	151, 156	— v. Thiedemann (1862) ...	228
— v. Steeves (Can.) ...	164, 165	— v. Wentworth Municipality & Hamilton Corpn. (Can.) ...	584
Willis v. De Castro (1858) ...	204	Woodyer v. Hadden (1813) ...	207, 332, 333
— v. Willis (1850) ...	212	Wooldrige v. Norris (1868) ...	127, 129
Wilmslow Urban District Council v. Sidebottom (1906) ...	528, 529	Woolley v. Corbishley (1860) ...	422
Wilson v. Bevan (1849) ...	240	Woosnam v. Price (1833) ...	183
— v. Bolton Corpn. (1871) ...	535, 536	Works Comrs., Third Parties, Kirby v. Chessum & Sons (1914) ...	224
— v. Breslau (1877) ...	133	Worley v. St. Mary Abbots, Kensington, Vestry (1892) ...	502
— v. Craven (1841) ...	95, 96, 171	Worlich v. Massey (1905) ...	60, 61
— v. Cristall (Can.) ...	180	Worsborough Urban District Council v. Barnsley British Co-operative Society, Ltd. (1914) ...	472
— v. Cunliffe (1874) ...	565	Worth v. Newton (1854) ...	160, 167
— v. Groves (Can.) ...	344	Worthington v. Peck (Can.) ...	200
— v. Henderson (Scot.) ...	296	— v. Sudlow (1862) ...	529
— v. Hodgson's Kingston Brewery Co. (1915) ...	418	Wortley v. St. Mary, Islington, Vestry (1886) ...	499
— v. Lloyd (1873) ...	174, 177, 198, 199	Woulff v. Jay (1872) ...	186
— v. Middlesex County Corpn. (Can.) ...	344	Wright v. Frant Overseers (1863) ...	478
— v. Milner (1810) ...	226, 227	— v. Hickling (1866) ...	154
— v. Progress Municipal District (Can.) ...	389	— v. Ingle (1885) ...	490, 491, 492, 493
— v. St. Giles, Camberwell, Vestry (1892) ...	276	— v. Morley (1805) ...	114
— v. Wishart (Scot.) ...	66	— v. Russell (1774) ...	171, 172
Winch v. Thames Conservators (1872) ...	262, 306, 353	— v. Sandars (1857) ...	164, 165
— v. — (1874) ...	262, 306, 353	— v. Simpson (1802) ...	70, 71, 108
Winckworth v. Mills (1796) ...	232	— v. Western Canada Accident & Guarantee Insurance Co., Ltd. (Can.) ...	157, 183
Windlesham Urban District Council v. Seward (1912) ...	468, 469	— v. Winnipeg (City) (Can.) ...	294
Windsor Corpn. v. Taylor (1899) ...	352	Wrigley v. Smith (1834) ...	233
Wing v. London General Omnibus Co. (1909) ...	132, 433	Wulff v. Jay (1872) ...	186, 190, 192
Wingfield v. De St. Croix (1919) ...	204	Wyatt v. Gums (1893) ...	424
Winnipeg Electric Ry. Co. v. Delisle (Can.) ...	316, 317	Wyatt & Thompson, <i>Re, Ex p. Thompson</i> (1832) ...	61, 67
Winsbrough v. London Joint Stock Bank, Ltd. (1903) ...	424, 425	Wycombe Rural Council v. Smith (1903) ...	406
Winslowe v. Bushey Urban District Council (1908) ...	411	Wyke v. Rogers (1852) ...	182, 183
Winterbottom v. Derby (Lord) (1867) ...	203, 453, 454	Wynne v. Hughes (1873) ...	23
Wintermute v. Moulton (Can.) ...	96	— v. Tempest (1897) ...	222
Wirral Highway Board v. Newell (1895) ...	471	Wythes v. Labouchere (1859) ...	107, 210, 215
Wirral Rural District Council v. Carter (1903) ...	543, 545		
Wiseman, <i>Ex p., Re</i> Kelson, Tritton & Co. (1871) ...	210, 211		
Wisner v. Great Western Ry. Co. (Can.) ...	414	Yabbicom v. Bristol Brewery, Ltd. (1903) ...	565
Withers v. Bircham (1824) ...	137, 138	Yarmouth Corpn. v. Simmons (1878) ...	477
Witherspoon v. East Williams Township (Can.) ...	590	Yates v. Evans (1892) ...	52, 182
Wodehouse v. Farebrother (1855) ...	112	— v. Windsor (Can.) ...	389
Wolfson v. Crowe (S. Af.) ...	67	Yonge v. Reynell (1852) ...	113, 114
Wolmershausen, <i>Re, Wolmershausen v. Wolmershausen</i> (1890) ...	157, 203	York City & County Banking Co. v. Bainbridge (1880) ...	155
— v. Gullick (1893) ...	139, 146, 147	York City Banking Co. v. Wallis (1872) ...	86
Wolverhampton Corpn. v. Salop County Council (1895) ...	463	York School Trustees v. Hunter (Can.) ...	87
Wood v. Barker (1865) ...	26, 27, 122	Yorkshire, East Riding, County Council v. Selby Bridge Co. of Proprietors (1925) ...	333, 571, 589
— v. Benson (1831) ...	19, 27, 30	Yorkshire Railway Wagon Co. v. Maclure (1882) ...	17
— v. Carleton Branch Ry. Co. (Can.) ...	332	Young, <i>Ex p., Re</i> Kitchen (1881) ...	103, 138
— v. Chambers (Can.) ...	93	— v. — (1698) ...	318
— v. London County Council (1895) ...	273, 274	— v. Assets & Investment Insurance Co. (Trustee) (Scot.) ...	61
— v. Priestner (1866) ...	49, 53, 92	— v. Cuthbertson (1854) ...	264, 296, 302, 308
— v. — (1867) ...	49, 53, 92	— v. Davis (1863) ...	398, 399
— v. Veal (1822) ...	288, 289	— v. Kinlock (Scot.) ...	281
Wood Brothers v. Gardner (S. Af.) ...	29	— v. Milne (Can.) ...	24
Woodall v. Nuttall (1891) ...	390	— v. Percy (N.Z.) ...	340, 341, 343, 344
Woodard v. Billericay Highway Board (1879) ...	388	— v. St. Mary's, Islington, Vestry (1896) ...	393, 515
Woodcock v. Oxford & Worcester Ry. Co. (1853) ...	158	— v. Schuler (1883) ...	58
Woodford Urban District Council v. Henwood (1899) ...	539, 543		

## Y.





# GUARANTEE AND INDEMNITY.

	PAGE
PART I. CHARACTERISTICS OF GUARANTEE . . . . .	9
PART II. REQUISITES OF GUARANTEE . . . . .	12
SECT. 1. IN GENERAL . . . . .	12
SECT. 2. MUTUAL ASSENT OF PARTIES . . . . .	13
SUB-SECT. 1. OFFER . . . . .	13
SUB-SECT. 2. ACCEPTANCE . . . . .	14
SECT. 3. CAPACITY OF PARTIES . . . . .	15
SUB-SECT. 1. IN GENERAL . . . . .	15
SUB-SECT. 2. MARRIED WOMEN . . . . .	15
SUB-SECT. 3. PARENTAL AND QUASI-PARENTAL INFLUENCES . . . . .	16
SUB-SECT. 4. LUNATICS . . . . .	16
SUB-SECT. 5. DIRECTORS AND OFFICERS OF COMPANY . . . . .	16
SECT. 4. CONSIDERATION . . . . .	17
SUB-SECT. 1. NECESSITY FOR CONSIDERATION . . . . .	17
SUB-SECT. 2. FROM AND TO WHOM CONSIDERATION MUST MOVE . . . . .	18
SUB-SECT. 3. WHAT CONSTITUTES CONSIDERATION . . . . .	18
A. In General . . . . .	18
B. Benefit to Debtor at Surety's Request . . . . .	19
(a) Goods Supplied or to be Supplied . . . . .	19
(b) Money Advanced or to be Advanced . . . . .	20
(c) Employment of Debtor . . . . .	22
(d) Time Given to Pay or Forbearance to Sue . . . . .	22
C. Time Given to Pay or Forbearance to Sue . . . . .	22
(a) In General . . . . .	22
(b) Sufficiency of Right of Action . . . . .	23
(c) Suspension of Pending Proceedings . . . . .	24
(d) Length of Time Forborne . . . . .	25
SUB-SECT. 4. CONSIDERATION BASED ON ILLEGAL TRANSACTIONS . . . . .	26
SUB-SECT. 5. PAST CONSIDERATION . . . . .	27
A. In General . . . . .	27
B. Words Importing either Past or Future Consideration . . . . .	28
PART III. PROOF OF GUARANTEE . . . . .	28
SECT. 1. STATUTORY PROVISIONS . . . . .	28
SUB-SECT. 1. THE STATUTE OF FRAUDS . . . . .	28
A. " No Action shall be brought " . . . . .	28
B. " Any Special Promise " . . . . .	29
C. " Debt, Default or Miscarriage " . . . . .	29
D. Promises partly within Statute . . . . .	30
E. Part Performance . . . . .	30
SUB-SECT. 2. REPRESENTATIONS AS TO CREDIT, ETC.—STATUTE OF FRAUDS AMEND- MENT ACT, 1828 . . . . .	31
A. In General . . . . .	31
B. Requisites of Memorandum . . . . .	33

# GUARANTEE AND INDEMNITY.

	PAGE
SECT. 2. GUARANTEES WITHIN STATUTORY PROVISIONS . . . . .	33
SUB-SECT. 1. LIABILITY OF PRINCIPAL DEBTOR MUST EXIST OR BE CONTEMPLATED . . . . .	33
A. Existing Liability . . . . .	33
(a) In General . . . . .	33
(b) Release of Principal Debtor . . . . .	35
B. Contemplated Liability . . . . .	36
(a) In General . . . . .	36
(b) Question of Fact . . . . .	37
C. Promise to pay Rent if Landlord will not Distrain . . . . .	38
D. Promise to pay from Debtor's Money . . . . .	38
E. Promises in consideration of Stay or Withdrawal of Proceedings . . . . .	39
F. Promises to be answerable for Persons under Disability . . . . .	39
G. Indemnities . . . . .	39
SUB-SECT. 2. PROMISE MUST BE MADE TO CREDITOR . . . . .	39
SUB-SECT. 3. LIABILITY MUST RESULT FROM GUARANTEE ONLY . . . . .	41
SUB-SECT. 4. MAIN OBJECT MUST BE PAYMENT OF DEBT OR LIABILITY OF PRINCIPAL DEBTOR . . . . .	42
SUB-SECT. 5. AGREEMENT MUST NOT AMOUNT TO SALE OF DEBT OR SECURITY FOR DEBT . . . . .	43
SECT. 3. WRITTEN EVIDENCE REQUIRED . . . . .	44
SUB-SECT. 1. TIME FOR MAKING MEMORANDUM . . . . .	44
A. In General . . . . .	44
B. Revival of Statute-barred Guarantee . . . . .	44
SUB-SECT. 2. TO WHOM MEMORANDUM GIVEN OR ADDRESSED . . . . .	44
SUB-SECT. 3. FORM OF MEMORANDUM . . . . .	45
A. In General . . . . .	45
B. Liability arising on Bills or Notes . . . . .	45
C. Connected Documents . . . . .	46
SUB-SECT. 4. CONTENTS OF MEMORANDUM . . . . .	48
A. Parties . . . . .	48
B. Terms . . . . .	48
(a) In General . . . . .	48
(b) Consideration . . . . .	49
SUB-SECT. 5. SIGNATURE TO MEMORANDUM . . . . .	49
A. In General . . . . .	49
B. By Agent . . . . .	50
C. By Directors of Company . . . . .	50
SUB-SECT. 6. ADMISSIBILITY OF PAROL EVIDENCE . . . . .	50
SECT. 4. STAMP DUTIES . . . . .	50
SUB-SECT. 1. WHAT DOCUMENTS MUST BE STAMPED . . . . .	50
SUB-SECT. 2. EXEMPTIONS . . . . .	52
SUB-SECT. 3. TIME FOR STAMPING . . . . .	52
PART IV. INTERPRETATION . . . . .	53
SECT. 1. RULES OF CONSTRUCTION . . . . .	53
SUB-SECT. 1. IN GENERAL . . . . .	53
SUB-SECT. 2. RECITAL AND CONDITION . . . . .	54
A. In General . . . . .	54
B. Variance between Recital and Condition . . . . .	54
SECT. 2. ADMISSIBILITY OF EXTRINSIC EVIDENCE . . . . .	57
SUB-SECT. 1. IN GENERAL . . . . .	57
SUB-SECT. 2. TO PROVE FUTURE CONSIDERATION . . . . .	58
SECT. 3. WHETHER CONSIDERATION PAST OR FUTURE . . . . .	59
SUB-SECT. 1. IN GENERAL . . . . .	59
SUB-SECT. 2. EXTRINSIC EVIDENCE TO EXPLAIN . . . . .	60
SECT. 4. CONSTRUCTION OF PARTICULAR WORDS . . . . .	60

SECT. 5. CONTINUING GUARANTEES . . . . .	PAGE 61
SUB-SECT. 1. IN GENERAL . . . . .	61
SUB-SECT. 2. WHETHER PROSPECTIVE, RETROSPECTIVE, OR BOTH . . . . .	62
SUB-SECT. 3. CONSTRUCTION OF PARTICULAR GUARANTEES. . . . .	62

PART V. LIABILITY OF THE SURETY . . . . . 62

SECT. 1. IN GENERAL . . . . .	62
SECT. 2. WHEN LIABILITY ARISES . . . . .	63
SUB-SECT. 1. DEFAULT OF PRINCIPAL DEBTOR. . . . .	63
A. In General. . . . .	63
B. What Constitutes Default . . . . .	65
C. Under Joint and Several Contract with Surety . . . . .	66
SUB-SECT. 2. FULFILMENT OF CONDITIONS PRECEDENT . . . . .	67
A. Demand . . . . .	67
(a) On Principal . . . . .	67
(b) On Surety . . . . .	68
B. Notice of Default . . . . .	69
C. Prior Proceedings Against Principal Debtor . . . . .	70
D. Execution of the Contract by Other Parties . . . . .	72
(a) Joinder of Co-Sureties . . . . .	72
(b) Execution of Composition Deed by Creditors . . . . .	74
E. Performance of Consideration . . . . .	75
(a) Supply of Goods . . . . .	75
(b) Advance of Money . . . . .	76
(c) Forbearance to Sue . . . . .	77
F. Other Conditions. . . . .	77
SECT. 3. EXTENT OF LIABILITY . . . . .	79
SUB-SECT. 1. IN GENERAL . . . . .	79
SUB-SECT. 2. RECEIPTS BY PRINCIPAL AS TREASURER, COLLECTOR, RECEIVER, ETC. . . . .	81
A. In General . . . . .	81
B. Rates or Taxes Invalidly Imposed or Collected . . . . .	82
SUB-SECT. 3. UNDER GUARANTEE OF RENT . . . . .	83
SUB-SECT. 4. COSTS OF PROCEEDINGS . . . . .	83
A. Against Principal Debtor . . . . .	83
B. Other Proceedings . . . . .	84
SUB-SECT. 5. LIABILITY FOR INTEREST . . . . .	85
A. Apart from Agreement . . . . .	85
B. Under Agreement to Pay Interest . . . . .	85
SUB-SECT. 6. UNDER GUARANTEE OF DIVIDENDS OR SHARES . . . . .	87
SUB-SECT. 7. JOINT, SEVERAL OR JOINT AND SEVERAL LIABILITY . . . . .	87
SUB-SECT. 8. DEDUCTIONS TO WHICH SURETY ENTITLED . . . . .	88
A. Payments Made by Principal Debtor . . . . .	88
B. Dividends Received by Creditor in Bankruptcy of Principal Debtor . . . . .	88
SECT 4. UNDER CONTINUING GUARANTEES . . . . .	92
SUB-SECT. 1. IN RESPECT OF MERCANTILE TRANSACTIONS . . . . .	92
A. Goods Supplied or to be Supplied . . . . .	92
B. Money Advanced and to be Advanced . . . . .	91
SUB-SECT. 2. FIDELITY GUARANTEES . . . . .	96
SECT. 5. UNDER ILLEGAL OR VOID CONTRACTS OF PRINCIPAL DEBTOR . . . . .	96
SECT. 6. GUARANTEE IN FRAUD OF CREDITOR . . . . .	98
SECT. 7. ENFORCEMENT OF LIABILITY . . . . .	99
SUB-SECT. 1. PLEADING. . . . .	99
SUB-SECT. 2. PRACTICE AND PROCEDURE . . . . .	99
A In General . . . . .	99
B. Parties . . . . .	99
(a) Who May Sue . . . . .	99
(b) Who May be Sued . . . . .	101

# GUARANTEE AND INDEMNITY.

	PAGE
C. Proceedings under Order XIV . . . . .	102
D. Evidence . . . . .	102
E. Stay of Proceedings . . . . .	104
SUB-SECT. 3. SET-OFF IN ACTION AGAINST CREDITOR . . . . .	104
SUB-SECT. 4. CREDITOR'S RIGHT TO COUNTER-SECURITIES. . . . .	104
SUB-SECT. 5. CONTRIBUTION IN WINDING-UP PROCEEDINGS . . . . .	104
SUB-SECT. 6. OPERATION OF STATUTES OF LIMITATION . . . . .	105
<b>PART VI. SURETY'S RIGHTS AGAINST CREDITOR . . . . .</b>	<b>106</b>
SECT. 1. HOW RIGHTS ACQUIRED . . . . .	106
SUB-SECT. 1. IN GENERAL . . . . .	106
SUB-SECT. 2. WHERE CO-DEBTORS . . . . .	107
SECT. 2. BEFORE DEMAND OF PAYMENT . . . . .	108
SUB-SECT. 1. IN GENERAL . . . . .	108
SUB-SECT. 2. IN RESPECT OF FIDELITY GUARANTEE . . . . .	108
SUB-SECT. 3. CANCELLATION OF GUARANTEE . . . . .	108
SECT. 3. ON DEMAND OF PAYMENT . . . . .	109
SUB-SECT. 1. IN GENERAL . . . . .	109
SUB-SECT. 2. SET-OFF . . . . .	110
SUB-SECT. 3. MARSHALLING SECURITIES . . . . .	111
SECT. 4. AFTER PAYMENT . . . . .	112
SUB-SECT. 1. RECOVERY OF MONEY IMPROPERLY PAID . . . . .	112
SUB-SECT. 2. SUBROGATION . . . . .	112
A. In General . . . . .	112
B. Right to Securities held by Creditor . . . . .	113
(a) Origin of Right . . . . .	113
(b) When Right arises . . . . .	113
(c) In Respect of What Securities—Mercantile Law Amendment Act, 1850, s. 5 . . . . .	113
i. All Securities, whether Satisfied or not . . . . .	113
ii. Satisfied Securities . . . . .	116
iii. Guarantee for Part of Debt . . . . .	117
C. In case of Crown Debtor . . . . .	117
D. Right to Dividend on Bankruptcy of Principal Debtor . . . . .	117
E. Rights in connection with Mortgages . . . . .	117
(a) In General . . . . .	117
(b) Tacking . . . . .	117
(c) Consolidation . . . . .	119
(d) Time allowed for Redemption . . . . .	119
(e) Whether necessary Party to Foreclosure Action . . . . .	119
F. Waiver of Right of Subrogation . . . . .	119
<b>PART VII. SURETY'S RIGHTS AGAINST PRINCIPAL DEBTOR . . . . .</b>	<b>121</b>
SECT. 1. NATURE OF RIGHTS . . . . .	121
SECT. 2. RIGHT TO INDEMNITY . . . . .	122
SUB-SECT. 1. EXPRESS INDEMNITY . . . . .	122
SUB-SECT. 2. IMPLIED INDEMNITY . . . . .	123
A. In General . . . . .	123
B. Mortgage by Surety for Debt of Principal Debtor . . . . .	124
C. Bills of Exchange . . . . .	124
SUB-SECT. 3. WHEN NOT ENFORCEABLE . . . . .	124
SUB-SECT. 4. ABANDONMENT OF RIGHT . . . . .	125
SECT. 3. RIGHTS BEFORE SATISFACTION OF DEBT BY SURETY . . . . .	125
SUB-SECT. 1. IN GENERAL . . . . .	125
SUB-SECT. 2. RIGHT TO EXONERATION FROM LIABILITY . . . . .	126
A. In General . . . . .	126
B. When Right Arises . . . . .	128
C. Parties to Action. . . . .	129
D. How Enforced . . . . .	129

	PAGE
SECT. 4. RIGHTS AFTER SATISFACTION OF DEBT BY SURETY . . . . .	129
SUB-SECT. 1. WHAT AMOUNTS TO SATISFACTION . . . . .	129
SUB-SECT. 2. RIGHT TO STAND IN PLACE OF CREDITOR . . . . .	129
A. In General . . . . .	129
B. Surety for Crown Debt . . . . .	130
SUB-SECT. 3. RIGHT OF ACTION AGAINST DEBTOR . . . . .	130
SUB-SECT. 4. WHERE PRINCIPAL DEBTOR A BANKRUPT . . . . .	132
SUB-SECT. 5. ON COMPROMISE BETWEEN CREDITOR AND SURETY . . . . .	134
SUB-SECT. 6. RIGHT TO LIEN OR CHARGE . . . . .	134
SUB-SECT. 7. RIGHT TO INTEREST . . . . .	136
SUB-SECT. 8. RIGHT TO COSTS . . . . .	137
SUB-SECT. 9. RIGHT TO DAMAGES . . . . .	137
SECT. 5. ENFORCEMENT OF RIGHTS . . . . .	137
SUB-SECT. 1. ACTION FOR INDEMNIFICATION . . . . .	137
SUB-SECT. 2. THIRD PARTY NOTICE . . . . .	138
SUB-SECT. 3. SET-OFF . . . . .	138
PART VIII. RIGHTS AND LIABILITIES OF CO-SURETIES INTER SE . . . . .	139
SECT. 1. WHO ARE CO-SURETIES . . . . .	139
SECT. 2. CONTRIBUTION INTER SE . . . . .	139
SUB-SECT. 1. RIGHT TO CONTRIBUTION . . . . .	139
A. In General . . . . .	139
B. On Bankruptcy of Co-Surety . . . . .	141
C. Bills of Exchange . . . . .	141
D. Sureties under Separate Instruments . . . . .	141
E. When Right Arises . . . . .	143
F. Death of One Surety . . . . .	143
SUB-SECT. 2. WHEN RIGHT ARISES. . . . .	143
A. Before Payment . . . . .	143
B. After Payment . . . . .	143
(a) In General . . . . .	143
(b) Payment of Sum greater than Proportionate Share . . . . .	144
SUB-SECT. 3. WHAT AMOUNT RECOVERABLE BY WAY OF CONTRIBUTION . . . . .	144
A. Method of Reckoning . . . . .	144
B. Portion of Principal Debt . . . . .	146
C. Interest . . . . .	146
D. Costs . . . . .	146
E. For What Credit must be given . . . . .	146
SUB-SECT. 4. ENFORCEMENT OF CONTRIBUTION . . . . .	146
A. Right of Action . . . . .	146
(a) Before Payment . . . . .	146
(b) After Payment . . . . .	147
B. Execution of Judgment Assigned by Creditor . . . . .	148
C. Third Party Notice . . . . .	148
D. Defences to Action for Contribution . . . . .	148
SUB-SECT. 5. RECOVERY OF CONTRIBUTION PAID . . . . .	149
SECT. 3. RIGHTS IN RESPECT OF SECURITIES . . . . .	149
SUB-SECT. 1. HELD BY CREDITOR . . . . .	149
SUB-SECT. 2. HELD BY CO-SURETIES . . . . .	149
PART IX. DETERMINATION OF THE GUARANTEE . . . . .	151
SECT. 1. FULFILMENT OF PURPOSE OF THE GUARANTEE . . . . .	151
SUB-SECT. 1. BY PRINCIPAL DEBTOR . . . . .	151
A. Payment . . . . .	151
(a) What Amounts to Payment . . . . .	151
(b) Appropriation . . . . .	152
i. In General . . . . .	152
ii. Banking Guarantees . . . . .	154

	PAGE
B. Set-Off as between Principal Debtor and Creditor . . . . .	155
C. Other Modes of Fulfilment . . . . .	155
SUB-SECT. 2. BY SURETY . . . . .	156
SECT. 2. DISCHARGE FROM LIABILITY . . . . .	156
SUB-SECT. 1. VARIATION OF TERMS OF PRINCIPAL CONTRACT . . . . .	156
A. General Rule . . . . .	156
B. Consent of Surety to Variation . . . . .	157
C. Particular Instances . . . . .	158
(a) Separable Contracts . . . . .	158
(b) Advances or Loans . . . . .	158
(c) Banking Guarantees . . . . .	159
(d) Bills of Exchange . . . . .	159
(e) Building Contracts . . . . .	159
(f) Compositions and Deeds of Arrangement . . . . .	159
(g) Fidelity Guarantees . . . . .	159
(h) Sale of Goods . . . . .	161
(i) Other Cases . . . . .	161
(j) Agreement to give Time . . . . .	163
SUB-SECT. 2. VARIATION WITHOUT SURETY'S CONSENT OF HIS OWN CONTRACT WITH CREDITOR . . . . .	163
A. General Rule . . . . .	163
B. Particular Instances . . . . .	164
SUB-SECT. 3. CHANGE IN PARTIES . . . . .	165
A. Debtor . . . . .	165
(a) In General . . . . .	165
(b) Fidelity Guarantees . . . . .	165
i. Re-appointment to Same Office or Employment . . . . .	165
ii. Appointment to Other Office or Employment . . . . .	166
iii. Change in Condition of Office or Employment . . . . .	167
iv. Debtor Member of a Partnership . . . . .	170
B. Creditor . . . . .	171
(a) In General . . . . .	171
(b) Fidelity Guarantees . . . . .	172
C. Surety . . . . .	173
SUB-SECT. 4. AGREEMENT TO GIVE TIME TO PRINCIPAL DEBTOR . . . . .	175
A. Essential Characteristics of Agreement . . . . .	175
(a) In General . . . . .	175
(b) Relation of Surety and Debtor . . . . .	176
(c) Consideration . . . . .	176
(d) Bills of Exchange . . . . .	176
B. What Constitutes Giving Time . . . . .	176
(a) In General . . . . .	176
(b) Further Security taken from Principal Debtor . . . . .	177
(c) Cognovit taken from Debtor . . . . .	179
(d) Debt made payable by Instalments . . . . .	179
(e) Non-Enforcement of Payment by Creditor . . . . .	179
(f) Bills of Exchange . . . . .	180
C. Effect of Agreement . . . . .	180
(a) General Rule . . . . .	180
(b) Exceptions to General Rule . . . . .	181
i. Agreement with Knowledge or Consent of Surety . . . . .	181
ii. Reservation of Creditor's Rights Against Surety . . . . .	182
iii. Other Cases . . . . .	183
(c) Bills of Exchange . . . . .	184
(d) Partial Relief . . . . .	184
SUB-SECT. 5. AGREEMENT BETWEEN CREDITOR AND PRINCIPAL TO GIVE TIME TO SURETY . . . . .	184
SUB-SECT. 6. AGREEMENT BETWEEN CREDITOR AND SURETY TO GIVE TIME TO SURETY . . . . .	184

	PAGE
SUB-SECT. 7. LACHES BY CREDITOR . . . . .	185
A. In General. . . . .	185
B. What Amounts to Laches . . . . .	185
(a) Omissions . . . . .	185
i. In General . . . . .	185
ii. Enforcement of Payment. . . . .	186
(b) Other Cases . . . . .	187
C. Fidelity Guarantees . . . . .	188
SUB-SECT. 8. LOSS OF BENEFIT OF SECURITY HELD BY CREDITOR . . . . .	190
A. In General . . . . .	190
B. What Amounts to Loss of Benefit . . . . .	190
C. Extent of Discharge . . . . .	192
D. Security given by Co-Surety . . . . .	192
SUB-SECT. 9. DISCHARGE OF PRINCIPAL DEBTOR BY CREDITOR . . . . .	192
A. In General . . . . .	192
B. What Amounts to Discharge . . . . .	193
(a) In General . . . . .	193
(b) Discharge by Operation of Law—Bankruptcy of Debtor . . . . .	193
(c) Surety for Lessee . . . . .	194
(d) Covenant Not to Sue . . . . .	195
(e) New Security taken by Creditor . . . . .	197
(f) Bills of Exchange . . . . .	197
C. Reservation of Rights Against Surety . . . . .	197
(a) Reservation in Guarantee . . . . .	197
(b) Reservation in Instrument of Release . . . . .	198
(c) Bills of Exchange . . . . .	200
SUB-SECT. 10. DISCHARGE OF CO-SURETY BY CREDITOR . . . . .	200
A. In General . . . . .	200
B. Joint Liability . . . . .	200
C. Joint and Several Liability . . . . .	202
D. Several Liability . . . . .	203
E. Reservation of Rights Against other Sureties . . . . .	203
SUB-SECT. 11. REVOCATION OF THE GUARANTEE . . . . .	204
A. Novation . . . . .	204
B. Notice to Determine . . . . .	204
C. Death . . . . .	205
(a) Creditor . . . . .	205
(b) Principal Debtor . . . . .	207
(c) Surety . . . . .	207
i. Single Suretyship . . . . .	207
ii. Joint Suretyship . . . . .	208
D. Other Cases . . . . .	209
SUB-SECT. 12. BANKRUPTCY OF SURETY . . . . .	209
SUB-SECT. 13. DISCHARGE UNDER MONEY-LENDERS ACT, 1900 . . . . .	209
PART X. AVOIDANCE OF THE GUARANTEE . . . . .	210
SECT. 1. IN GENERAL . . . . .	210
SECT. 2. DUTY OF CREDITOR . . . . .	210
SECT. 3. DUTY OF SURETY . . . . .	211
SECT. 4. FRAUDULENT CONCEALMENT AND MISREPRESENTATION . . . . .	211
SUB-SECT. 1. IN GENERAL . . . . .	211
SUB-SECT. 2. CONCEALMENT—WHAT AMOUNTS TO . . . . .	212
A. In General . . . . .	212
B. Secret Agreement between Parties . . . . .	213
C. Fidelity Guarantees . . . . .	213
D. Banking Guarantees . . . . .	215
SUB-SECT. 3. Misrepresentation . . . . .	215
SUB-SECT. 4. PARTIES TO ACTION FOR RELIEF . . . . .	217



	PAGE
SECT. 5. COERCION . . . . .	217
SUB-SECT. 1. IN GENERAL . . . . .	217
SUB-SECT. 2. HUSBAND AND WIFE . . . . .	218
SECT. 6. MATERIAL ALTERATION OF INSTRUMENT . . . . .	218
SECT. 7. FAILURE OF CONSIDERATION . . . . .	220
SECT. 8. NON-FULFILMENT OF CONDITIONS PRECEDENT . . . . .	220
PART XI. RIGHTS AND LIABILITIES IN BANKRUPTCY PROCEEDINGS . . . . .	220
SECT. 1. IN GENERAL . . . . .	220
SECT. 2. PROOF OF DEBTS . . . . .	220
SECT. 3. PROPERTY AVAILABLE FOR DISTRIBUTION AMONG CREDITORS . . . . .	220
SECT. 4. COMPOSITION SCHEMES AND DEEDS OF ARRANGEMENT . . . . .	220
SECT. 5. RIGHT OF SURETY TO DIVIDENDS RECEIVED BY CREDITOR . . . . .	221
SECT. 6. INDEMNITIES . . . . .	221
PART XII. INDEMNITY . . . . .	221
SECT. 1. IN GENERAL . . . . .	221
SECT. 2. HOW RIGHT ARISES . . . . .	222
SUB-SECT. 1. IN GENERAL . . . . .	222
SUB-SECT. 2. BY CONTRACT . . . . .	223
A. Implied . . . . .	223
(a) In Respect of Acts Done at Request or Order of Another . . . . .	223
(b) In Respect of Money paid under Compulsion of Law . . . . .	225
(c) In Respect of Voluntary Acts for Benefit of Another . . . . .	226
(d) In Respect of Acts done on Faith of Representation or Conduct . . . . .	226
(e) Between Joint Tortfeasors. <i>See</i> TORT. . . . .	
(f) When Implication Excluded . . . . .	227
B. From Relationship of Parties . . . . .	227
SUB-SECT. 3. BY STATUTE . . . . .	230
SECT. 3. VALIDITY OF INDEMNITY . . . . .	230
SECT. 4. ASSIGNABILITY OF INDEMNITY . . . . .	231
SECT. 5. PROOF OF INDEMNITY . . . . .	232
SUB-SECT. 1. IN GENERAL . . . . .	232
SUB-SECT. 2. CONSIDERATION . . . . .	232
SUB-SECT. 3. STAMP DUTIES . . . . .	233
SECT. 6. EXTENT OF LIABILITY . . . . .	233
SUB-SECT. 1. AS REGARDS SUBJECT-MATTER . . . . .	233
A. In General . . . . .	233
B. Interest . . . . .	233
C. Costs . . . . .	235
(a) Under Express Indemnity . . . . .	235
(b) Under Implied Indemnity . . . . .	237
(c) What Costs Recoverable . . . . .	239
SUB-SECT. 2. AS REGARDS TIME . . . . .	240
A. When Liability Arises . . . . .	240
B. Duration of Liability . . . . .	241
SECT. 7. ENFORCEMENT OF LIABILITY . . . . .	242
SUB-SECT. 1. IN GENERAL . . . . .	242
SUB-SECT. 2. PARTIES . . . . .	242
SUB-SECT. 3. NECESSITY FOR NOTICE . . . . .	243
SUB-SECT. 4. PROOF OF LIABILITY . . . . .	243
SUB-SECT. 5. DEFENCES. . . . .	243
SECT. 8. RIGHT OF INDEMNIFIER . . . . .	244
SUB-SECT. 1. SET-OFF . . . . .	244
SUB-SECT. 2. RIGHT OF CONTRIBUTION FROM JOINT INDEMNIFIER . . . . .	244
SECT. 9. RIGHTS OF PERSONS INDEMNIFIED INTER SE . . . . .	244
SECT. 10. DISCHARGE OF INDEMNITY . . . . .	244

*Accord and Satisfaction* See CONTRACT.

*Bail* . . . . „ ADMIRALTY; CRIMINAL LAW; MAGISTRATES.

*Bankers* . . . . „ BANKERS.

*Bills of Exchange* . . „ BILLS OF EXCHANGE.

*Bonds* . . . . „ BONDS; EXECUTORS.

*Contracts* . . . . „ CONTRACT.

*Contributory* . . . . „ COMPANIES.

*Corporations* . . . . „ CORPORATIONS.

*Covenants in Deeds* . . „ DEEDS.

*Infants* . . . . „ INFANTS.

*Insurance* . . . . „ INSURANCE.

*Joint Tort-feasors* . . „ TORT.

*Jus tertii* . . . . See INTERPLEADER; TRESPASS.

*Limitations, Statutes of* „ LIMITATION OF ACTIONS; REAL PROPERTY.

*Lunatics* . . . . „ LUNATICS.

*Partners* . . . . „ PARTNERSHIP.

*Principal and Agent* . . „ AGENCY.

*Promissory Notes* . . „ BILLS OF EXCHANGE.

*Retainer* . . . . „ EXECUTORS.

*Warranty* . . . . „ ANIMALS; AUCTION AND AUCTIONEERS; FOOD AND DRUGS; SALE OF GOODS.

## Part I.—Characteristics of Guarantee.

**1. How constituted — General rule.]** — (1) A contract of guarantee may under special circumstances be one of those contracts in which *uberrima fides* is required on the part of the person with whom the contract is made though ordinarily a guarantee is not one of such contracts.

Ordinary contracts of guarantee are not amongst those requiring *uberrima fides* on the part of the creditor towards the surety, & mere non-communication to the surety by the creditor of facts known to him affecting the risk to be undertaken by the surety will not vitiate the contract, unless there be fraud or misrepresentation. But the difference between these two classes of contract [insurance & guarantee] does not depend upon any essential difference between the word “insurance” & the word “guarantee.” There is no magic in the use of those words. The words, to a great extent, have the same meaning & effect; & many contracts may with equal propriety be called contracts of insurance or contracts of guarantee. Whether the contract be one requiring *uberrima fides* or not must depend upon its substantial character & how it came to be effected (ROMER, L.J.).

(2) In general, contracts of guarantee are between persons who occupy, or ultimately assume the positions of creditor, debtor, & surety, & thereby the surety becomes bound to pay the debt or make good the default of the debtor. In general the creditor does not himself go to the surety, or represent, or explain to the surety, the risk to be run. The surety often takes the position from motives of friendship to the debtor, & generally not as the result of any direct bargaining between him & the creditor, or in consideration of any remuneration passing to him from the creditor (ROMER, L.J.).—SEATON v. HEATH, SEATON v. BURNAND, [1899] 1 Q. B. 782; 68 L. J. Q. B. 631; 80 L. T. 579; 47 W. R. 487; 15 T. L. R. 297; 4 Com. Cas. 193, C. A.; *on appeal*, *sub nom.* SEATON v. BURNAND, BURNAND v. SEATON, [1900] A. C. 135.

*Annotations*.—*As to (1) Consd. Re Denton's Estate, Licensees Insee. Corp'n. & Guarantee Fund v. Denton*, [1904] 2 Ch. 178. *Reid. Parr's Bank v. Albert Mines Syndicate*

(1900), 5 Com. Cas. 116; London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Generally, Mendt. Floyd v. Gibson* (1909), 100 L. T. 761; *Cantiero Meccanico Brindisino v. Janson*, [1912] 3 K. B. 152; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662; *Wilson v. United Counties Bank*, [1920] A. C. 102; *Yorkshire Insee. v. Cume*, [1922] 2 A. C. 511.

**2. — Promise to pay by surety — Original distinguished from collateral contract.]** — Where debt comes only in aid of another, so that there is a remedy against both, it is a collateral promise, & void by Stat. Frauds: otherwise where the whole credit is given to debt.

If two come to a shop, & one buys, & the other, to gain him credit, promises the seller, “If he does not pay you, I will,” this is a collateral undertaking, & void without writing, by Stat. Frauds; but if he says, “Let him have the goods, I will be your paymaster,” or “I will see you paid,” this is an undertaking as for himself, & he shall be intended to be the very buyer, & the other to act but as his servant (*per Cur.*).

If A. is about to hire a horse from B., & C. (in order to encourage B. to lend the horse) say to him, “Let A. have the horse & I undertake that he shall re-deliver it to you safely,” this is a collateral promise within Stat. Frauds, & void, it not being in writing. — *BIRKMYR v. DARNELL* (1704), 1 Salk. 27; 91 E. R. 27; *sub nom.* BIRKMYRE v. DARNELL, Holt, K. B. 606; 6 Mod. Rep. 248; *sub nom.* BOURKMYRE v. DARNELL, 3 Salk. 15; *sub nom.* BUCKMYR v. DARNALL, 2 Ld. Raym. 1085. *Annotations*.—*Reid. Tomlinson v. Gill* (1756), Amb. 330; *Williams v. Byrnes* (1863), 1 Moo. P. C. N. S. 151.

**3. — — — — —.]** — Promise that S. will pay such a sum for work to be done. When the work is performed, an *indebitatus assumpsit* lies against the party promising, for the sum.

There is a difference between a conditional & an absolute undertaking; as if A. promise to pay B. such a sum if C. does not, there A. is but a security for C. But if A. promise that C. will pay such a sum, A. is the principal debtor, for the act done was on his credit & no way upon C. (*LEE, J.*). — *GORDON v. MARTIN* (1731), Fitz-G. 302; 2 Barn. K. B. 13; 94 E. R. 766.

### PART 1.

**a. How constituted.—Promise to pay by surety.]**—A. contracts to make a highway, & B. becomes A.'s surety. A. employs C. to cut timber for him, & while thus engaged A. fails in his

contract. B. tells C. to go on & he will see him paid:—*Held*: A. was primarily liable on his contract, & B. as a guarantor. — *NICHOLAS v. KING & GAR-SIDE* (1849), 5 U. C. R. 324. — *CAN.*

**b. — — — — —.]**—The covenant in

an assignment of an agreement for sale whereby the assignor covenants “that in case of default by the purchaser in payment of any sum or sums of money which shall become due or owing under the said articles of agreement, that he will forthwith on demand, well & truly

4. ————.] — *OLDHAM v. ALLEN* (1784), cited in 2 Cr. & M. at p. 433; 3 L. J. Ex. at p. 128; 149 E. R. 830.  
*Annotation*.—*Consd. Simpson v. Penton* (1834), 2 Cr. & M. 430.

5. **Nature of transaction—Word “guarantee” not conclusive.**—S., who employed E. & Co. as his brokers, & L. & Co. as his general agents, gave E. & Co. the following undertaking: “In consideration of your allowing L. & Co. to draw upon you to the extent of £12,000, & your accepting three drafts accordingly, I hereby guarantee to you that amount; it being distinctly understood, that payment of these drafts is to be provided either by myself, or L. & Co., in direct discountable bills.” E. & Co. accordingly accepted & paid these drafts, in consideration of which they received from S. & L. & Co. various substituted bills. S. & L. & Co. respectively became bkpt., when the substituted bills were still running, & which were not paid when they fell due:—*Held*: L. & Co. were entitled to prove the commission against S., the balance that was due to them in respect of their advances on the faith of this undertaking, which was not so much a guarantee, as an original undertaking of S. as a principal. *Semble*: it would have been provable, even though the instrument was considered as a guarantee.

The meaning of the word “guarantee” is to be ascertained from the nature of the instrument in which it is used, as well as from the nature of the transaction between the parties; & the conclusion does not necessarily follow, that the party using the term is merely a surety (SIR G. ROSE).—*Re SUDELL, Ex p. SIMPSON* (1834), 3 Deac. & Ch. 792; 1 Mont. & A. 511; 3 L. J. Bey. 113, Ct. of R. *Annotations*.—*Mentd. Re Rostron, Ex p. Raleigh* (1838), 3 Mont. & A. 670, Abbott v. Hicks (1839), 7 Scott, 715; *Lane v. Burghart* (1841), 3 Man. & G. 597; *Re Willis, Ex p. Brook* (1848), 17 L. J. Bey. 8.

6. ————.]—The holder of a policy in A. Co. received a circular stating that it was “dissolved,” & its business & assets had been transferred to B. Co., & that he was entitled to have his policy exchanged for a new one in B. Co., or to have an indorsement by B. Co. on the old policy, “guaranteeing the fulfillment” of the old policy. He accepted the latter alternative, & obtained an indorsement, charging the assets of B. Co. with the payment of the old policy:—*Held*: he had accepted the liability of B. Co. in lieu of, & not as surety for, that of A. Co.

It is pressed upon me that according to the circular he is entitled to treat that indorsement as a guarantee & not as a novation, an alternative being offered & the word “guarantee” used. I must consider the whole of that letter & I think that the indorsement on the old policy meant the same thing as the taking a new policy. So too, he [the holder] seems at first to have considered & the idea of its being a guarantee is a mere after-thought (MALINS, V.-C.).—*Re INTERNATIONAL LIFE ASSURANCE SOCIETY & HERCULES INSURANCE CO., Ex p. BLOOD* (1870), L. R. 9 Eq. 316; 39 L. J. Ch. 295; 22 L. T. 467; 18 W. R. 370.  
*Annotation*.—*Mentd. Re India & London Life Assoc.* (1872), 20 W. R. 586.

7. ————.]—*SEATON v. HEATH, SEATON v. BURNAND*, No. 1, ante.

8. ————.]—(1) An arrangement whereby the guarantors of an issue of debentures are released

from their guarantee, the interest on the debenture debt is increased, new trustees of the trust deed securing the debentures are appointed, & the sinking fund discontinued, in an “arrangement or compromise” which the ct. has jurisdiction to sanction under Joint-Stock Cos. Arrangement Act, 1870 (c. 104).

(2) A resolution making such an arrangement & carried by the requisite majority at a meeting of the debenture-holders of a co. is binding upon the minority.

(3) Some considerable discussion has taken place as to the nature of this so-called guarantee; is it, or is it not an ordinary contract of suretyship, or is it not rather, although called a guarantee, a policy of insurance against the happening of certain events? If it is necessary to decide the question, in my opinion this document does not embody a mere contract of suretyship. The mere disappearance of the debenture debt would not necessarily destroy the efficiency of the guarantee; but if the resolutions are binding, as defts. say they are, the guarantee would necessarily be gone, because the guarantee is to be of the payment of the money due under these debentures, & the terms of the agreement by which pltf. on this assumption is bound require that he shall accept a debenture without the guarantee. It could not, then, be taken to be an insurance against loss under the fresh debentures, for the debenture-holder is bound to accept them as debentures without guarantees. It was the insurance of the original, & could not be taken to be the insurance of the new debentures (WARRINGTON, J.).—*SHAW v. ROYCE, LTD.*, [1911] 1 Ch. 138; 80 L. J. Ch. 163; 103 L. T. 712; 55 Sol. Jo. 188; 18 Mans. 159.

*Annotation*.—*As to* (3) *Reid, Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insec. Case*, [1914] 2 Ch. 617.

9. ———— **Form of contract—Insurance policy.**—A bank advanced £4,000 upon a mtge. of a public-house. The mtge. deed contained a joint & several covenant by the mtgor. & D. (who, it was recited, “had agreed to join as surety for the mtgor.”) to pay to the bank, on demand by them left at the public-house, the principal & interest, subject to a proviso that D.’s liability should be limited to £1,000; & the deed provided that the power of sale conferred on mtgees. by Conveyancing Act, 1881 (c. 41), should be exercisable at any time after such demand without any further notice; & it was also provided & agreed that although, as between the mtgor. & D., D. was only surety for the mtgor., yet, as between D. & the bank, D. should be considered as principal debtor for the whole mtge. debt. The mtge. deed also contained a covenant by the mtgor. to insure the mtge. debt & interest with pltf. co. in the name of the bank. Accordingly a mtge. insurance policy was effected with pltf. co., whereby the co. agreed that, if the bank should become entitled under their power of sale to sell the mtge. premises & should give notice in writing thereof to the co., the co. would after the expiration of six months from the receipt of the notice pay the principal & interest; & it was agreed that thereupon the bank should assign to the co. the mtge. debt & all securities therefor at the time of granting this policy. The co. were aware of D.’s covenant. Under this policy, the

pay or cause to be paid to the assignee, his successors or assigns, any sum or sums so in default,” is a contract of suretyship.—*GENERAL FINANCIAL CORPN. OF CANADA v. LE JUNE*, [1918] 1 W. W. R. 372; 11 Sask. L. R. 38;

39 D. L. R. 33.—CAN.

51. **Nature of transaction—Word “guarantee” not conclusive.**—*IMPERIAL ROOFING CO. v. DICK* (1913), 23 W. L. R. 821; 10 D. L. R. 484;

4 W. W. R. 100; 5 Alta. L. R. 470.—CAN.

e. ———— **“Cautionary obligation”**—*Undertaking to give guaranter.*—An undertaking by defenders to give,

mtgor. having made default, the co. paid £5,000 for principal, interest, & costs. The mtged. property realised £4,000, & the securities for the debt were transferred by the bank, to the co. The co. claimed to recover the £1,000 balance against D.'s estate under the covenant in the mtge. deed:—*Held*: (1) the policy was not a contract of indemnity, but was a contract of suretyship; (2) upon the true construction of the contract the co. were not co-sureties with D. so as to entitle him to contribution, but were guarantors to the bank against the default of both the mtgor. & D.

(3) The contention is that the very form of the obligation which they had undertaken towards the bank was sufficient to show that the corpn. had entered, not into a contract of suretyship but into a contract of insurance. No doubt the form is that of a policy of insurance but I think there is nothing in the form of the contract being that of a policy of insurance to prevent the contract being one of guarantee (VAUGHAN WILLIAMS, L.J.).—*Re DENTON'S ESTATE, LICENSES INSURANCE CORPN. & GUARANTEE FUND, LTD. v. DENTON*, [1904] 2 Ch. 178; 73 L. J. Ch. 465; 90 L. T. 698; 52 W. R. 484; 48 Sol. Jo. 396, C. A.

*Annotations*:—*As to* (3) *Reid*, Shaw v. Royce, [1911] 1 Ch. 138; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Case*, [1914] 2 Ch. 617.

*See, generally*, INSURANCE.

10. — *Arises out of contract—Not tort.*—*Re STRATTON, Ex p. SALTING*, No. 780, *post*.

11. *Distinguished from absolute promise to pay.*—The declaration stated, that by an indenture made between R., of the first part, pltf. of the second part, & defts. of the third part, defts. covenanted to pay pltf. £100 on Aug. 31, then next. The plea set out on oyer, an indenture, by which (after reciting that in consideration of £300 & £100 paid to R. by pltf.) R. mortgaged certain premises to pltf.; deft. & R., for the more effectually securing the repayment of the said sum of £100 & interest, covenanted with pltf. to pay that sum & interest, on Aug. 31, then next:—*Held*: this was an absolute covenant to pay a sum of money on a day certain, on which debt might be maintained.—*EVANS v. JONES* (1839), 5 M. & W. 295; 7 Dowl. 482; 8 L. J. Ex. 257; 3 Jur. 705; 151 E. R. 126.

*Annotations*:—*Reid*, *Harrison v. Matthews* (1812), 2 Dowl. N. S. 313; *Sison v. Kidman* (1842), 3 Man. & G. 810; *Marshall v. Wilson* (1866), 14 W. R. 699.

*See, also*, Nos. 2-4, *ante*, & *compare* Part III., Sect. 2, sub-sect. 1, *post*.

12. *Distinguished from indemnity—Statute of Frauds, s. 4.*—A promise by deft. in consideration of pltf. accepting certain bills of exchange, to indemnify him from liability to make payments in respect of such bills is not within above sect.

Deft. orally promised pltf. that, if he, pltf., would accept certain bills for a firm in which deft.'s son was a partner, he, deft., would provide pltf. with funds to meet the bills:—*Held*: this was a promise of indemnity & not of guarantee, & not required by above sect. to be in writing.

A promise to be liable for a debt conditionally on the principal debtor making default is a guarantee, & is a promise to make good the default of another within the statute. On the

other hand, a promise to become liable for a debt whenever the person to whom the promise is made should become liable, is not a promise within Stat. Frauds & need not be in writing (LOPES, L.J.).

There is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, & a promise to keep a person who has entered, or is about to enter, into a contract of liability, indemnified against that liability independently of the question whether a third person makes default or not (DAVEY, L.J.).—*GUILD & Co. v. CONRAD*, [1894] 2 Q. B. 885; 63 L. J. Q. B. 721; 71 L. T. 140; 42 W. R. 642; 10 T. L. R. 549; 38 Sol. Jo. 579; 9 R. 746, C. A. *Annotation*:—*Distd.* *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778.

13. —*J. A. co. issued debentures in each of which it promised to pay £100 on Aug. 30, 1910, or upon such earlier day as the principal sum should become payable in accordance with the conditions indorsed thereon, & to pay interest in the meantime. Under the conditions the principal sum became payable on the happening of any one of certain events, as, for instance, default in payment of interest or the winding up of the co. A guarantee society by a policy printed at the foot of each debenture guaranteed to the registered holder thereof payment of the principal sum to become due under the debenture in manner following, namely, if the co. made default in payment of the principal sum or any part thereof the society would pay the amount thereof upon whichever of the days following should first happen, namely, on Aug. 30, 1910, or on the day after the securities for the debenture-holders should have been enforced & completely realised & disturbed. Subsequently the guarantee society entered into a contract with a mtge. insurance co. whereby the latter in consideration of a yearly premium guaranteed the society to the extent of two-elevenths of the risk insured by the society under their policy, & the like proportion of all costs & expenses incurred by the society with the consent of the mtge. insurance co. in respect of any claim arising under the policy. Default was made in payment of the debentures, & in 1909 the society entered into possession of the debenture-holders' securities. Shortly afterwards the society went into liquidation, & after the debenture-holders' securities had been realised & the proceeds distributed there remained a deficiency due to them of £4,988:—*Held*: (1) the contract between the society & the mtge. insurance co. was a contract of insurance, & the co. was liable to pay to the liquidator of the society two-elevenths of the deficiency of £4,988, & not merely two-elevenths of the dividend payable by the society to the debenture-holders upon that deficiency; (2) even if the contract was a contract of indemnity the mtge. insurance co. would still be liable to the liquidator for two-elevenths of the deficiency.—*RE LAW GUARANTEE TRUST & ACCIDENT SOCIETY, LTD., LIVERPOOL MORTGAGE INSURANCE CO.'S CASE*, [1914] 2 Ch. 617; 84 L. J. Ch. 1; 111 L. T. 817; 30 T. L. R. 616; 58 Sol. Jo. 704, C. A.*

*Annotations*:—*As to* (1) *Expld.* & *Distd.* *British Dominions General Insee. v. Duder*, [1915] 2 K. B. 394. *As to* (2) *Consd.* *British Dominions General Insee. v. Duder*, [1915]

when required, a guaranty for the repayment of money to be lent by pursuer is a good "cautionary obligation" within 1856 Act, s. 6.—*WALLACE v. GIBSON*, (1895) A. C. 354.—*SCOT.*

11.1. *Distinguished from absolute promise to pay.*—Deft. employed pltf., promising in addition to his ordinary wages to pay him the arrears of wages due by W.:—*Held*: not an under-

taking to answer for the debt of another, but a new & original promise made upon a distinct consideration of benefit to deft.—*TUMBLAY v. MEYERS* (1858), 16 U. C. R. 143.—*CAN.*

11.11. —*J. A. undertook to "hold himself liable" for medical attendance to B.:—Held*: not an agreement of suretyship but A. liable as principal.—*RENOU v. WILCOTT* (1909), 10 H. C.

240.—*S. AF.*

13.1. *Distinguished from indemnity.*

—A. assigned his interest in land & gave a bond to his assignee with respect to payments under the sale agreement:—*Held*: the bond was a guarantee of payment & not an independent contract of indemnity, because it was so treated by the parties & its wording & the nature of the transaction so

2 K. B. 394. *Reid*. British Union & National Insce. v. Rawson, [1916] 2 Ch. 476. *Generally, Reid*. *Re* Law Guarantee Trust & Accident Soc., *Godson's Claim*, [1915] 1 Ch. 340. *Mentid*. Anglo-Baltic & Mediterranean Bank v. Barber, [1924] 2 K. B. 410.

For indemnity generally, see Part XII., *post*.

**14. Distinguished from insurance.]**—W. Life Assurance Society, under a power contained in their deed of settlement for the purpose, in June, 1865 transferred their funds & property to A. Co., A. Co. agreeing, in consideration thereof, to pay & satisfy all claims & demands upon W. Society, when & as the same should successively arise, & to take upon itself all other liabilities of every description of the said society. A. Co. became insolvent in 1869, & therefore unable to fulfil its engagements with W. Society; & W. Society claimed a lien upon the funds & property transferred, for the purpose of satisfying the liabilities of W. Society, which had been thrown back upon it by the failure of A. Co. The particulars of the funds & property transferred, which were vested in trustees, consisted of a lease of a house, of several mtges., & certain re-assurance policies effected by W. Society with other assurance cos. upon lives assured in W. Society. The claim was supported (*inter alia*) on the ground that W. Society, on the transfer being effected, became sureties to its creditors for the liabilities accepted by A. Co., & therefore entitled to the benefit of any security possessed by the principal debtor:—*Held*: W. Society were not sureties for A. Co. for the discharge of the liabilities of W. Society; for the creditors of W. Society did not, by the undertaking, become creditors of A. Co.—*Re* ALBERT LIFE ASSURANCE CO., *Ex p.* WESTERN LIFE ASSURANCE SOCIETY (1870), L. R. 11 Eq. 164; 40 L. J. Ch. 166; 23 L. T. 726; 19 W. R. 321.

*Annotation*.—*Mentid*. Davies v. Thomas, [1900] 2 Ch. 462.

**15. —**]—By an instrument purporting to be a "policy of insurance," it was witnessed that defts. guaranteed to the "assured," *pltf.*, payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same. The bank made default in

payment of the sum deposited. Subsequently to such default a scheme of arrangement between the bank & its creditors was, under the provisions of a statute of the colony, sanctioned by a meeting of creditors & the colonial ct. By this scheme the bank was to be wound up & a new bank constituted, the creditors becoming entitled to certain rights against the new bank in satisfaction of their debts. *Pltf.* did not assent to this scheme, which, however, was binding upon her by the colonial statute:—*Held*: defts. remained liable to *pltf.* under their contract notwithstanding the scheme of arrangement.

The contract in question begins with the words "This policy of insurance." It seems to me clear that the intention was that this contract should be one of insurance & that those who entered into it with *pltf.* should be in the position of underwriters. An underwriter is not a surety. He is a person who undertakes to pay money in a certain event. The form of a policy is not that of a guarantee. A policy on a ship, for instance, is not an undertaking to pay the amount insured if somebody else, *e.g.* the owner of another ship that has caused the loss, does not, but to pay such amount on the loss of the ship (LORD ESHER, M.R.).—*DANE v. MORTGAGE INSURANCE CORPN., LTD.*, [1894] 1 Q. B. 54; 63 L. J. Q. B. 144; 70 L. T. 83; 42 W. R. 227; 10 T. L. R. 86; 9 K. 96, C. A.

*Annotations*.—*Apld. Re* Law Guarantee Trust & Accident Soc., *Liverpool Mortgage Insce. Case*, [1914] 2 Ch. 617. *Reid*. *Finlay v. Mexican Investment Corp.*, [1897] 1 Q. B. 517; *Seaton v. Heath*, *Seaton v. Burnand*, [1899] 1 Q. B. 782; *Parr's Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas. 116; *Re Denton's Estate*, *Licenses Insce. Corp. & Guarantee Fund v. Denton*, [1904] 2 Ch. 178; *Shaw v. Royce*, [1911] 1 Ch. 138.

**Necessity for uberrima fides.]**—*SEATON v. HEATH*, *SEATON v. BURNAND*, No. 1, *ante*.

*See, generally*, INSURANCE.

**17. Liability of principal debtor—Not merged in specialty security of surety.]**—*CLARKE v. HENTY*, No. 1353, *post*.

*See, further*, CONTRACT, Vol. XII., pp. 515 *et seq.*

## Part II.—Requisites of Guarantee.

### SECT. 1.—IN GENERAL.

**Necessary parties—Debtor, creditor & surety.]**—*See* Nos. 2-4, *ante*.

**18. Certainty—As to amount guaranteed.]**—*Qu.*: if debt will lie upon an agreement in writing to pay the debt of another where the sum is uncertain, though capable of being ascertained.—*JOHNSON v. MORGAN* (1800), Cro. Eliz. 758; 78 E. R. 989.

**19. —As to creditor guaranteed.]**—*Deft.* on occasion of there being a great run upon a banking-house, went to the bank & told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with £30,000 at which the holders then present were satisfied,

& said they would take no more money than was necessary, & would keep the rest of their notes till they got again into currency; & afterwards *deft.* signed the following written paper, "I do hereby authorise G. to assure the inhabitants of P. & its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the M. Bank, as far as the sum of £30,000 will extend to pay":—*Held*: the bank having afterwards stopped payment, *deft.* was not liable upon this undertaking to an action by an individual holder, who had taken the notes after notice of such undertaking, but before the stoppage.

This is not a case of an individual promise, for there is not any promise to an individual, but only a promise to add £30,000 to the then failing funds

indicated.—*WESTMINSTER TRUST CO. v. BRYMNER & RAND*, [1920] 3 W. W. L. 488; 54 D. L. R. 244.—*CAN.*

**d. Necessity for uberrima fides.]**—The principle of *uberrima fides* does not apply to a contract of guarantee, & the creditor need not inform the intended surety of matters affecting the credit of the debtor, or of any

circumstances unconnected with the transaction in which he is about to engage which will render the position more hazardous.—*LINDSAY v. STEVENSON (L.) & SONS, LTD.* (1891), 17 V. L. R. 112.—*AUS.*

**e. Distinguished from absolute contract.]**—*Defts.* contracted with T. for the delivery to them of lumber.

They afterwards agreed to transfer to *pltf.* the lumber coming from T., & guaranteed to see the lumber delivered at the time specified in the agreement with T.:—*Held*: this was an absolute contract by *defts.* to deliver, & not a guarantee that T. should deliver it.—*LINDSAY v. ROSE* (1847), 3 Kerr, 576.—*CAN.*

of the bank & not a promise to the holder of any aliquot part of the notes of the house (LORD ELLENBOROUGH, C.J.).—*PHILLIPS v. BATEMAN* (1812), 10 East, 358; 104 E. R. 1124.

20. — **As to transactions guaranteed.**—P. being indebted to pltf.s., defts. gave them the following guarantee: "In consideration of your agreeing, at our request, from time to time to supply on credit to P. such goods as he may require & you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes & may at any time, from time to time, owe to you":—*Held*: the guarantee did not contain any binding agreement on the part of pltf.s. to supply goods to P., & as they never did supply any goods to P. after the date of the guarantee, defts. did not become liable to pay the existing debt of P.

This is not such an agreement on the part of pltf.s. as the law can enforce. It amounts only to an agreement to treat (POLOCK, C.B.).—*WESTHEAD v. SPROSON* (1861), 6 H. & N. 728; 30 L. J. Ex. 265; 4 L. T. 408; 7 Jur. N. S. 502; 9 W. R. 695; 158 E. R. 301.

*Annotation*:—*Distd. Morroll v. Cowan* (1877), 6 Ch. D. 166.

21. **Information to which surety entitled—Identity of creditor—Nature of obligation.**—*SQUIRE v. WHITTON*, No. 1712, *post*.

*Compare* No. 639, *post*.

22. **Legality of contract—Out of which debt arose—Ultra vires loan by friendly society.**—*Friendly Societies Act*, 1896 (c. 25), s. 46 (c), provides that a registered society shall not make any loan to a member exceeding £50, & sects. 84 & 89 make it an offence, subject to a penalty of £5 to do anything forbidden by the Act:—*Held*: loan exceeding £50 by a registered society to a member was an illegal & void transaction, & consequently repayment could not be enforced against a surety.—*LOUGHER v. MOLYNEUX*, [1916] 1 K. B. 718; 85 L. J. K. B. 911; 114 L. T. 696; 60 Sol. Jo. 605.

— **Effect of illegal contract on liability of surety.**—*See* Part V., Sect. 5, *post*.

**Continuing liability of principal debtor.**—*See* Part III., Sect. 2, sub-sect. 1, *post*.

**Capacity to contract.**—*See* Part II., Sect. 3, *post*.

**Mutual assent.**—*See* Part II., Sect. 2, *post*.

**Consideration.**—*See* Part II., Sect. 4, *post*.

## SECT. 2.—MUTUAL ASSENT OF PARTIES.

### SUB-SECT. 1.—OFFER.

*See, generally*, CONTRACT, Vol. XII., pp. 53 *et seq.*

23. **What constitutes offer—Construction of document—Not intimation of readiness to treat.**—A paper writing was given by deft. to A. (to whose house pltf.s. had declined to furnish goods on their credit alone) to this effect: "I understand A. & Co. have given you an order for rigging, etc., I can assure you, from what I know of A.'s honour & probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit"; which paper was handed over by A. to pltf.s., together with a guarantee from another house, which they required in addition, & the goods were thereupon furnished:—*Held*: the paper did not amount to a guarantee, there being no notice given by pltf.s. to deft. that they

accepted it as such, or any consent of deft. that it should be a conclusive guarantee.

The words [Indeed, I have no objection to guarantee you against any loss from giving them this credit] import that if application were made he would guarantee, but no such subsequent application was made. Considering this as a mere overture to guarantee it appears to us that there should have been a subsequent consent on his part to convert it into a conclusive guarantee (LORD ELLENBOROUGH, C.J.).—*M'IVER v. RICHARDSON* (1813), 1 M. & S. 557; 105 E. R. 208.

*Annotations*:—*Apld. Symmons v. Want* (1818), 2 Stark. 371; *Mozley v. Tinkler* (1835), 1 Cr. M. & R. 692. *Distd. Jays v. Sala* (1898), 14 T. L. R. 461. *Refd. Andrews v. Garrett* (1859), 6 C. B. N. S. 262.

24. — **Deft. being desirous of having goods shipped to R. & Co., his agents in India, applied by letter on July 9, 1868, to pltf.s., who were manufacturers of edge tools carrying on business at Sheffield, asking the price of certain tools to be sent out to India to the firm of Messrs. R. & Co. Pltf.s. in reply stated their lists of prices, & that their terms were cash settlement in England within a few weeks. On July 11 deft. wrote to them as follows: "I shall be very glad that you should come to an arrangement with R. & Co. that they should be your agents there; but that requires direct correspondence between you & them. I am quite willing to guarantee the first shipment." The same day pltf.s. enclosed a list of prices, & requested a confirmation of the order, which deft. accordingly sent. The goods, amounting in value to £800, were accordingly shipped to R. & Co. in India. Other shipments followed. The sum of £300 only having been paid by R. & Co. in respect of this first shipment, pltf.s. in July, 1871, wrote to deft., "We sincerely hope it may not be necessary to act upon your letter of July 11, 1868." In two letters which deft. subsequently wrote to pltf. he never disclaimed his liability, but on Sept. 26, 1871, he wrote, "As the event on which I expressed by willingness to guarantee never took place, it never became effective." Messrs. R. & Co. having stopped payment, & there being a sum of £530 still due upon the first shipment of goods, pltf.s. sued deft. upon his guarantee:—*Held*: there was an express offer of a guarantee & an intimation of acceptance.—*SORBY v. GORDON* (1874), 30 L. T. 528.**

25. **Revocable before acceptance.**—A guarantee, for the space of twelve months, for the due payment of all such bills as pltf.s. might discount for D. to the extent of £600, may be revoked by a notice given during the twelve months, although some discount may have been made & repaid before notice.

This promise itself creates no obligation. It is, in effect, conditioned to be binding if pltf. acts upon it either to the benefit of defts. or to the detriment of himself. But until the condition has been at least in part fulfilled, defts. have the power of revoking it (ERLE, C.J.).—*OFFORD v. DAVIES* (1862), 12 C. B. N. S. 748; 31 L. J. C. P. 319; 6 L. T. 579; 9 Jur. N. S. 22; 10 W. R. 758; 142 E. R. 1336.

*Annotations*:—*Refd. Coulthart v. Clementson* (1879), 5 Q. B. D. 42; *Beckett v. Addyman* (1882), 9 Q. B. D. 783; *Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733.

26. **Must be made to creditor.**—Pltf. let a house to J. on her sending him a letter addressed to her by deft. saying he would undertake to be responsible for the rent:—*Held*: there was no agreement between pltf. & deft.—*NASH v. SPENCER* (1896), 13 T. L. R. 78.

**Necessity for writing.**—*See* Part III., Sect. 3, *post*.

*Sect. 2.—Mutual assent of parties: Sub-sect. 2.*  
*Sect. 3: Sub-sects. 1*

**SUB-SECT. 2.—ACCEPTANCE.**

*See, generally, CONTRACT, Vol. XII., pp. 63 et seq.*

**27. Necessity for acceptance.]—**M'IVER v. RICHARDSON, No. 23, *ante*.

**28. —**—A written proposal to pay a moiety of the debt of another if the creditor will at a specified time of meeting accept the proposal & discharge the debtor, is not binding unless the creditor accede to the terms in writing.—GAUNT v. HILL (1815), 1 Stark. 10, N. P.

*Annotations:—*Refd. Williams v. Byrnes (1863), 1 Moo. P. C. C. N. S. 154. *Mentd.* British Empire Shipping Co. v. Soames (1858), 31 L. T. O. S. 196.

**29. —**—In an action on a guarantee, pltf. gave in evidence a letter in the handwriting of deft., but without date, in which the latter stated, "I have no objection to guarantee the payment of the rent, as far as that of each quarter, during W.'s continuance in possession." He also proved that W. rented certain premises from him:—*Held*: this was not sufficient, without showing that pltf. accepted deft.'s offer.—SYMMONS v. WANT (1818), 2 Stark. 37, N. P.

**30. —**—Guarantee in the following form: "F. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as £50; for my reference apply to B." Signed "G. T." B. wrote this memorandum, & added "Witness to G. T.—J. B." It was forwarded by B. to pltf., who never communicated their acceptance of it to G. T. In an action against the latter on the guarantee: *Held*: pltf. not proving any notice of acceptance to deft., were not entitled to recover.—MOZLEY v. TINKLER (1835), 1 Cr. M. & R. 692; 1 Gale, 11; 5 Tyr. 416; 149 E. R. 1258; *sub nom.* MORLEY v. TINKLER, 4 L. J. Ex. 84.

*Annotations:—*Distd. Jays v. Sala (1898), 14 T. L. R. 461. *Refd.* Andrews v. Garrett (1859), 6 C. B. N. S. 262. *Mentd.* Smith v. Neale (1857), 2 C. B. N. S. 67; Rouss v. Pickaley (1866), 1 L. R. 1 Exch. 342.

**31. —**—R., a nephew of deft., being indebted to pltf., deft. wrote a series of letters to pltf., on which pltf. relied to prove the guarantee on which the action was brought. In the first, on Nov. 8, 1861, he wrote, "I have no doubt I can send R. money to pay on Tuesday next, Nov. 12; just give him time, & I will see you don't lose a shilling by him." On Dec. 6 he wrote, saying: "I really don't know what to do for the best, but something shall be done so that you shall have your money; I hope I shall be able to get some in, & discharge your bill as soon as possible; you shall hear from me this day week, without fail. I have been disappointed; but you shall be paid." On Feb. 8, 1862, he wrote: "I received a letter from your solr., requesting payment of £25. You are aware that this is all loss to me. I am sorry to say I am still liable to other claims upon me; under these circumstances I hope you will be as favourable as you can. I think, if I make an effort to pay £15 to you for my release from this transaction, I will do so at once, as you will then have R. to sue for the balance":—*Held*: the above letters were mere unaccepted proposals, & did not constitute a sufficient promise, binding within the terms of Stat. Frauds.

When a guarantee is given for the debt of another person, it is accepted by the party to whom it is given, the consideration for it being an agreement by him to forbear payment for the required time; but there was nothing of that sort here (CHANNELL, B.).—NEWPORT v. SPIVEY (1862), 1 New Rep. 30; 7 L. T. 328.

**32. Mode of acceptance—By conduct.]—**OLDHAM v. ALLEN (1784), cited in 2 Cr. & M. at p. 433; 3 L. J. Ex. at p. 128; 149 E. R. 830. *Annotation:—*Refd. Simpson v. Penton (1834), 2 Cr. & M. 430.

**33. —**—Consistent with offer.]—Pltf. declared that, in consideration that they would lend to S. & Co. £5,000, deft. promised to be answerable for the same; that they did lend the said sum, whereby deft. became liable. The form of the guarantee was, that deft. would be answerable to the extent of £5,000 for the use of the house of S. & Co. At the time this was given, S. & Co. were indebted to pltf. in a considerable sum of money, for which pltf. held a promissory note, drawn by S. & Co., & other bills, as a security. On receiving the guarantee, pltf. cancelled the note, & delivered up the bills which they held. S. & Co. then delivered those bills back again to pltf., together with a new promissory note, but no money passed:—*Held*: the guarantee only contemplated future loans, & the transaction did not amount to a loan of money so as to charge deft.

The proper & obvious course would have been an advance of so much money leaving the past transactions as they were. The several transactions do not amount to a loan & advance of money so as to satisfy the words of the declaration as between the parties themselves, & still less so as against deft., applying the principles of law she is entitled to have applied in the construction of the engagement into which she has entered (DALLAS, J.).—GLYN v. HERTEL (1818), 8 Taunt. 208; 2 Moore, C. P. 134; 129 E. R. 363.

*Compare* No. 20, *ante*.

**34. —**—No dissent within reasonable time.]—In an action for goods sold deft. pleaded that deft. & M. had agreed with pltf. that M. should give a guarantee for payment of the debt by instalments, & that the guarantee was given & was accepted by pltf., in satisfaction. Replication, denying the agreement, & denying that pltf. had accepted the guarantee in satisfaction. It appeared that, before the bringing of the action L., who was pltf.'s attorney on the record, had written to deft. for payment of the debt, & it was proposed to give evidence of what L. had said after he has so written & before the action. Such evidence was held not receivable without further proof of the agency of L. It was afterwards proved by L. that M. had asked him to propose to pltf. to accept his guarantee, & that L. having consented to do so, M. signed a guarantee, which was on the next day sent by L. to pltf., who kept it three weeks & then returned it:—*Held*: if pltf. did not return the guarantee within a reasonable time they must be taken to have accepted it, & that unexplained—three weeks was an unreasonable time; & if M. was worth nothing, & was a mere man of straw, that fact would make no difference on these pleadings, as pltf. had not replied fraud, but had denied that they had accepted the guarantee.

**PART II. SECT. 2, SUB-SECT. 2.**  
**27 L. Necessity for acceptance.]—**  
 NIEL & CO. v. QUIN & O'HEA, [1903]  
 T. H. 458.—S. AF.

**33 i. Mode of acceptance—By conduct—Consistent with offer.]—**BEATTIE & WORKMAN (1879), 2 L. N. 212; 24 L. C. J. 15.—CAN.

**i. Acceptance by mistake—Validity.]**  
 —Defts. without negligence signed a document purporting to be a guarantee, in the honest belief that it was a docu-



If a person offers a guarantee, & more still, if he signs a guarantee by which he makes himself liable, & that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time ; & if he keeps the guarantee an unreasonable time, he is bound to accept it just the same as if he had assented to it by words ; & if he has ever accepted it either by word or by act, he cannot afterwards retract (COLERIDGE, J.).—  
POPE v. ANDREWS (1840), 9 C. & P. 564, N. P.

35. ——— Goods supplied.]—JAYS, LTD.  
v. SALA (1898), 14 T. L. R. 461.

36. ————.]—**MARSDEN & SON v. CAPITAL & COUNTIES NEWSPAPER CO., LTD.**  
(1901), 46 Sol. Jo. 11, C. A.

37. Form of acceptance—Writing.]—GAUNT  
v. HILL, No. 28, *ante*.

*Sec, further, Part III., Sect. 3, post.*

38. Notice of acceptance—Necessity for.]—  
M'IVER v. RICHARDSON, No. 23, *ante*.

39. — — —.] — **MOZLEY v. TINKLER**, No.  
30, *ante*.

**40. Acceptance on Sunday—Validity—Sunday Observance Act, 1677 (c. 7).—**(1) A plea, that the contract declared upon, being a contract which, under Stat. Frauds, required deft.'s signature, was entered into with pltf. on a Sunday in the way of pltf.'s ordinary business, is not supported by evidence that the contract was signed & delivered by deft. to C. on a Sunday, & delivered by C. to pltf. on a subsequent day. A guarantee given by B., a tradesman to A., another tradesman, for the faithful services of C., a traveller, to be employed by A., is not an act done in the way of the ordinary business of B., within the above Act.

(2) A declaration by A. against B. upon a guarantee is supported by proof of a document drawn up in the plural number, & concluding "as witness our hands" but signed by B. alone.—*NOTTON v. POWELL* (1842), 4 Man. & G. 42; 11 L. J. C. P. 202; 134 E. R. 18.

**41. Acceptance induced by fear—Validity.]—** A son carried to bankers of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it, was lying at the bankers dishonoured. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, & executed on agreement to make an equitable mtge. of his property. The notes, with the forged indorsements, were then delivered up to him:—*Held*: the agreement was invalid.

A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though that is not put forward by any party as the motive for the

agreement, is not a free & voluntary agent, & the agreement he makes under such circumstances is not enforceable in equity.

A contract to give security for the debt of another, which is a contract without consideration is, above all things, a contract that should be based upon the free & voluntary agency of the individual who enters into it (LORD WESTBURY).—WILLIAMS v. BAYLEY (1866), L. R. 1 H. L. 200; 35 L. J. Ch. 717; 14 L. T. 802; 30 J. P. 500; 12 Jur. N. S. 875, H. L.; *affg.* S. C. *sub nom.* BAYLEY v. WILLIAMS (1865), 4 Giff. 638.

**Annotations.**—**Archd. Davies** v. **London & Provincial Marine Insee.** (1878), 8 **Ch. D.** 469. **Conrad Seear** v. **Cohen** (1881), 45 **L. T.** 589; **Haywood** v. **Whitaker** (1887), 3 **T. L. R.** 537. **Relf**, **Whitmore** v. **Farley** (1881), 45 **L. T.** 99; **Mlower** v. **Sadler** (1882), 10 **Q. B.** D. 572; **McClatchie** v. **Haslam** (1891), 65 **L. T.** 691; **Jones** v. **Morionethshire Permanent Benefit Bldg. Soc.** [1892] **Ch.** 173. **Mend.** **W. A. C. Williams** v. **W. H. Williams** (1886), 39 **Ch.** 299; **Itourke** v. **Mealy** (1879), 41 **L. T.** 168; **Allen** v. **Flood** [1898] **A. C.** 1; **Barnes** v. **Richards** (1902), 71 **L. J. K. B.** 341.

**42. Acceptance not revocable.] — POPE v. ANDREWS, No. 34, ante.**

43. Acceptance of conditional offer — Notice of waiver of condition.]—MORTEN v. MARSHALL, No. 560, *post*.

### SECT. 3.—CAPACITY OF PARTIES.

SUB-SECT. 1.—IN GENERAL.

*See* CONTRACT, Vol. XII., pp. 41, 12, Nos. 198-217

### SUB-SECT. 2.—MARRIED WOMEN.

*Sec, generally, HUSBAND & WIFE.*

44. Guarantee by wife—Under husband's influence—Document not understood.]—CHAPLIN & CO., LTD. v. BRAMMALL, No. 1728, *post*.

45. — **Whether undue influence presumed—No independent advice.**—(1) Pltf. having obtained judgment against a debtor, it was agreed that the judgment debtor & the two defts. in the present action, who were husband & wife, should give pltf. a joint & several promissory note, payable by instalments, for the amount of the judgment. The husband, who had business relations with the judgment debtor, procured his wife's signature to the promissory note, the jury finding that the transaction was sufficiently explained to her & that she knew that the document she was signing was a promissory note, & that she also knew that she was incurring a possible liability for the benefit of the judgment debtor in so signing; they also found that her signature was procured by the influence of her husband, but could not agree as to whether it was procured by his undue influence. Default having been made by the judgment debtor in payment of the instalments of the promissory note, the present action was brought against the husband & wife to recover the balance of the instalments of the promissory note. The husband allowed judgment to go by default:—**Held:** notwithstanding the absence of independent advice, the wife was liable upon the promissory note.

ment of a wholly different nature:—  
*Held*: not bound by the document.—  
**BANK OF IRELAND v. M'MANAMY**,  
[1916] 2 I. R. 161.—IR.

*band's influence—Document not understood—Burden of proving undue influence—What amounts to undue influence.*—**BANK OF MONTREAL v. HOLOBOFF**, [1923] 3 W. W. R. 645.—**CAN.**

MAZE, [1924] 4 D. L. R. 255; [1924] 3  
W. W. R. 9.—CAN.

*Effect of non-renunciation of legal privileges.]—MACKELLAR*  
BOND (1884), 9 App. Cas. 715.—S. AF.

**PART II. SECT. 3, SUB-SECT. 2.**

g. *Guarantee by wife*—Under hus-

44 i. ————,]—MCLEAN v.



**Sect. 3.—Capacity of parties: Sub-sects. 2, 3, & 4 & 5. Sect. 4: Sub-sect. 1.]**

(2) There is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband & wife, so as to throw on the husband, or on the person who is suing the wife, the *onus* of disproving an allegation of undue influence.—*Howes v. Bishop*, [1909] 2 K. B. 390; 78 L. J. K. B. 796; 100 L. T. 826; 25 T. L. R. 523, C. A. *Annotations*:—*As to* (2) *Apld.* *Talbot v. Von Boris*, [1911] 1 K. B. 854. *Refd.* *Shears v. Jones* (1922), 128 L. T. 218.

**46. ————]**—The relation of husband & wife does not raise a presumption of undue influence; & a mtge. by a wife to secure a husband's debts is not void merely because she had no independent advice.—*BANK OF AFRICA, LTD. v. COHEN*, [1909] 2 Ch. 129; 78 L. J. Ch. 767; 100 L. T. 916; 25 T. L. R. 625, C. A.

*Annotation*:—*Mentd.* *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502.

**47. ———— Wife to obtain indirect advantage—Explanation of transaction necessary.]**—Where a wife becomes surety for her husband in a transaction under which she is to get an indirect advantage, the nature of the transaction & what she is doing must be properly explained to her.—*TALBOT v. VON BORIS*, [1911] 1 K. B. 854; 80 L. J. K. B. 661; 104 L. T. 524; 27 T. L. R. 266; 55 Sol. Jo. 290, C. A.

**Undue influence of husband.]**—*See, further, HUSBAND & WIFE.*

DURESS & undue influence generally, *see* CONTRACT, Vol. XII., pp. 90 *et seq.*

**SUB-SECT. 3.—PARENTAL AND QUASI-PARENTAL INFLUENCES.**

**Influence of father.]**—*See* CONTRACT, Vol. XII., p. 103, No. 633.

**Influence of uncle.]**—*See* CONTRACT, Vol. XII., p. 101, No. 620.

**Influence of stepfather.]**—*See* CONTRACT, Vol. XII., p. 105, Nos. 645–647.

**Influence of guardian.]**—*See* CONTRACT, Vol. XII., p. 106, No. 659.

Undue influence generally, *see* CONTRACT, Vol. XII., pp. 98 *et seq.*

**SUB-SECT. 4.—LUNATICS.**

**48. Power of committee of person of lunatic—Surety for committee of estate.]**—The committee of the person of a lunatic can, with the consent of the A.-G., become surety for the committee of the estate.—*Re BURTON* (1851), 18 L. T. O. S. 85, L. J. *See, generally, LUNATICS.*

**SUB-SECT. 5.—DIRECTORS AND OFFICERS OF COMPANY.**

**49. Company not bound by signature of directors—If guarantee ultra vires the company.]**—

(1) The managing body of a railway co. incorporated by Act of Parliament are not entitled to employ the funds of the co. in, or to guarantee the payment of a dividend, or the repayment of capital to other parties who engage in undertakings which are not part of, or directly connected with, the works which

are authorised by the Act of Parliament; & that although they may increase the traffic of the railway, & although a majority of the shareholders in the railway co. may approve of such application of their funds; & although the object may not be against public policy.

(2) Where the directors of a railway co. had proposed to guarantee the parties who should form a joint-stock steam-packet co., to run vessels from a port to which the railway would convey passengers:—*Held*: one of the shareholders in the railway co. was entitled to sue on behalf of himself & all the other shareholders, except the directors who were defts., although some of these shareholders had taken shares in the steam-packet co.—*COLMAN v. EASTERN COUNTIES RY. CO.* (1846), 10 Beav. 1; 4 Ry. & Can. Cas. 513; 16 L. J. Ch. 73; 8 L. T. O. S. 530; 11 Jur. 74; 50 E. R. 481.

*Annotations*:—*As to* (1) *Consd.* *Norwich Corpn. v. Norfolk Ry.* (1855), 4 E. & B. 397. *Refd.* *East Anglian Ry. v. Eastern Counties Ry.* (1851), 11 C. B. 775; *Bostock v. North Staffordshire Ry.* (1855), 4 E. & B. 798; *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331; *Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees* (1856), 27 L. T. O. S. 241; *Shrewsbury & Birmingham Ry. v. North-Western Ry.* (1857), 6 H. L. Cas. 113; A.-G. v. G. N. Ry. (1860), 1 Drow. & Sm. 154; *South Wales Ry. v. Rodmond* (1861), 10 C. B. N. S. 675; *Mauvell v. Mid. G. W. (Ireland) Ry.* (1863), 1 Hem. & M. 130; *Bloxam v. Met. Ry.* (1868), 3 Ch. App. 337; *Riche v. Ashbury Ry. Carriage Co.* (1874), L. R. 9 Exch. 221; *Jackson v. N. E. Ry.* (1877), 37 L. T. 664; *Norton v. L. & N. W. Ry.* (1878), 9 Ch. D. 623; A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449; A.-G. v. L. C. C., [1901] 1 Ch. 781; A.-G. v. Mersey Ry., [1907] 1 Ch. 81; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *As to* (2) *Consd.* *Forrest v. M. S. & L. Ry.* (1861), 4 De G. F. & J. 126. *Refd.* *Filder v. L. B. & S. C. Ry.*, *Barchard v. Brighton, Uckfield & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 489; *Seaton v. Grant* (1867), 36 L. J. Ch. 638.

**50. ————]**—*Re ERA LIFE ASSURANCE SOCIETY*, [1866] W. N. 309.

**51. ————]**—The business of a co. was that of importers & dealers in tinned ox-tongues & other provisions. H. was appointed manager of the co.'s business in South America, "to take the entire charge of the interests of the co. there." No express authority was conferred on him to sign or accept bills or promissory notes on behalf of the co. He was desirous of entering into a contract with L. for the supply of ox-tongues to the co. in South America. L. refused to enter into a contract unless a guarantee was given by some third person, &, at the request of H., S. agreed to give the required guarantee, which he did by depositing £1,000 in a bank to the order of L. As a counter-security to S., H. gave him a promissory note for £1,000, signed by him "in representation of" the co. The co. made default in carrying out the provisions of the contract with L. &, under a power contained in it, he forfeited the deposit, which was paid over to him by the bank. No goods were supplied to the co. under the contract. The co. never recognised the promissory note, & it was dishonoured at maturity. The co. being in liquidation, S. claimed to prove in the winding up upon the note:—*Held*: it not being shown that the giving of the note was necessary for the carrying on of the business of the co., or that it was in the ordinary course of the business of such a co., the note was not binding upon the co., & the claim in respect of it could not be admitted.—*Re CUNNINGHAM & CO., LTD., SIMPSON'S CLAIM* (1887), 36 Ch. D. 532; 57 L. J. Ch. 169; 58 L. T. 16.

**52. Guarantee within scope of company's business—Authority of directors to enter into**

**guarantee.**—The directors of a joint stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers & to act in such a manner as might appear to them best calculated to promote the interest of the bank, have, when the formation of another co. is of importance to the bank, power to guarantee the payment of interest on debentures of that co. issued for the purpose of forming it.—*Re WEST OF ENGLAND BANK, Ex p. BOOKER* (1880), 14 Ch. D. 317; 49 L. J. Ch. 400; 42 L. T. 619; 28 W. R. 809.

**Powers of companies in regard to guarantees.**—*See COMPANIES, Vol. IX., pp. 610, 611, Nos. 4063-4066.*

**53. Guarantee signed by some directors only—Primary liability of directors signing.**—Where some only of a body of directors have given a guarantee, they are primarily liable, unless the other directors adopt it.—*Re DOVER & DEAL RY., CINQUE PORTS, THANET & COAST JUNCTION CO., LONDESBOROUGH'S (LORD) CASE* (1854), 4 De G. M. & G. 411; 23 L. J. Ch. 738; 23 L. T. O. S. 33; 18 Jur. 863; 1 W. R. 472; 43 E. R. 567, L. J.J.

**54. ———.**—A railway co. being in want of money, & being advised that they had no power to borrow, sold part of their rolling-stock to a wagon co. for £30,000, at the same time making a contract with the wagon co. for the hire of the same rolling-stock at a rent which would repay the £30,000 with interest in five years, & then for its re-purchase at a nominal price. At the same time three of the directors guaranteed to the wagon co. the payment of the rent. The wagon co. brought an action against the railway co. & the sureties for non-payment of rent due :—*Held* : the transaction was not a borrowing of money, but a *bonâ fide* sale & hiring of the rolling-stock, & was valid both against the railway co. & the sureties.—*YORKSHIRE RAILWAY WAGON CO. v. MACLURE* (1882), 21 Ch. D. 309; 51 L. J. Ch. 857; 47 L. T. 290; 30 W. R. 761, C. A.

**Annotations.**—*Consd. Re Yarrow, Collins v. Weymouth* (1889), 59 L. J. Q. B. 18; *Re Watson, Ex p. Official* or in Bankruptcy (1890), 25 Q. B. D. 27; *Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. Exld. Re Eastern & Midlands Ry.* (1891), 65 L. T. 668. *Consd. Garrard v. James* [1925], Ch. 616. *Reid. Re Cornwall Minerals Ry.* (1882), 48 L. T. 41; *Madell v. Thomas* (1890), 60 L. J. Q. B. 227; *Re Liskard & Caradon Ry., [1903] 2 Ch. 681*; *Wauthier v. Wilson* (1912), 28 T. L. R. 239; *British Ry. Traffic & Electric Co. v. Kahn, [1921] W. N. 52. Mentd. Phillips v. London School Board, Cockerton v. London School Board* (1897), 77 L. T. 397.

## SECT. 4.—CONSIDERATION.

### SUB-SECT. 1.—NECESSITY FOR CONSIDERATION.

*See, generally, CONTRACT, Vol. XII., pp. 172 et seq.*

**Necessity to express consideration in writing.**—*See Part III., Sect. 3, sub-sect. 4, B. (b), post, & Mercantile Law Amendment Act, 1856 (c. 97), s. 3.*

**55. How far necessary.**—A general & voluntary promise by a son to pay his father's debts, there being no consideration, & no advancement by the father :—*Held* : not enforceable.—

**53 i. Guarantee signed by some directors only—Primary liability of directors signing.**—Debt. co. made an agreement to purchase from ptfs. salt. The agreement was signed in the name of the co., by the president, the secretary-treasurer, & the vice-president :—*Held* : the three officers were personally liable as guarantors.—*JOHNSON CO. v. IMPERIAL FISHERIES, LTD.* (1911), 19 W. L. R. 285; 16 J.—VOL. XXVI.

B. C. R. 445.—*CAN. m. — Validity.*—*MOLSONS BANK v. CRANSTON* (1918), 44 O. L. R. 58; 45 D. L. R. 316.—*CAN.*

### PART II. SECT. 4, SUB-SECT. 1.

**55 i. How far necessary.**—*PALGRAVE v. MURPHY* (1864), 14 C. P. 153.—*CAN.*

**55 ii. ———.**—*JOHNSON v. FITZ-*

*ALEXANDER v. CRESHELD* (1631), Toth. 21; 21 E. R. 111.

**56. ———.**—An *assumpsit* is not maintainable against an heir on a promise to pay money due upon the bond of his ancestor, unless the heir was expressly bound in the bond.—*BARBER v. FOX* (1671), 2 Keb. 836; 1 Vent. 159; 2 Wms. Saund. 134; 85 E. R. 859; *sub nom. BARKER v. FOX*, 2 Keb. 811.

**Annotations.**—*Consd. Jackson v. Posked* (1813), 1 M. & S. 231. *Exld. Leo v. Muggeridge* (1813), 5 Taunt. 36. *Reid. Lloyd v. Leo* (1718), 1 Stra. 94; *Morton v. Burn* (1837), 7 Ad. & El. 19; *England v. Davidson* (1840), 9 L. J. Q. B. 287; *Liversidge v. Broadbelt* (1859), 28 L. J. Ex. 332. *Mentd. Stroom v. Seyer* (1696), 1 Ld. Raym. 111; *Crouther v. Oldfield* (1706), 1 Salk. 361.

**57. ———.**—A. is bound as a surety in a recognisance dated May 5, 1660, for payment of money, which happened not to be made good by Convention Act, for confirming judicial proceedings, the Act not extending to that day. A. being a surety only, & having no consideration for entering into this recognisance, the ct. would not make it good, nor allow it to be so much as a debt.—*SHEFFIELD v. CASTLETON (LORD)* (1700), 2 Vern. 393; 1 Eq. Cas. Abr. 93; 23 E. R. 853.

**58. ———.**—An undertaking to honour a bill of exchange is binding upon the party so undertaking.

The mere promise to pay the debt of another without any consideration at all is *nudum pactum* : but the least spark of a consideration will be sufficient (*WILMOT, J.*)—*PILLANS & ROSE v. VAN MIEROP & HOPKINS* (1765), 3 Burr. 1063; 97 E. R. 1035.

**Annotations.**—*Consd. Jones v. Ashburnham* (1804), 4 East, 455; *Re Bentley, Ex p. Bolton* (1838), 2 Deac. 537; *Bank of Ireland v. Archer* (1813), 11 M. & W. 383; *Re Agra & Masterman's Bank, Ex p. Asiatic Banking Corp.* (1867), 16 L. T. 162. *Reid. Johnson v. Collings* (1800), 1 East, 98; *Clarke v. Cock* (1803), 4 East, 57; *Easton v. Pritchett* (1835), 4 Tyr. 472. *Mentd. Hann v. Hughes* (1764), 7 Term Rep. 349, n.; *Master v. Miller* (1791), 4 Term Rep. 320; *Tato v. Hilbert* (1793), 2 Ves. 111; *Vez v. Emory* (1799), 5 Ves. 141; *Mondizabal v. Machado* (1833), 3 L. J. C. P. 70.

**59. ———.**—*JONES v. ASHBURNHAM*, No. 121, *post*.

**60. ———.**—*BARRELL v. TRUSSELL*, No. 292, *post*.

**61. ———.**—By Stat. Frauds, s. 4, an agreement to pay the debt of another must, in order to give a cause of action, be in writing.

At common law a promise to pay the debt of another, if made simply & without a good consideration for it, would be void (*ABBOTT, C.J.*)—*SAUNDERS v. WAKEFIELD* (1821), 4 B. & Ald. 595; 106 E. R. 1054.

**Annotations.**—*Apld. Clancy v. Piggott* (1835), 2 Ad. & El. 473. *Reid. Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14; *Lilley v. Hewitt* (1822), 11 Price, 494; *Russell v. Mosley* (1822), 6 Moore, C. P. 521; *Morley v. Boothby* (1823), 3 Bing. 107; *Lees v. Whitcomb* (1828), 3 C. & P. 289; *Newbury v. Armstrong* (1829), 6 Bing. 201; *Cole v. Dyer* (1837), Cr. & J. 461; *James v. Williams* (1834), 5 B. & Ad. 1109; *Re Frost, [1898] 2 Ch. 556.*

**62. ———.**—A. agreed in writing, that in consideration of B. appointing him to receive a sum of money for a lace machine (agreed for between B. & C.), he would take the machine, & pay the balance, should there be any default on the part of C.; & C. having made default :—*Held* :

*GERALD* (1897), 29 N. S. R. 339.—*CAN.*

**55 iii. ———.**—*LONDON GUARANTEE & ACCIDENT CO. v. CORNISH* (1907), 17 Man. L. R. 148.—*CAN.*

**55 iv. ———.**—*BREWLEY v. WHITEFORD* (1832), Hayes, 356; 4 Ir. L. Rec. 1st ser. 91.—*IR.*

**55 v. ———.**—*WILCOCKS v. HANNINGTON* (1856), 5 L. Ch. R. 38; 7 Ir. Jur. 281.—*IR.*

**Sect. 4.—Consideration: Sub-sects. 1, 2 & 3, A. & B. (a).]**

on demurrer to a replication, in an action against A., the agreement was void for want of consideration.—*BATES v. CORT* (1824), 2 B. & C. 474; 3 Dow. & Ry. K. B. 676; 107 E. R. 460.

*Annotation:—Refd.* Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131.

**63. —.]**—A., by letter, acknowledged to have received from B. £321 5s. By a contemporaneous account taken between these parties, it appeared that £146 3s. 6d., part of the £321 5s. was a sum due from C. to B., which A. allowed to be transferred to the debit of his account with B. A. was sued by B. for money lent & upon an account stated:—*Held*: A. was not liable for the £146 3s. 6d., the arrangement amounting to a promise, without consideration, to pay the debt of another. *FRENCH v. FRENCH* (1841), 2 Man. & G. 644; Drinkwater, 159; 3 Scott, N. R. 121; 10 L. J. C. P. 220; 5 Jur. 410; 133 E. R. 903.

*Annotations:—Refd.* Marshall v. Wilson (1866), 14 W. R. 699; Camillo Tank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.

**64. —.]**—Allowing a parol promise to be brought in aid of a promise which is bad under Stat. Frauds for want of consideration, would be a virtual repeal of the statute (*per Cur.*).—*JONES v. KEARNS* (1844), 3 L. T. O. S. 178.

**65. —.]**—*CROFTS v. BEALE*, No. 161, *post*.

**66. —.]**—*WILLIAMS v. BAYLEY*, No. 41, *ante*.

**67. —.]**—*MILES v. NEW ZEALAND ALFORD ESTATE CO.*, No. 134, *post*.

**SUB-SECT. 2.—FROM AND TO WHOM CONSIDERATION MUST MOVE.**

**68. From creditor — To surety.]**—*MORLEY v. BOOTHBY*, No. 72, *post*.

**69. —.]**—An engagement by A. to answer the draft of B. for payment of a debt due from B. to C., no draft having been drawn by B., & no communication of the transaction between A. & B. having been made to C., raises no equity in C. to recover the amount of the debt from A.

The owner of a ship proposed to his agent, to whom he was indebted on account, to transfer the ship to him, provided the agent would answer the owner's draft for the amount of the repairs, in respect of which the owner was indebted to a third person not named. The ship was, in pursuance of this proposal, transferred to the agent, & the vendor afterwards became bkpt., without having drawn upon the purchaser & without any communication of the terms of the purchase having been made to the creditor to whom the vendor was indebted for the repairs:—*Held*: there was no consideration between the purchaser & the vendor's creditor to entitle the latter to recover from the purchaser the amount of the repairs.—*RATTENBURY v. FENTON* (1834), 3 My. & K. 505; 3 L. J. Ch. 203; 40 E. R. 192; *previous proceedings* (1833), Coop. temp. Brough. 60, L. C.

**70. —.]**—**Part consideration.]**—A declaration stated that two actions had been brought, one by pltf. against M. the other by W. against deft., in the latter of which the record was entered for trial. It then stated an agreement between pltf., deft., & W. that the record in that case should be withdrawn, W. to pay his own

costs, as well as the costs out of pocket of the attorney for deft. in that action; in consideration whereof, & in consideration that pltf. would give time to M. for payment of £115, the sum agreed by the parties to be the amount of debt & costs, deft. promised to guarantee the payment of such debt & costs. Breach, that although pltf. did give time to M., etc., deft. refused to guarantee:—*Held*: on general demurrer, this declaration disclosed a sufficient consideration for deft.'s promise.

A promise to pay where there is no debt, & the party to whom the promise is made knows it, or where there are merely disputes respecting an alleged debt, may not be founded upon a sufficient consideration; but here is an agreed debt, payment of which deft. promises to guarantee on time being given. That is clear enough (*LORD DENMAN, C.J.*).

The agreement to give time is a consideration proceeding from pltf., & it is not necessary that the whole consideration should proceed from him (*PATTESON, J.*).—*HODSON v. LEE* (1847), 9 L. T. O. S. 312.

**71. Not from debtor—To surety.]**—Undertaking by one person to pay the debt of another does not require a consideration moving between them.—*Ex p. MINET* (1807), 14 Ves. 189; 33 E. R. 493, L. C.

*Annotations:—Expld.* Morley v. Boothby (1825), 3 Bing. 107. *Refd.* Boehm v. Campbell (1819), 3 Moore, C. P. 15; Jenkins v. Reynolds (1821), 6 Moore, C. P. 86. *Mentd.* *Re Sudell, Ex p. Myers* (1833), 2 Deac. & Ch. 251; *Re Willis* (1849), 4 Exch. 530.

**SUB-SECT. 3.—WHAT CONSTITUTES CONSIDERATION.**

**A. In General.**

*See, generally,* CONTRACT, Vol. XII., pp. 170 *et seq.*

**72. General rule.]**—"M. & Co.—We hereby promise that your draft on W. & Co., due at A.'s, at six months, on Nov. 27 next, shall be then paid out of money to be received from S., say amount £174 13s. 5d.—W., B.:—" *Held*: this undertaking was void within Stat. Frauds, no consideration appearing for B.'s promise.

No ct. of common law has ever said that there should be a consideration directly between the persons giving & receiving the guarantee. It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guarantee is given suffer inconvenience, as an inducement to the surety to become guarantee for the principal debtor (*BEST, C.J.*).—*MORLEY v. BOOTHBY* (1825), 3 Bing. 107; 10 Moore, C. P. 395; 3 L. J. O. S. C. P. 177; 130 E. R. 455.

*Annotation:—Distd.* Andrews v. Smith (1835), 5 L. J. Ex. 80.

*Sec, now,* Mercantile Law Amendment Act, 1856 (c. 97).

**73. Marriage—Guarantee of settlement.]**—*GARBREY v. BROWN* (1588), Gouldsb. 94; 75 E. R. 1018; *sub nom.* *BROWNE v. GARBOROUGH*, Cro. Eliz. 63.

**74. Delivery of debtor's promissory note—To surety.]**—The delivery of a note by which a stranger promises to pay the deliverer money, is a good consideration for a promise, & in an action

**PART II. SECT. 4, SUB-SECT. 3.—A.**

**a. Substitution of new form of guarantee.]**—When a guarantor receives back a guarantee he has given, &

executes another form of guarantee, the transaction amounts simply to the substitution of one form for the other & the consideration supporting the original guarantee is consideration for

the substituted one.—*NORTHERN CROWN BANK v. ELFORD* (1916), 34 W. L. R. 1185; 10 Sask. L. R. 96; 34 D. L. R. 280.—*CAN.*

thereon, pltf. need not prove upon what consideration the note was made.—*MEREDITH v. CHUTE* (1702), 2 Ld. Raym. 759; 92 E. R. 7; *sub nom. MEREDITH v. SHORT*, Holt, K. B. 34; 1 Salk. 25; *sub nom. TUKE'S CASE*, 7 Mod. Rep. 12.

*Annotation*:—*Mentid. Courtney's Case* (1703), 7 Mod. Rep. 140.

**75. Whether benefit to surety necessary.**—If an act be to be done to another, at my request, of which I am to have no benefit, yet for this I shall be chargeable, in an action upon the case; so if I say to another, deliver so much to such an one, & I will pay you for it, by this I am chargeable, & this is a good consideration, to charge me with my promise, though no benefit at all by this redounds unto me (*COKE, C.J.*).—*FREEMAN v. FREEMAN* (1614), 2 Bulst. 269; 1 Roll. Rep. 61; 80 E. R. 1113.

**76.** —[—]—In order to facilitate the making of an agreement, for which there was sufficient consideration, between pltf. & a third person, deft., who received no benefit to himself by the agreement, became party thereto:—*Held*: as the agreement was such as pltf. would not have made, unless deft. had acceded, there was a sufficient consideration for deft.'s promise.—*BAILEY v. CROFT* (1812), 4 Taunt. 611; 128 E. R. 470.

**77.** — *Delivery of document.* — *BROOKS v. HAIGH*, No. 402, *post*.

*In relation to negotiable instruments.* — See *BILLS OF EXCHANGE*, Vol. VI., pp. 114 *et seq.*

#### *B. Benefit to Debtor at Surety's Request.*

(a) *Goods Supplied or to be Supplied.*

**78. Delivery after guarantee — Contract made before guarantee.**—A promise to pay, in consideration that pltf. would deliver goods, which he had before sold, to deft.'s son, is good.—*SHERWOOD v. WOODWARD* (1599), Cro. Eliz. 700; 78 E. R. 935.

**79.** —[—]—A guarantee for the payment of goods, supplied to a third person, given on the 7th, will cover goods contracted for on the 6th, but not delivered till the 7th, & then supplied on the credit of guarantee.—*SIMMONS v. KEATING* (1818), 2 Stark. 426, N. P.

**80.** — *Contract consequent on guarantee.*—A promise, in consideration that if A. sold goods to B. to be paid *ad aliquod tempus vel tempora nunc inter eos concordand* & B. did not pay, that he would, will support an *assumpsit*, although part was to be paid in ready money.—*PHILLIPS v. TURNER* (1801), Cro. Eliz. 807; 78 E. R. 1034.

**81.** —[—]—*FOSTER v. HALLIMAN* (1663), 1 Keb. 512, 627; 1 Lev. 103; 83 E. R. 1084, 1150.

**82.** —[—]—A guarantee in writing to pay for any goods which the vendor delivers to a third person is good within Stat. Frauds, s. 4, as containing a sufficient description of the consideration of the promise (*viz.* the delivery of the goods when made) as of the promise itself; both of which are included in the word agreement required by that sect. to be reduced into writing, etc.—*STADT v. LILL* (1808), 9 East, 348; 103 E. R. 605; *sub nom. STAPP v. LILL*, 1 Camp. 242.

*Annotations*:—*Consd. Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154. *Refd. Bambridge v. Wade* (1850), 16 Q. B. 89; *Powers v. Fowler* (1855), 4 E. & B. 511; *Holmes v. Mitchell* (1859), 6 Jur. N. S. 73.

**83. Goods supplied before & after guarantee—**

**Past transactions not within guarantee.**—[Guarantee—"I engage to pay pltf. for all the gas which may be consumed in the M. theatre, etc., during the time it is occupied by A.; & I also engage to pay for all arrears, which may be now due":—*Held*: the agreement was void as to the arrears, but the amount of the gas subsequently supplied might be recovered under a count for goods sold.—*WOOD v. BENSON* (1831), 2 Cr. & J. 94; 2 Tyr. 93; 1 L. J. Ex. 18; 149 E. R. 40.

*Annotations*:—*Expld. Harris v. Venables* (1872), L. R. 7 Exch. 235. *Refd. Williams v. Burgess* (1839), 10 Ad. & El. 499; *Harman v. Reeve* (1856), 18 C. B. 587; *Oldershaw v. King* (1857), 2 H. & N. 399.

**84.** —[—]—(1) The wife of a retail dealer who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you having at my request agreed to supply & furnish goods to C." (her husband), "I do hereby guarantee to you the sum of £500. This guarantee is to continue in force for the period of six years & no longer":—*Held*: the guarantee was limited to goods actually supplied to the husband after it was given.

When we look at the document, we find that the expressed consideration is really no consideration at all; the agreement to supply goods at C.'s request was no consideration, for there was no obligation on pltf. to supply any goods. But when the request was complied with, & the goods actually supplied, then a consideration arose (*BAGGALLAY, L.J.*).

(2) The question turns on the construction of a very few words in a short document (*JAMES, L.J.*).

The ct. is entitled to look at the surrounding circumstances; *i.e.* it is entitled to consider, first, who the parties were; secondly, in what position they were; thirdly, what the subject-matter of the agreement was (*THESIGER, L.J.*).—*MORRELL v. COWAN* (1877), 7 Ch. D. 151; 47 L. J. Ch. 73; 37 L. T. 586; 42 J. P. 262; 26 W. R. 90, C. A.

*Annotations*:—*As to* (1) *Refd. Brunning v. Odhams* (1896), 75 L. T. 602. *As to* (2) *Refd. Henton v. Paddison* (1893), 68 L. T. 405; *Spencer, Turner & Boldero v. Lotz* (1916), 32 T. L. R. 373.

**85.** — *Past transactions included—Supply in way of trade.* — *JOHNSTON v. NICHOLLS*, No. 97, *post*.

**86.** —[—]—A declaration on a guarantee stated that in consideration that pltf. would sell & deliver goods to C., deft. promised pltf. to guarantee to him the payment of the amount of, or the balance unpaid to pltf. for, any goods then sold & delivered, & to be thereafter sold & delivered to, & of any money lent, or to be lent to, or paid for by pltf. to the extent of £1,000 & that pltf. should be at liberty, at any time thereafter, to call upon deft. for the payment of £1,000, which might be applied by pltf. as pltf. thought proper, either in payment or part payment of any debt which might be due or have been due to pltf. & should not have been paid by C.:—*Held*: the declaration disclosed a sufficient consideration for the promise.

The first count of the declaration discloses a sufficient cause of action. It states that in consideration that pltf. at the request of deft. would sell & deliver goods to [C.] deft. promised & agreed with pltf. to guarantee to him the due payment of the balance unpaid to pltf. for any goods then

#### PART II. SECT. 4, SUB-SECT. 3.— B. (a).

*o. Delivery after guarantee—Contract & guarantee in same instrument.*—

An agreement was made between A. & B., whereby A. was to deliver logs for a specified price. At the foot of the agreement was a memorandum, signed by deft. at the same time that

D. signed it guaranteeing payment to A.:—*Held*: there was a sufficient consideration expressed by reference to the agreement.—*TAYLOR v. HARRIS* (1843), 2 Kerr, 343.—*CAN.*

**Sect. 4.—Consideration: Sub-sect. 3, B. (a) & (b).]**

sold & delivered to C. The whole depends upon the future sale & delivery of goods & advance of money. The option given to pltf. with respect to the application of the money received under the guarantee, can only properly apply where there has been some new supply of goods or some new advance of money, the expectation of which was the whole foundation of the contract (TINDAL, C.J.). —**BOYD v. MOYLE** (1846), 2 C. B. 644; 135 E. R. 1099.

**Annotation:—***Reid*. **Boyd v. Robins** (1858), 4 C. B. N. S. 749.

**87. — — — — —.]—Guarantee**—"In consideration of your agreeing to supply S. with goods upon credit, in the way of your trade (the amount to be in your own discretion), I hereby guarantee you the due & regular payment of such sum or sums as he may now, or at any time, & from time to time hereafter, owe to you, etc. My liability under this guarantee is to be limited to principal sum, in running account, of £100." A declaration upon this guarantee stated that pltf., confiding in the promise of deft., afterwards supplied S. with goods to the amount of £85 10s. 9., & that, although the credit had expired, S. had not paid for them, of which the deft. had notice; & alleged for breach, the non-payment of the amount by deft., on request:—*Held*: the guarantee disclosed a sufficient consideration, & the declaration was good on general demurrer.

At the trial it occurred to me that a mere illusory dealing would not satisfy the guarantee, & I left it to the jury to say whether or not the dealings had been *bond fide* continued. The jury having found a verdict for pltf., the ct. held that the guarantee disclosed a sufficient consideration for the payment as well of the past as of the future debt, & that the declaration was good. So, here, I think that a sufficient consideration is disclosed on the face of the guarantee, & that it imports that the continued supply should be *bond fide* & to a reasonable extent (CRESSWELL, J.).—**WHITE v. WOODWARD** (1848), 5 C. B. 810; 17 L. J. C. P. 209; 12 Jur. 439; 136 E. R. 1097; *previous proceedings* (1847), 4 C. B. 752.

**Annotation:—***Reid*. **Broom v. Batchelor** (1856), 1 H. & N. 255.

**88. — — — — —.]—(1)** "In consideration of R. & Co. giving credit to D., I hereby engage to be responsible, & to pay any sum, not exceeding £120, due to the said R. & Co., by the said D.":—*Held*: to be a good & binding guarantee, the words "giving credit" being equally applicable to future as to past credit.

(2) In an action upon this guarantee, the declaration stated, that, at the time it was given, D. was indebted to pltf. in £16 for goods sold, & which sum was then payable; that pltf. had sold other goods to D., to the amount of £50, at a credit which had not yet expired; that D. had applied to pltf. for an extension of credit in respect of both debts, & also for a further supply of goods on credit, which pltf. had consented to do on receiving deft.'s guarantee; that deft., in consideration of the premises, gave pltf. the guarantee above set out; & that D. made default, etc.:—*Held*: on special demurrer, the declaration sufficiently showed that the consideration for the guarantee was future credit, & was therefore good.

(3) Evidence is admissible in an action on such a guarantee to show that it was intended to apply

to future credit.—**EDWARDS v. JEVONS** (1849), 8 C. B. 436; 19 L. J. C. P. 50; 14 L. T. O. S. 178; 14 Jur. 131; 137 E. R. 579.

**Annotations:—***As to* (3) *Reid*. **Bainbridge v. Wade** (1850), 16 Q. B. 89. *Generally*, *Mentd.* **Williams v. Byrnes** (1863), 1 Moo. P. C. N. S. 154.

**89. — — — — —.]—(1)** Pltf. supplied deft.'s son with some beer & on their refusing to supply more without a guarantee, the son gave them the following guarantee, signed by deft.: "I hereby undertake to pay you for all the beer supplied by you to S., on the completion of the purchase, which will take place in a few days. I am, etc." To M., etc.:—*Held*: the promise was *prima facie* a promise to pay for goods to be supplied.

(2) *Semble*: the promise also applied to the goods already supplied.—**MOCKETT v. AMES** (1871), 23 L. T. 729.

**90. Agreement to supply goods—Insufficient—Necessity for actual supply.]—****MORRELL v. COWAN**, No. 84, ante.

**(b) Money Advanced or to be Advanced.**

**91. Advance after guarantee.]—****BAXTER v. JACKSON** (1864), 1 Sid. 178; 82 E. R. 1042.

**92. — — — — —.]—****MAGNUS v. HALE** (1843), 1 L. T. O. S. 253; 8 J. P. 71.

**93. — — — — —.]—****HAARTLAND v. JUKE**, No. 726, post.

**94. Advance before & after guarantee—Whether past advances a consideration.]—(1)** "R., I hereby undertake to secure to you the payment of any sums of money you may have advanced, or may hereafter advance to D. & Co., on their account with you, commencing from Nov. 1, 1831, not exceeding £2,000, T.":—*Held*: to be insufficient, as a guarantee for the past advances, as no consideration for the promise was expressed, or was necessarily to be implied.

(2) Pltf. declaring on this guarantee, stated the consideration to be the future advances, & deft. pleaded *non assumpsit*:—*Held*: deft. was at liberty to contend that the consideration was not truly set forth in the declaration.—**RAIKES v. TODD** (1838), 8 Ad. & El. 846; 1 Per. & Dav. 138; 1 Will. Woll. & H. 619; 8 L. J. Q. B. 35; 112 E. R. 1058.

**Annotations:—***As to* (1) *Apld.* **Allnutt v. Ashenden** (1843), 12 L. J. C. P. 124. *Reid*. **Kennaway v. Treleavan** (1839), 5 M. & W. 498; **Johnston v. Nicholls** (1845), 1 C. B. 251. **Thackwell v. Gardiner** (1851), 5 De G. & Sm. 58; **Ellis v. Emmanuel** (1876), 1 Ex. D. 157. *As to* (2) *Consd.* **Lang v. Nevill & Druce** (1841), 6 Jur. 217; **Chapman v. Sutton** (1846), 2 C. B. 634. *Reid*. **Bainbridge v. Wade** (1850), 16 Q. B. 89; **Caballero v. Slater** (1854), 23 L. J. C. P. 67; **Oldershaw v. King** (1857), 2 H. & N. 399. *Generally*, *Mentd.* **Bower v. Marris** (1841), Cr. & Ph. 351.

**95. — — — — —.]—****BROOKS v. HAIGH**, No. 402, post.

**96. — — — — —.]—**A. guaranteed to a banking co. "all current obligations in their hands, to which B. may be a party, & also all his future obligations & engagements that may come into their hands":—*Held*: the latter part of the guarantee, as to the future obligations, implied of itself a consideration, & did not require the specific statement of one in the body of the guarantee, according to the requisition of Stat. Frauds; & the banking co. might therefore, on the bkpcy. of A., prove for the amount of their advances to B., subsequent to the date of the guarantee.—*Re* **DUNCAN, Ex p. LITTLEJOHN** (1843), 3 Mont. D. & De G. 182; 12 L. J. Bcy. 31; 7 Jur. 474.

**PART II. SECT. 4, SUB-SECT. 3.—B. (b).**

*p. Advance before & after guarantee.]—***GRIMSHAW v. WOOLLEY** (1848), 12 L. L. R. 147.—**IR.**

97. — — —.]—B. gave to A. the following guarantee: "As you are about to enter upon transactions in business with C., with whom you have already had dealings, in the course of which C. may from time to time become largely indebted to you, in consideration of your doing so, I hereby agree to be responsible to you for & guarantee to you, the payment of any sums of money which C. now is, or may at any time be, indebted to you, so that I am not called upon to pay more than the sum of £2,000." There had been considerable dealings between A. & C. prior to the date of the guarantee, consisting of loans of money, payments made for, & goods supplied to C. by A., the credit upon which had not then expired, & those dealings had been to a small extent since continued:—*Held*: the guarantee disclosed a sufficient consideration, for the payment as well of the past as of the future debt.—*JOHNSTON v. NICHOLLS* (1845), 1 C. B. 251; 14 L. J. C. P. 151; 4 L. T. O. S. 95, 336; 9 Jur. 429; 135 E. R. 535.

*Annotations*:—*Apld.* *White v. Woodward* (1818), 5 C. B. 810. *Consd.* *Oldershaw v. King* (1857), 2 H. & N. 517. *Mentd.* *Saintor v. Ferguson* (1849), 7 C. B. 716.

98. — — —.]—*BOYD v. MOYLE*, No. 86, *ante*.

99. — — —.]—"In consideration of advances made & to be made by T. & S., or by any other persons of whom their firm may from time to time consist to F., we jointly & severally hereby guarantee to the said T. & S. the repayment of the said advances & to indemnify them against any loss by reason of such advances, our liability not to exceed the sum of £1,000. This guarantee to be a continuing guarantee, & to be a security to the said T. & S. to the extent of £1,000 as aforesaid for the whole of any balance which may from time to time, or at any time, become due to the said T. & S., or to the persons for the time being constituting the firm of the said banking-house":—*Held*: this guarantee disclosed a good consideration for the promise to pay past as well as future advances, the future advances having been made.—(*CHAPMAN v. SUTTON* (1846), 2 C. B. 631; 3 Dow. & L. 646; 15 L. J. C. P. 166; 135 E. R. 1095.

100. — — —.]—In an action on the following guarantee:—"In consideration of your having this day advanced to our client, D., £750, secured by his warrant of attorney, payable on Aug. 22 next, we hereby jointly & severally undertake to pay the same on default, etc. Dated June 20, 1840."—the declaration stated, that in consideration that *pltf.* would, on June 22, 1840, lend to one D. £750, on the security of a warrant of attorney, payable on Aug. 22 then next, & would forbear & give time to D. until Aug. 22, debt. promised, etc.:—*Held*: the instrument was sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee, & no amendment of the declaration was necessary.—(*GOLDSHEDE v. SWAN* (1847), 1 Exch. 154; 16 L. J. Ex. 284; 9 L. T. O. S. 248; 154 E. R. 65.

*Annotations*:—*Apld.* *Bainbridge v. Wade* (1850), 16 Q. B. 89. *Refd.* *Edwards v. Jevons* (1849), 8 C. B. 436; *Steele v. Hoo* (1849), 14 Q. B. 431; *Colbourn v. Dawson* (1851), 10 C. B. 766; *Broom v. Batchelor* (1856), 1 H. & N. 255; *Horlor v. Carpenter* (1857), 27 L. J. C. P. 1; *Wood v. Priestner* (1866), 4 H. & C. 681. *Mentd.* *Simpson v. Margitson* (1847), 11 Q. B. 23; *Bruff v. Conybeare* (1862), 9 Jur. N. S. 78; *Bruer v. Moore*, [1904] 1 Ch. 305.

101. — — —.]—The declaration on a guarantee stated that R. kept an account with a banking co., & was indebted to them in £800 for money advanced by them to him, & that it was proposed that they should advance to R. more money; & thereupon an agreement was entered

into between the co. & defts., & signed by defts., as follows:—"We, the undersigned, hereby indemnify (the co.) to the extent of £1,000, advanced or to be advanced to R., but the said indemnity to cease when the said R. shall have paid the sum of £1,000 to the credit of his account." The evidence was, that, at the time the guarantee was given, £1,400 was due from R. to the co. for money already advanced:—*Held*: the guarantee, construed with reference to the facts existing at the time it was given, did not disclose a good consideration, & if the preliminary averments in the declaration were to be taken as a statement of part of the consideration, they were put in issue by *non assumpsit*, & were not proved.

The words "advanced, or to be advanced" might fairly admit of the construction that future as well as past advances were meant; but the facts show that at the time this guarantee was given there was a debt of £1,400 due to the bank from R. & there is nothing upon the face of the instrument, & certainly nothing when the state of account between the bank & R. is looked at, to show that the parties contemplated a security for future advances to the extent of £1,000 (*WILDE, C.J.*).—(*BELL v. WELCH* (1850), 9 C. B. 154; 19 L. J. C. P. 184; 14 L. T. O. S. 397; 14 Jur. 432; 137 E. R. 851.

102. — — —.]—A bond was vested in a trustee, in trust as to income for a married woman for her life, with remainder, as to the corpus in trust for her issue, & in default of issue, in trust for such persons as the married woman alone, notwithstanding coverture, should by deed or instrument in writing, to be by her sealed & delivered in the presence of & attested by two credible witnesses, appoint. The husband being indebted to his bankers on the balance of an account current, the married woman deposited the bond with the bankers, with a letter signed by her, to the effect that, in consideration of the bankers paying, or having already paid, the cheques of the husband, or otherwise advancing him sums of money, she thereby guaranteed the repayment thereof; & that she deposited as a collateral security the bond which she undertook to assign to the bankers, on request:—*Held*: the consideration was sufficient, & the separate life interest of the wife was effectually charged; but the letter not having been executed & attested as required by the power, the *ct.* would not, under the circumstances, give effect to it as an appointment.—(*THACKWELL v. GARDINER* (1851), 5 De G. & Sm. 58; 21 L. J. Ch. 777; 19 L. T. O. S. 101; 16 Jur. 588; 64 E. R. 1017.

103. — — —.]—A guarantee given by *deflt.* to *pltf.* was as follows: "In consideration of the credit given by B. to E., I hereby agree to guarantee the payment of all bills of exchange drawn by the said B. & accepted by E. Also I hereby agree to guarantee the payment of any balance that may be due from the said E. to the said B. This guarantee to include all bills of exchange now running as well as the balance of account at this day." It appeared that at the time of the giving of the guarantee there were bills running & an account due from E. to B., & future dealings between the parties were contemplated:—*Held*: (1) the guarantee extended to future as well as to past transactions; (2) the principle of construction *ut res magis valeat quam pereat* applied.—(*BROOM v. BATCHELOR* (1856), 1 H. & N. 255; 25 L. J. Ex. 299; 27 L. T. O. S. 222; 4 W. R. 712; 156 E. R. 1190.

*Annotations*:—*As to* (1) *Refd.* *Hoad v. Grace* (1861), 5 L. T. 359; *Heffield v. Meadows* (1869), L. R. 4 C. P. 595.

**Sect. 4.—Consideration: Sub-sect. 3, B. (b), (c) & (d), & C. (a) & (b).]**

**104. ———.] —OLDERSHAW v. KING, No. 143, post.**

**105. ———.] —M. & Co., being indebted to plffs. to the amount of £41, deft. signed this guarantee: "I. V. hereby engages to be responsible for liabilities incurred by Messrs. M. & Co. to the extent of £50 to Messrs. C. & Co."—Held: in an action for plff.'s balance of account, from which it appeared that debts of more than £50 had been incurred & paid off by M. & Co. after the date of this guarantee, the contract created a liability on deft.'s part only for the amount due at the time the guarantee was made, & such sum as was immediately after credited by plffs. & which together made up to £50; & there was no continuing liability.**

We are asked to extend the words by reading them as if they were "incurred or to be incurred," but we cannot do so without manifest reason, especially in the case of a surety (BYLES, B.).—**CHALMERS v. VICTORS (1868), 18 L. T. 481; 16 W. R. 1046.**

Compare Nos. 83, 84, 87–89, ante.

(c) *Employment of Debtor.*

**106. Consideration for guarantee of fidelity.] —Plff. being about to take C. into his service, deft. gave him the following guarantee: "I do hereby agree to bind myself to be security to you for C., late in the employ of P., for whatever (while in your employ) you may entrust him with, to the amount of £50; in case of any default, to make the same good"—Held: by fair implication, this agreement disclosed a sufficient consideration for deft.'s promise.—**NEWBURY v. ARMSTRONG (1829), 6 Bing. 201; 3 Moo. & P. 509; 8 L. J. O. S. C. P. 4; 130 E. R. 1257.****

**Annotations:—Consd. Kennaway v. Treleavan (1839), 5 M. & W. 498. Rejd. Cole v. Dyer (1831), 9 L. J. O. S. Ex. 109; James v. Williams (1831), 3 B. & Ad. 1109.**

**107. ———.] —LYSAGHT v. WALKER, No. 1151, post.**

**108. ———.] —"Messrs. K. & Co.—Gentlemen, I hereby guarantee to you, Messrs. K. of E., the sum of £250, in case P. should default in his capacity of agent & traveller to you"—Held: it sufficiently appeared on the face of this instrument that the consideration was the future employment of P. as agent & traveller. **KENNAWAY v. TRELEAVAN (1839), 5 M. & W. 498; 9 L. J. Ex. 20; 3 Jur. 1034; 151 E. R. 211.****

**Annotations:—Rejd. Baring v. Grieco (1858), 31 L. T. O. S. 96; Williams v. Byrnes (1863), 1 Moo. P. C. C. N. S. 151. Mentd. Fishmongers' Co. v. Robertson (1813), 5 Man. & G. 131.**

(d) *Time Given to Pay or Forbearance to Sue.*

See Sub-sect. 3, C., post.

C. *Time Given to Pay or Forbearance to Sue.*

(a) *In General.*

See, generally, CONTRACT, Vol. XII., pp. 180 et seq.

**109. How far a consideration.] —Assumpsit cannot be maintained against a father, on a promise to pay in consideration of forbearing to sue a bond against his son, although the promise be made at the son's request.—**PYERS v. TURNER (1592), Cro. Eliz. 283; 78 E. R. 537.****

**PART II. SECT. 4, SUB-SECT. 3.—C. (a).**

**109 i. How far a consideration.] —DAVIES v. FUNSTON (1880), 45 U. C. R.**

**369.—CAN.**

**109 ii. ———.] —ISBELL DEAN CO. v. AVERY, [1923] 1 D. L. R. 708; 31 B. C. R. 502; [1923] 1 W. W. R. 441.**

**—CAN.**

**Assignment for benefit of creditors.] —SULIN v. JÄRVINEN (1907), 5 W. L. R. 189.—CAN.**

**110. — Promise by executor to pay testator's debt.] —PAPWORTH v. JOHNSON (1613), 2 Bulst. 91; 80 E. R. 984.**

**111. ———.] —GOODWIN v. WILLOUGHBY, No. 123, post.**

**112. ———.] —BEVEN v. COWLING, No. 124, post.**

**113. ———.] —A promise to pay the debt of another, in consideration that plff. *mitteret pro rei*, is sufficiently certain.—**BUCKLY v. TURNER (1670), 1 Mod. Rep. 43; 86 E. R. 718.****

**114. ———.] —Declaration, that K. was indebted to the firm of B. & S.; that plff. had been appointed by the Ct. of Ch. receiver of the debts of the firm, whereby K. became liable to pay plff. when requested; that in consideration of the premises, & that plff. as such receiver would give K. two months' time to pay, deft. promised to pay in case K. omitted to do so within that time. Breach, that K. omitted, & that deft. never paid:—Held: on arrest of judgment, sufficient authority appeared for plff. to contract & sue, & sufficient consideration for deft.'s promise.—**WILLATTS v. KENNEDY (1831), 8 Bing. 5; 1 Moo. & S. 35; 1 L. J. C. P. 4; 131 E. R. 301.****

**Annotation:—Mentd. Ward v. Shew (1833), 2 Moo. & S. 756.**

**115. ———.] —A debt being due to plff. from a client of deft., an attorney, the latter inclosed to plff. a bill of exchange accepted by his client for the amount, telling plff. that he might safely put his name to it as drawer & that he would see it paid:—Held: there was a sufficient consideration in the forbearance of plff. to proceed until the bill became due, to render deft. liable. **EMMOTT v. KEARNS (1839), 5 Bing. N. C. 559; 8 L. J. C. P. 329; 132 E. R. 1214; sub nom. EMMETT v. KEARNS, 7 Dowl. 630; 7 Scott. 687; 3 J. P. 629; 3 Jur. 436.****

**116. ———.] —Declaration by indorsee against indorser stated that W. & Co. made their bill of exchange, & directed the same to H., & then indorsed it to deft., who indorsed it to plffs. Plea, that W. & Co. were plffs.; that they were the makers of the bill & the persons who indorsed it to deft., & who were liable to him as such indorsers in the event of his paying the same. Replication, that before & at the time of the drawing of the bill by plffs. & the indorsement by deft., H. was indebted to plffs. in £40 12s.; that it was agreed between plffs. & H. that, in consideration that H. should procure deft. to indorse & become surety as indorser to plffs. of such bill, plffs. should give time to H. for payment of the said £40 12s.; that plffs. drew & indorsed the bill, & that deft. for the accommodation of H. indorsed the bill, with the intent of becoming security as indorser to plffs. of the said bill, & that plffs. gave time to H.:—Held: plffs.' agreement not to sue H. was a sufficient consideration for deft.'s guarantee.—**WILDERS v. STEVENS (1840), 15 M. & W. 208; 15 L. J. Ex. 108; 153 E. R. 824.****

**Annotations:—Mentd. Boulcott v. Woolcott (1847), 16 M. & W. 584; Wilkinson v. Unwin (1851), 7 Q. B. D. 636.**

**117. ———.] —(1) The declaration stated, that, by an agreement made between plff. & W. & D., it was agreed, that, in consideration of plff. agreeing to supply F. with timber to the value of £200, W. & D. severally agreed to guarantee to plff. the due payment of any amount for such timber not exceeding £200, within six months from the date of the sale of the timber; that,**



in pursuance of such agreement, pltf. supplied timber to the amount of £153 10s. 1d. to F.; that afterwards, & whilst the timber was unpaid for, & before the period of six months from the date of the sale had elapsed, pltf. became dissatisfied with such guarantee so given by W. & D.; & thereupon by another agreement between pltf. & deft., after reciting the guarantee, that pltf. had delivered timber to the value of £153 10s. 1d., & that pltf. was not satisfied with such guarantee, deft., at the request of W. & D., in consideration of the premises, & of pltf. forbearing to take any proceedings against W. & D., guaranteed to pltf. payment of the sum of £153 10s. 1d. on Dec. 13, then next. Breach, that, although pltf. had done all things on his part to entitle him to be paid by deft. the said sum of £153 10s. 1d., deft. had not paid the same, or any part thereof. Fourth plea, that pltf. had done everything on his part to entitle him to be paid by deft. the sum of £153 10s. 1d., inasmuch as he, pltf., did not forbear to take the proceedings in the declaration mentioned against W. & D., but, on the contrary, took such proceedings before Dec. 13, next after the making of the alleged agreement:—*Held*: on motion in arrest of judgment, pltf.'s forbearance to sue W. & D. before the day named, was a condition precedent to his right of action against deft. on the guarantee.

(2) *Seemle*: the guarantee imported a forbearance to sue W. & D. until Dec. 13 next after its date. —*ROLT v. COZENS* (1856), 18 C. B. 673; 25 L. J. C. P. 254; 27 L. T. O. S. 159; 2 Jur. N. S. 1073; 139 E. R. 1534.

*Annotation*:—As to (1) *Distd.* *Harris v. Venable* (1872), L. R. 7 Exch. 235.

118. — — No express agreement to forbear — **Forbearance in fact.** — [Pltf.'s agent to deft.: "I have this morning received the most peremptory instructions to settle this account. Be good enough to arrange something by to-morrow." Deft. in reply: "I undertake to pay £500 on the account between my late brother, H., & your client on or before this day three weeks." Pltf. did not expressly agree to forbear suing, but did in fact forbear for three weeks:—*Held*: the correspondence together with pltf.'s actual forbearance for three weeks to sue, constituted a good & binding promise to pay on the part of deft.

It is true that pltf. did not expressly agree to forbear suing for three weeks, but he did in fact forbear, & that, to me, independently of all authority appears to be a good consideration for deft.'s promise to pay (*KELLY, C.B.*).—*WYNNE v. HUGHES* (1873), 21 W. R. 628.

119. — — — — —]—A request to the creditor of another person, express or implied, to forbear suing the debtor, followed by forbearance, is good consideration for the promise of the person making the request to pay the debt, although there is no binding agreement to forbear.

Deft., in order to induce pltf. to give time to his father for the payment of a debt due from his father to pltf., made, together with his father, a joint & several promissory note, whereby they promised to pay pltf. on demand the amount of the debt, with interest thereon half-yearly. Afterwards pltf. forbore to demand payment of the debt for several years:—*Held*: in an action upon the promissory note, a request by deft. to give time

was implied, there was a good consideration for the note by deft., & he was liable on it.

If at the request of the guarantor the creditor does in fact forbear there is sufficient consideration to bind the guarantor. It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request (*LORD ESHER, M.R.*). —*CREARS v. HUNTER* (1887), 19 Q. B. D. 311; 57 L. T. 551; 35 W. R. 821; 3 T. L. R. 756; *sub nom.* *CREARS v. BURNYEAT*, 56 L. J. Q. B. 518, C. A.

*Annotation*:—*Mentd.* *Bulstee & Colmore v. Parker & Bulstee's Trustee in Bankruptcy* (1916), 32 T. L. R. 661.

120. Request by surety—Whether necessary]—*CREARS v. HUNTER*, No. 119, *ante*.

#### (b) Sufficiency of Right of Action.

*See, generally*, *CONTRACT*, Vol. XII., p. 195.

121. How far necessary—General rule.]—Where pltf. declared that A., since deceased, was indebted to him so much, & that after his death, in consideration of the premises, & that he, at the instance of deft., would forbear & give day of payment of the debt (not stating to whom he was to forbear) deft. promised, etc.:—*Held*: on demurrer to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to deft. or of detriment to pltf.: & unless there were some person whom pltf. could have sued for his debt his forbearance was no detriment to him.

It is not entitled to the name of forbearance, unless you show something or somebody to be forborne. If there be a right which can be enforced against anybody, no doubt that a promise to forbear is a good consideration, but if there be no person liable, how is it entitled to the name or quality of forbearance? (*LORD ELLENBOROUGH, C.J.*).

How does pltf. show any damage to himself by forbearing to sue, when there was no fund which could be the object of the suit; where it does not appear that any person *in rerum natura* was liable to be sued by him? No right can exist in this vague, abstract, & indefinite way. Right is a correlative term; there must be some object of right, some object of suit, some party who in respect of some fund, or some character known in the law, is liable. Otherwise there cannot be said to be any right. Has there been then, any suspension of pltf.'s right? Now, unless a right is capable of being exercised, unless it can be put into force, there can be no suspension of it. And that it could have been exercised or put in force, but for the promise made by deft. was not shown. Then what forbearance is shown? It must be a forbearance of a right which may be enforced with effect (*LORD ELLENBOROUGH, C.J.*). —*JONES v. ASHBURNHAM* (1804), 4 East, 455; 1 Smith, K. B. 188; 102 E. R. 905.

*Annotations*:—*Reid*, *Petch v. Lyon* (1816), 9 Q. B. 147; *Smith v. Hartley* (1851), 2 L. M. & P. 304.

122. — — — — —]—*PAPWORTH v. JOHNSON* (1613), 2 Bulst. 91; 80 E. R. 981.

123. — — — — —]—If I say to one "Do not trouble me, & I will give you so much," this is not actionable, for there ought to be a lawful ground, &

118 i. — — No express agreement to forbear.]—*NEVILLE v. JOSEPH* (1832), N. B. Dig. 397.—*CAN.*

118 ii. — — — — —]—Forbearance of

a claim against a third person is a sufficient consideration for a surety bond, although there may be no express contract by the obligee to forbear.—

*JAGADINDRA NATH ROY v. CHANDRA NATH PODDAR* (1903), L. L. R. 31 Cal. 242.—*IND.*



**Secl. 4.—(Consideration : Sub-secl. 3, C. (b), (c)**

for this cause the declaration is void, for it is only to avoid molestation. "Give me time." etc., this is no good *assumpsit*, for forbearance is no ground of action where he hath no cause to have debt (DODERIDGE, J.).

If a stranger saith, "Forbear such a debt of S., & I will pay it," it is a good consideration for the loss to plff. (DODERIDGE, J.).—GOODWIN v. WILLOUGHBY (1626), Poph. 177; Lat. 141; 79 E. R. 1273.

*Annotation :—Mentd.* Loyd v. Lee (1718), 1 Stra. 94.

124. —.—.]—If there be no consideration at the time, or no cause of action, the forbearance afterwards will not make it actionable (DODERIDGE, J.).

If an obligation be forfeited, & I say to the obligee, "Do not sue the obligor," or "Do not implead him," an action upon the case lies against me (*per Cur.*).—BEVEN v. COWLING (1626), Poph. 183; 79 E. R. 1277.

125. —.—.]—Here is a good consideration, for it is that plff. shall forbear to sue for the money generally, which goes to all the world, & it is not only to forbear to sue a particular person, but to forbear to sue for the money; & this forbearance may be a prejudice to the party, & a loss in not suing till that time (*per Cur.*).—HUME v. HINTON (1651), Sty. 304; 82 E. R. 730.

*Annotation :—Consd.* Jones v. Ashburnham (1801), 4 East, 455.

126. —.—.]—HODSON v. LEE, No. 70, *ante*.

127. —.— **Fraud on bankruptcy laws—Suppression of evidence of debt.**]—NEROT v. WALLACE, No. 146, *post*.

128. —.— **Claim not well founded—Whether material.**]—The declaration stated that debt. was solr. to a railway co.; that G. & S. were members of the committee; that they were indebted to plffs. in £1,000, which plffs. sought to recover by contributions from the committee; that plffs. had commenced an action against G., & intended to commence one against S. for the amount; that in consideration that plffs. at the request of debt., would cease to prosecute the one action & forbear to commence the other, debt. promised that if plffs. did not by May 1 ensuing realise the amount of their claim by contributions from the committee, he would pay them £30, in full satisfaction of all the claims of plffs. against G. & S. in connection with the railway co., etc. On demurrer:

*Held*: the declaration was good, the consideration of forbearance being sufficient whether there was any well founded claim or not, & although it was not alleged that debt. was a member of the co. or that the actions related to the affairs of the co. TEMPSON v. KNOWLES (1849), 7 C. B. 651; 137 E. R. 258; *sub nom.* TEMPSON v. KNOWLES, 18 L. J. C. P. 222; 13 L. T. O. S. 119.

*See, further, Sub-secl. 4, post.*

129. —.— **Compromise of doubtful claim.**]—MILES v. NEW ZEALAND ALFORD ESTATE CO., No. 134, *post*.

*See, further, Sub-secl. 4, post.*

**Forbearance relating to criminal acts.**]—*See Sub-secl. 1, post.*

(c) *Suspension of Pending Proceedings.*

130. **On writ of execution.**]—A promise to pay the debt & costs which plff. had recovered by

default against a third person, if that third person did not, in consideration that plff. would forbear to execute a *capias ullagatum*, will support an *assumpsit*.—JENNINGS v. HARLEY (1602), Cro. Eliz. 909; 78 E. R. 1132.

131. —.—.]—A. having recovered judgment against B. & a *fi. fa.* being delivered to the sheriff, in consideration that A. at the special instance & request of C. had requested the sheriff not to execute the writ C. promised to pay A. the debt & costs, together with the sheriff's poundage, bailiff's fees, & other charges. On a judgment by default & error brought:—*Held*: the promise was binding on C., though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, etc., was, nor that debt. had notice of such amount.—PULLIN v. STOKES (1794), 2 Hy. Bl. 312; 126 E. R. 568, Ex. Ch.

*Annotation :—Mentd.* Whitehead v. Greatham (1825), M'Cle. & Yo. 205.

132. —.—.]—*Assumpsit*, in consideration that plff., at the request of debt., would consent to suspend proceedings against A. on a *cognovit*, debt. promised to pay £30 on account of the debt, for which the *cognovit* was given, on Apr. 1 then next. Averment, that plff. did suspend proceedings on the *cognovit*. Plff., at the trial, proved the following agreement in writing: "Plff. having, at my request, consented to suspend proceedings against A., I do hereby, in consideration thereof, personally promise to pay £30 on account of the debt on Apr. 1."—*Held*: the consideration for the promise was sufficient, because it must be taken as a consent to suspend proceedings, at least, until Apr. 1.—PAYNE v. WILSON (1827), 7 B. & C. 423; 1 Man. & Ry. K. B. 708; 6 L. J. O. S. K. B. 107; 108 E. R. 781.

*Annotations :—Consd.* Elworthy v. Maunder (1828), 2 Moo. & P. 482. *Refd.* Oldershaw v. King (1857), 2 H. & N. 517.

133. **Withdrawal of bankruptcy petition.**]—(1) Plff. having presented a petition for winding up a co., debt. signed the following guarantee: "In consideration of your withdrawing the petition you have presented for winding up the co. called K. & Co., we agree to pay you all the costs you have incurred of & in relation to such petition, & to indemnify you against all costs (if any) you may be liable to pay to the co., or to any other parties appearing for or in reference to the petition. We further agree to guarantee the payment to you within eighteen months from this date, by the co. or the liquidator thereof, of the principal of your debt of £722." In an action on the second branch of the guarantee:—*Held*: the consideration applied to both promises; the consideration was the withdrawal of the then pending petition, & not the forbearing for eighteen months to proceed with any petition to wind up the co.; & such a consideration was sufficient to support the promise.

(2) *Qu.*: whether, if the presenting of a second petition had had the effect of preventing the co. from paying the debt, the surety would have been discharged.—HARRIS v. VENABLES (1872), L. R. 7 Exch. 235; 41 L. J. Ex. 180; 26 L. T. 437; 20 W. R. 974.

134. **Threatened litigation.**]—A co.'s articles provided that the co. should have a first & paramount lien on each member's share for his liabilities to the co. G., a shareholder, in 1882,

YOUNG v. MILNE (1910), 15 O. W. R. 379; 20 O. L. R. 336.—CAN.

1341. **Threatened litigation.**]—VAUGHAN v. RICHARDSON (1892), 21 S. C. R. 359.—CAN.

**PART II. SECT. 4, SUB-SECT. 3.—**

C. (c).

1301. **On writ of execution.**]—An action on an alleged guarantee by M. to pay the amount of plff.'s judgment

against the C., if plffs. would withdraw execution against C.:—*Held*: the circumstances indicated that it was not the intention of M. to shoulder personally C.'s liability in any event.—

mortgaged his shares to *pltf.* In 1883 the co. & shareholders threatened an action against G. in respect of alleged misrepresentations as to the value of property sold by G. to the co. G. signed a letter guaranteeing that certain dividends should be earned & paid by the co. during ninety years, or that he would pay the deficiency. The co. & shareholders thereupon abandoned their intention (if any) of suing G. *Pltf.* having brought an action against the co. & G., claiming a first charge on G.'s shares, the co. pleaded their articles & G.'s undertaking. The trial judge was of opinion on the evidence that, though no case of misrepresentation by G. was shown, yet the consideration for his undertaking, though not expressed, was that the threatened proceedings against him should not be taken, & that the consideration for G.'s undertaking was sufficient, whether the co. had reasonable grounds for their threatened action or not, if they were acting *bonâ fide*. On appeal:—*Held*: the compromise of the threatened claim, whether good in law or not, if made *bonâ fide*, would have been a sufficient consideration for the guarantee; but the evidence did not show a binding contract to compromise the threatened litigation.—*MILES v. NEW ZEALAND ALFORD ESTATE CO.* (1886), 32 Ch. D. 266; 55 L. J. Ch. 801; 54 L. T. 582; 34 W. R. 669, C. A.

*Annotations*:—*Reid*, *Crears v. Hunter* (1887), 19 Q. B. D. 341; *Milson v. Stafford* (1899), 80 L. T. 590; *Fullerton v. Provincial Bank of Ireland*, [1903] A. C. 309. *Mentd.* *Kingsford v. Oxenden* (1890), 55 J. P. 182; *Law v. Law*, [1905] 1 Ch. 140; *Reeve v. Jennings*, [1910] 2 K. B. 522; *Glegg v. Bromley*, [1912] 3 K. B. 174; *Jayavickreme v. Amata-suriya*, [1918] A. C. 869.

**Proceedings in bankruptcy.**—*See* Sub-sect. 4, *post*.

**Proceedings in respect of crime.**—*See* Sub-sect. 4, *post*.

#### (d) Length of Time Forborne.

##### 135. Sufficiency of—Definite time—Fortnight.]

*CLYPSAM v. MORRIS* (1668), 1 Vent. 9; 1 Lev. 218; 1 Sid. 396; 86 E. R. 7; *sub nom.* *CLYPSAM v. MORRIS*, 2 Keb. 401, 443, 453.

*Annotation*:—*Reid*, *Abbot v. Moor* (1669), 2 Keb. 543.

136. ——— Indefinite time—Short time.]—Forbearance for a short time, is not a good consideration.—*LUTWICH v. HUSSEY* (1583), *Cro. Eliz.* 19; 78 E. R. 286.

137. ———]—A promise to forbear indefinitely is not a good consideration in *assumpsit*; but where a time certain is named for payment a request before the day is not necessary.—*PHILLIPS v. SACKFORD* (1595), *Cro. Eliz.* 455; 78 E. R. 694.

138. ——— **Magnum tempus.**—*Assumpsit* on a promise in consideration that *pltf.* would forbear *per magnum tempus* to sue another person on his bond, is good.—*MAPES v. SIDNEY* (1624), *Cro. Jac.* 683; 70 E. R. 592.

*Annotations*:—*Distd.* *Oldershaw v. King* (1857), 2 H. & N. 399. *Mentd.* *Bourn v. Mason & Robinson* (1669), 2 Keb. 457.

139. ———]—*PAYNE v. WILSON*, No. 132, *ante*.

140. ——— Fixed time from death of living person.]—*TANNER v. MOORE*, No. 415, *post*.

141. ———]—*CREARS v. HUNTER*, No. 119, *ante*.

142. ——— Reasonable time.]—*JOHNSON v. WHITCHOTT* (1639), 1 Roll. Abr. 24, *pl.* 33.

*Annotations*:—*Reid*, *Day v. Garely* (1676), 3 Keb. 710; *Payne v. Wilson* (1827), 7 B. & C. 423; *Oldershaw v. King* (1857), 29 L. T. O. S. 364.

143. ———]—(1) In Aug. 1848, *deft.* entered & gave the following guarantee to O.: "I am aware that my uncles J. & K. stand considerably indebted to you for professional business

& for cash advanced to them, & that it is not in their power to pay you at present, & as in all probability they will become further indebted to you, though I by no means intended that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past or future transactions between you & my said uncles to a certain extent & therefore, in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage & agree to guarantee you in payment of any sum they may be indebted to you upon the balance of accounts at any time during the next six years to the extent of £1,000 whenever called upon by you to pay the same, & after twelve months previous notice." At the date of the guarantee J & K. were indebted to O. in the sum of £513. Subsequently O. advanced large sums of money to J. & K., & dealings went on till Jan. 1849, when the debt due from them to O. amounted to £2,184:—*Held*: the guarantee was founded on a sufficient consideration, & further advances having been made & time given, it bound *deft.*

(2) The consideration for the promise to guarantee was the keeping the account open & making further advances (*per Cur.*).

(3) An agreement to forbear for a reasonable time is a good consideration to support a promise to guarantee a debt due from a third person (*per Cur.*).—*OLDERSHAW v. KING* (1857), 2 H. & N. 517; 27 L. J. Ex. 120; 29 L. T. O. S. 364; 3 Jur. N. S. 1152; 5 W. R. 753; 157 E. R. 213, Ex. Ch.

*Annotations*:—As to (1) *Consd.* *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266; *Crears v. Hunter* (1887), 19 Q. B. D. 341. *Reid*, *Liversidge v. Broadbent* (1859), 4 H. & N. 603; *Coles v. Pack* (1869), L. R. 5 C. P. 65; *Barber v. Mackrell* (1892), 67 L. T. 108. As to (3) *Consd.* *Wynne v. Hughes* (1873), 21 W. R. 628. *Reid*, *Hond v. Grace* (1861), 7 H. & N. 494; *Westhead v. Sproson* (1861), 6 H. & N. 728. *Re* *Crough, Bradford Commercial Banking Co. v. Cure* (1885), 31 Ch. D. 324; *Henton v. Paddison* (1893), 68 L. T. 405; *Fullerton v. Provincial Bank of Ireland*, [1903] A. C. 309; *Glegg v. Bromley*, [1912] 3 K. B. 474. *Generally*, *Mentd.* *Gumm v. Fowler* (1860), 2 E. & E. 890; *Reichel v. Oxford* (Bp.) (1887), 35 Ch. D. 48.

144. No definite time mentioned—Whether presumption of reasonable time.]—(1) A declaration stated, that L. made his promissory note payable to *pltf.*: that the note being in *pltf.*'s hands overdue & unpaid, in consideration that *pltf.* would forbear & give time to L. for payment of the note, to wit, for a reasonable time, *deft.* promised to pay the note, in case L. should make default. It then alleged that L. made default, & that *deft.* did not pay the amount of the note. *Plea*, *non assumpsit*. At the trial it appeared that *deft.*, having agreed to guarantee the payment of the note by L., indorsed on the back thereof as follows: "I guarantee the payment of the within note by L., the maker, on Nov. 2 next." On that day, the note being due & dishonoured, *deft.* signed the following memorandum, addressed to *pltf.*:—"Sir, I request you will hold over the promissory note in your favour, of L., dated July 31, 1844, for £200, at three months, & in consideration of your so doing, I undertake to continue in all respects my guarantee of the same."—*Held*: the guarantee was defective; & there was no evidence to support the declaration.

(2) *Semble*: the declaration was bad, in stating the consideration to be forbearance to sue for a reasonable time.

(3) In a case like the present, what definite idea can you attach to forbearance for a reasonable time? The meaning of the words may depend

*Sect. 4.—(Consideration: Sub-sect. 3, C. (d); sub-sects. 4 & 5, A.)*

upon the character of the party—whether he is litigious, or whether he is mild & somnolent. The cases in which the law implies a reasonable time are those in which the particular act requires some time to do it (ALDERSON, B.).—*SEMPLE v. PINK* (1847), 1 Exch. 71; 9 L. T. O. S. 229; 154 E. R. 31; *sub nom.* *TEMPLE v. PINK*, 16 L. J. Ex. 237.

*Annotations:—As to (1) Dtd. Oldershaw v. King* (1857), 2 H. & N. 517; *Coles v. Pack* (1869), L. R. 5 C. P. 65. *Consd. Wynne v. Hughes* (1873), 21 W. R. 628.

145. ———.]—*HENTON v. PADDISON*, No. 507, *post*.

*Compare, CONTRACT*, Vol. XII., p. 212, Nos. 1701, 1702.

#### SUB-SECT. 4. CONSIDERATION BASED ON ILLEGAL TRANSACTIONS.

146. **Fraud on bankruptcy laws—Concealment of assets.**—A promise made by a friend of the bkpt. when he was on his last examination, that, in consideration that the assignees & comrs. would forbear to examine him touching certain sums which he was charged with having received & not accounted for, he would pay such sums as the bkpt. had received & not accounted for:—*Held*: void, as being against the policy of the bkpey. laws.

*Qu*: if the creditors had consented to the agreement, whether that would have varied the case.

In order to found a consideration for a promise, it is necessary that the party by whom the promise is made should have the power of carrying it into effect, and secondly that the thing to be done should in itself be legal. The consideration for this promise is void on both these grounds. The assignees have no right to control the discretion of the comrs., & it would be criminal in them to enter into such an agreement, because it is their duty to examine the bkpt. fully, & the creditors may call on them to perform it (ASHHURST, J.).—*NEROT v. WALLACE* (1789), 3 Term Rep. 17; 100 E. R. 432.

*Annotations:—Distd. Kaye v. Bolton* (1795), 6 Term Rep. 131. *Mentd. Bowen v. Morris* (1810), 2 Taunt. 374; *Jackson v. Pesked* (1813), 1 M. & S. 234; *Whitehead v. Groomham* (1825), M'Cle. & Yo. 205; *Re McHenry, McDermott v. Boyd, Levita's Claim*, [1894] 3 Ch. 365.

147. — **Concealment of indebtedness.**—*Assumpsit* on debt.'s guarantee for a debt due from S. to plff., the promise alleged being that, if plff. would give S. a written acknowledgment that plff. had no legal claim on S., debt. would be answerable for the amount, with an averment that plff. wrote & sent such acknowledgment to S. Plea, that S. was a trader within the Bkpey. Acts, & a prisoner in execution for debt, owing £300 & upwards, & was desirous of petitioning the Ct. of Bkpey. for an *interim* order of protection under Execution Act, 1814 (c. 90), s. 6, & in support of such petition, of falsely representing himself to the ct. as owing less than £300: & that debt., at the request of S., gave the guarantee above stated, with the intent, on the part of S. & debt., that S. should be the better able falsely to make such representation; averment, that plff. knew the corrupt purpose for which the guarantee was given, & with such knowledge, accepted it, & assented to write the acknowledgment for the purpose of aiding S. in making the false representation, etc. Replication, *de injuria*:—*Held*: debt. was entitled to a verdict on the evidence; & plff. was not

entitled to judgment *non obstante veredicto*.—*COLES v. STRICK* (1850), 15 Q. B. 2; 117 E. R. 358.

148. — **Where agreement to pay creditors in full—Whether fraud committed.**—A covenant by a friend of a bkpt. to pay all his creditors their full debts in consideration that they will not proceed any further under the commission, is good in law.

This seems to be a fair agreement & not contrary to the policy of the bkpey. laws. The object of those laws is to have an equal distribution of the bkpt.'s effects among his creditors: that will not be defeated by a friend of the bkpt. undertaking, with the consent of all the parties concerned (not to divide among the creditors a fund which was probably insufficient for that purpose, but) to pay every creditor his full debt (LORD KENYON, C.J.).—*KAYE v. BOLTON* (1795), 6 Term Rep. 134; 101 E. R. 474.

149. — **Fraudulent preference.**—Bond to secure to one creditor the deficiency of a composition, not communicated to the other creditors, decreed to be delivered up, with costs, though to *particeps criminis*; in these cases, proceeding upon public policy, the relief being given on account, not of the individual, but of the public.—*JACKMAN v. MITCHELL* (1807), 13 Ves. 581; 33 E. R. 412.

*Annotations:—Folld. Wood v. Barker* (1865), L. R. 1 Eq. 139. *Refd. Wells v. Girling* (1819), 4 Moore, C. P. 78; *McKewan v. Sanderson* (1873), L. R. 15 Eq. 229; *McKewan v. Sanderson* (1875), L. R. 20 Eq. 65. *Mentd. Lee v. Lookhart* (1837), 3 My. & Cr. 302; *Simpson v. Howden* (1837), 3 My. & Cr. 97; *Mare v. Sandford & Sandford* (1859), 5 Jur. N. S. 1339; *Re McHenry, McDermott v. Boyd, Levita's Claim*, [1894] 3 Ch. 365.

150. ———.]—A creditor, in respect of two demands, seized the goods of B., his debtor, under an execution for one of the two debts, & afterwards, at a meeting of some of the creditors of B., when a composition was proposed, declared that he would not agree to the composition, unless the debt for which the goods had been seized were secured to him; C., who was not a creditor, guaranteed the debt, & A. withdrew his execution, & signed the composition deed:—*Held*: the bargain was a fraud upon the rest of the creditors, & void.—*COLEMAN v. WALLER* (1829), 3 Y. & J. 212; 148 E. R. 1156.

*Annotation:—Mentd. Pfeiffer v. Browne* (1860), 28 Beav. 391.

151. ———.]—A., being about to compound with his creditors, in order to induce B., one of them, to execute the deed, without the knowledge of the other creditors gave him two promissory notes for £25 each beyond the amount of the composition. Upon the first of these becoming due it was dishonoured, & an action was brought upon it, & judgment obtained & execution issued. C., who was a party to the notes, in consideration of A.'s forbearing to enforce the judgment, gave him a guarantee for the amount of the judgment & the outstanding note; & thereupon the two notes were given up:—*Held*: the guarantee was tainted with the original fraud, & could not be enforced, notwithstanding part of the consideration for it was the giving up a judgment in an action in which the illegality might have been but was not pleaded.—*CLAY v. RAY* (1861), 17 C. B. N. S. 188; 144 E. R. 76.

*Annotation:—Mentd. Re Lenzberg's Policy* (1877), 7 Ch. D. 650.

152. ———.]—On a bill by a bkpt., who had compounded with his creditors for eight shillings in the pound, & where bkpey. had been annulled, the ct. set aside, with costs, a secret bargain, whereby bkpt. agreed to pay one creditor in full, in consideration of his becoming surety for payment of the composition.—*WOOD v. BARKER*

(1865), L. R. 1 Eq. 139; 35 L. J. Ch. 276; 13 L. T. 318; 11 Jur. N. S. 905; 14 W. R. 47.

153. —[A banker holding bills & acceptances as a security for advances made to a customer took a guarantee from the brother of the customer that the loss of the bank should not exceed £2,000. This transaction took place after the customer had commenced proceedings for the liquidation of his affairs, & unknown to his other creditors, with a view to prevent the bank from opposing a composition. On a bill filed by the banker to enforce performance of the agreement:—*Held*: the arrangement, which would have the effect of giving one creditor a secret advantage over the others, could not be sustained, and the bill must be dismissed with costs.—*McKewan v. SANDERSON* (1875), L. R. 20 Eq. 65; 41 L. J. Ch. 447; 32 L. T. 385; 23 W. R. 607.

154. *Evasion of excise.*—[A. B., & C. entered into an agreement by which A. contracted to let & B. to take certain rooms belonging to A. a licensed victualler, & within premises for which A. was licensed. C. guaranteed the payment of the rent, etc., by B. To an action on the agreement by A. against C. on default of payment by B., C. pleaded that the agreement was made for the express purpose, object and intent of enabling B. to use the said rooms so as to evade the law of excise:—*Held*: the plea was a sufficient answer to the action, the agreement being void for illegality.—*RITCHIE v. SMITH* (1818), 6 C. B. 462; 3 New Mag. Cas. 54; 18 L. J. C. P. 9; 12 L. T. O. S. 148; 12 J. P. 822; 13 Jur. 63; 136 E. R. 1320.

*Annotations*:—*Mentd.* *Frost v. Hill* (1851), 15 C. B. 207; *Ramsden v. Lupton* (1873), 43 L. J. Q. B. 17; *Barton v. Mur* (1871), L. R. 6 P. C. 131; *Mellor v. Lydiate*, [1914] 3 K. B. 1141.

155. *Stifling prosecution.*—[In an action on a bond in the penal sum of £1,100, the declaration charged that the bond was given by deft. to plffs., as trustees of a friendly society, subject to a condition thereunder written, whereby, after reciting that certain moneys to the amount of £1,400 were stated to be owing from S., to plffs., as such trustees, & it had been agreed that deft. should secure to plffs. the sum of £700, part of such debt, the condition of the bond was declared to be, etc., & averred that deft. had not paid the said £700 or the said penalty. Plea 2. That S. had been treasurer of the said society & there was a deficiency in his accounts as such treasurer of a sum of £1,700, & the said trustees had caused a warrant to be issued for his apprehension, with a view to proceed criminally against him for an alleged felony in respect of the said money, & thereupon it was agreed between the said trustees & deft. that, instead of proceeding criminally against the said S., the trustees should accept payment of £1,000 in cash, in part of such deficiency, & take deft.'s bond for £1,400 as security for payment of £700, other part of such deficiency, & the bond in the declaration mentioned was delivered & accepted by the trustees, in pursuance of the said illegal agreement, & upon & for no other consideration. Plea 3. As a defence on equitable grounds, deft. repeated the allegations in plea 2, to the effect that S. had been treasurer of the said society, & that there was a deficiency of a large sum in his accounts, in respect of which the trustees alleged that he had committed a felony, & had caused a warrant to be taken out

for his apprehension; & further, that the said bond was executed & delivered by deft. to plffs. as such trustees, upon & subject to certain terms & condition then agreed upon between the said trustees & deft. & other persons, on behalf of S., i.e., upon the terms & conditions that all prosecution of S. by the society or by any of its members should cease. Deft. alleged that all prosecutions of S. did not cease, but, on the contrary, he was prosecuted by two members of the said society, & tried & acquitted of the several charges preferred against him. Averment, that all things happened to entitle him in equity to an unconditional injunction to restrain plffs., as such trustees, from suing on the said bond. On demurrer:—*Held*: the pleas were good, in answer to the action on the bond as showing an illegal agreement to stifle a prosecution.—*CANNON v. RANDS* (1870), 23 L. T. 817; 11 Cox, C. C. 631.

156. —[The secretary of a building society who had made default & was threatened by the society with a prosecution for embezzlement, applied for assistance to plffs., & they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which plffs. made themselves responsible, & in pursuance of that undertaking they gave two promissory notes to the society. Plffs. in giving the undertaking were actuated by the desire to prevent the prosecution, & this was known to the directors of the society: *Held*: it was an implied term of the agreement that there should be no prosecution, the agreement was founded on an illegal consideration & void, & the promissory notes ought to be set aside.—*JONES v. MERIONETH PERMANENT BENEFIT BUILDING SOCIETY*, [1892] 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 8 T. L. R. 133; 36 Sol. Jo. 108; 17 Cox, C. C. 389, C. A.; *affy.*, [1891] 2 Ch. 587.

*Annotation*:—*Refd.* *McClatchie v. Haslam* (1891), 65 L. T. 691.

*Discharge from illegal arrest for debt.*—*See CONTRACT*, Vol. XII., p. 208, Nos. 1676-1678.

*Indemnifying bail.*—*See Part XII., Sect. 3, post.*

#### SUB-SECT. 5.—PAST CONSIDERATION.

##### A. In General.

*See, generally*, *CONTRACT*, Vol. XII., pp. 213 *et seq.*

157. *Insufficiency of past consideration—Debts already contracted.*—[*Semble*: a promise made by a husband after the death of his wife to pay for goods sold to her while living as a *feme sole* trader, will not support an action; for it is an undertaking for which there is no legal consideration.—*PABIAN v. PLANT* (1691), 1 Show. 183; 80 E. R. 525.

*Annotation*:—*Mentd.* *Lavie v. Phillips* (1765), 3 Burr. 1776.

—[*Wood v. BENSON*, No. 83, *ante*.

159. —[No consideration is to be implied from an undertaking as follows:—“C. of B. about to proceed thither, having incurred an account with you amounting to £49 5s. with the understanding that he is to transmit the amount to you three months after he shall have arrived at B., we guarantee his performance of the said

#### PART II. SECT. 4, SUB-SECT. 4.

155 l. *Stifling prosecution.*—[S. gave a guarantee for the payment of debts due by H. As a consideration for

this guarantee, the creditors were to abstain from taking criminal proceedings against H. for fifteen days, & by implication were to abstain from taking such proceedings altogether if

the debts were paid within that time:—*Held*: such guarantee could not be enforced.—*KESHOWJI TULSIDAS v. HURJIVAN MULJI & SHANKUVARAHU* (1887), L. L. R. 11 Bom. 566.—*IND.*

**SECT. 4.—Consideration: Sub-sect. 5, A. & B. Part III. Sect. 1: Sub-sect. 1, A., B. & C.]**

engagement; &, in failure thereof, we will be responsible to you."—*ELLIS v. LEVY* (1835), 1 Scott, 669; 4 L. J. C. P. 294.

**160.** ———.]—*FRENCH v. FRENCH*, No. 63, ante.

**161.** ———.]—In *assumpsit* by payee against maker, on a promissory note payable on demand, with interest, deft. pleaded that the note was made by deft. as a collateral security for a debt, due from S., to plff.; that deft. was not, at the time of making the note, or ever, liable to pay the debt, or to give the note as a security for the same; & that there never was any other consideration for the making of the note, save as aforesaid:—*Held*: a sufficient plea of no consideration, after verdict. *CROFTS v. BEALE* (1851), 11 C. B. 172; 20 L. J. C. P. 186; 17 L. T. O. S. 172; 15 Jur. 709; 138 E. R. 436.

*Annotations*:—*Consd.* *CROSS v. HUNTER* (1887), 19 Q. B. D. 341. *Merid.* *CURRIE v. MISA* (1875), L. R. 10 Exch. 153.

— **Future dealings contemplated in way of trade—How far good consideration.**—See Sub-sect. 3, B. (a) & (b), ante.

**162. Consideration moved by precedent request—Subsequent promise to pay—Effect of promise.]**

*Assumpsit* will lie on a subsequent promise for money paid as surety in consequence of a precedent request, although the consideration is executed.—*SIDNAM v. WORTHINGTON* (1585), 1 Cro. Eliz. 42; 78 E. R. 306; *sub nom.* *SIDENHAM & WORTHINGTON'S CASE*, 2 Leon. 221.

**163.** ———.]—*THORNER v. FIELD* (1611), 1 Bulst. 120; 80 E. R. 816.

**Securities given in respect of antecedent debt.]**—See *CONTRACT*, Vol. XII., pp. 92, 173, 212, 218, Nos. 567, 1271, 1701, 1781.

*B. Words Importing either Past or Future Consideration.*

See Part IV., post.

## Part III.—Proof of Guarantee.

### SECT. 1.—STATUTORY PROVISIONS.

#### SUB-SECT. 1.—THE STATUTE OF FRAUDS.

A. "No Action shall be brought."

Operation of Stat. Frauds generally, see *CONTRACT*, Vol. XII., pp. 161, 171.

**164. Verbal guarantee enforced by court—Undertaking by solicitor.]**—Even supposing the undertaking to be void by Stat. Frauds this ct. may, nevertheless, exercise a summary jurisdiction over one of its own officers, an attorney of the ct. The undertaking was given by the party in his character of attorney, & in that character the ct. may compel him to perform it. An attorney is consunt of the law; & if he give an undertaking which he must know to be void, he shall not be allowed to take advantage of his own wrong, & say that the undertaking cannot be enforced (*per CUR.*).—*Re GREAVES* (1827), 1 Cr. & J. 374, n.; 1 Dowl. at p. 468; 118 E. R. 1466.

*Annotations*:—*Folld.* *Re Paterson* (1832), 1 Dowl. 168; *Re Hillard* (1815), 2 Dow. & L. 919. *Reid.* *Evans v. Duncombe* (1831), 1 Cr. & J. 372.

**165.** ———.]—*Seemle*: the ct. will compel an attorney to perform an undertaking entered into by him, notwithstanding it is void by Stat. Frauds, & no action can be brought upon it.—*EVANS v. DUNCOMBE* (1831), 1 Cr. & J. 372; 9 L. J. O. S. Ex. 82; 118 E. R. 1465; *sub nom.* *EVANS v. DUNCAN*, 1 Tyr. 283.

**166.** ———.]—Where an attorney of one ct. gives his undertaking as an attorney for a debt & costs in an action in another, the ct. of which he is an attorney will compel him to fulfil his undertaking though void by Stat. Frauds.—*Re PATERSON* (1832), 1 Dowl. 468.

**167.** ———.]—Where the attorney of deft. had given an undertaking to pay the debt, in consequence of which plff. stayed proceedings; the ct. enforced the undertaking; although it was void under Stat. Frauds, s. 4.—*Re HILLIARD*,

*Ex p. SMITH* (1815), 1 New Pract. Cas. 185; 2 Dow. & L. 919; 14 L. J. Q. B. 225; 5 L. T. O. S. 58, 59; 9 Jur. 664.

*Annotations*:—*Consd.* *United Mining & Finance Corpn. v. Becher*, [1910] 2 K. B. 296. *Reid.* *Swiny v. Hailand*, [1894] 1 Q. B. 707.

See, generally, SOLICITORS.

**168. Agreement prevented by fraud from being put into writing.]**—Plea of Stat. Frauds allowed, the agreement not being in writing; though a parol agreement was confessed by the answer.

If you interpose the medium of fraud by which the agreement is prevented from being put into writing I agree [it takes the case out of the statute] (*LORD THURLOW, C.*).—*WHITCHURCH v. BEVIS* (1789), 2 Bro. C. C. 559; 2 Dick. 664; 29 E. R. 300, 1. C.

*Annotations*:—*Consd.* *Cooth v. Jackson* (1801), 6 Ves. 12; *Spurrier v. Fitzgerald* (1801), 6 Ves. 518. *Reid.* *Cooke v. Tombs* (1791), 2 Aust. 120; *Barkworth v. Young* (1856), 4 Drew. 1.

**169. Plea of tender by defendant.]** A promise to pay the debt of another need not be proved to be in writing when deft. pleads a tender to the count on such promise.—*MIDDLETON v. BREWER* (1790), Peake, 20, N. P.

**170. Money paid under verbal guarantee not recoverable.]**—The agent for the grantee of several annuities delivered him four accounts in the course of eighteen months, & gave him credit for all the half-yearly instalments of the several annuities then due, but stated that some of them had not been received. He charged commission on all the instalments, & paid the balance of the accounts as if they had been received, & in the later accounts never brought forward those sums, nor intimated that he expected them to be repaid:—*Held*: upon this evidence the jury were properly told by the judge, that they might infer an agreement whereby the agent made himself personally responsible for the payment of those annuity instalments in default of payment by the grantors.—*SHAW v. WOODCOCK* (1827), 7 B. & C. 73; 9

### PART II. SECT. 4, SUB-SECT. 5.—A.

**162 I. Consideration moved by precedent request—Subsequent promise to**

pay.] The execution by A., at B.'s request, of a bill of sale of a vessel to C.:—*Held*: a sufficient consideration to support a subsequent express

promise by B. to pay on C.'s default.—*BRADFORD v. ROULSTON* (1858), 5 I. C. L. R. 468.—*IR.*

Dow. & Ry. K. B. 889; 5 L. J. O. S. K. B. 294; 108 E. R. 652.

*Innovations*.—**Mentd.** Wakefield v. Newbon (1841), 6 Q. B. 276; Oates v. Hudson (1851), 20 L. J. Ex. 284.

**Executor's right of retainer to enforce verbal guarantee.**—*See* EXECUTORS, Vol. XXIII., pp. 377 *et seq.*

**Plea of Statute of Frauds.**—*See* Part V., Sect. 7, sub-sect. 1, *post*.

### B. "Any Special Promise."

**171. Indemnity implied by law.**—Pltf. repaired certain leasehold premises held by deft. under a covenant to repair, on a parol promise by deft. to assign him his lease.—*Held*: deft., upon refusal to assign, was liable on an implied *assumpsit* to pay pltf. for such repairs.

Deft. has expended this money for the benefit, & at the instance of deft.; the law will therefore imply a promise not touched by the statute [Stat. Frauds, s. 4], nor within the danger of perjury guarded against by it; the agreement is executed on the part of pltf. & deft. is legally liable to remunerate him for what he has done (BEST, C.J.).—**GRAY v. HILL** (1826), 1 Ky. & M. 420, N. P.

*Annotation*.—**Distd.** Hopkins v. Richardson (1841), 11 L. J. Q. B. 80.

**172. Promise to procure signature to guarantee.**—(1) Pltfs., owners of a ship hired on charter-party by S., refused to let her sail till certain disputes about the freight between them & S. were settled, by S. giving security: whereupon deft., in consideration that pltfs. would let S. sail without giving security, undertook to get M. to sign the guarantee hereunder set forth, & deliver it to pltfs. in a week:—*Held*: this was not an undertaking for the debt, default, or miscarriage of another, within Stat. Frauds.

(2) The guarantee to be signed by M. was as follows:—"Whereas S. has hired your ship for six months from July 12, 1830, & such longer time as his intended voyage may require, & has paid or secured the freight for six months, from Aug. 20, 1830, & is about to leave England, I guarantee the payment of freight which shall accrue for any portion of the voyage after the six months:—"*Held*: an undertaking within Stat. Frauds, & insufficient for want of a consideration apparent on the face of it; & consequently that only nominal damages could be recovered against deft. for failing to procure M.'s signature, according to his promise.—**BUSHELL v. BEAVAN** (1834), 1 Bing. N. C. 103; 4 Moo. & S. 622; 3 L. J. C. P. 279; 131 E. R. 1056.

*Annotation*.—*As to* (2) **Distd.** Caballero v. Slater (1851), 23 L. J. C. P. 67.

**173. Promise to give guarantee.**—Pltf. had contracted to supply goods to C. & Co. to be paid for in cash on each delivery. C. & Co. being desirous of obtaining the goods at a month's credit instead of cash, deft., who had an interest in the performance of the work upon which the goods were to be used, promised pltf. that, if he would supply the goods to C. & Co., drawing upon them at one month, & would allow him, deft., 3 per cent. upon the amount of the invoice, he would pay pltf. cash, & take C. & Co.'s bill "without recourse," in other words, buy the bill of him:—*Held*: this was a contract to answer for the debt

or default of another, within Stat. Frauds, s. 4.—**MALLET v. BATEMAN** (1805), L. R. 1 C. P. 163; Har. & Ruth. 109; 35 L. J. C. P. 40; 13 L. T. 410; 12 Jur. N. S. 122; 14 W. R. 225, Ex. Ch. *Annotation*.—*Reid.* Davys v. Buswell, [1913] 2 K. B. 47.

**174. Promise to allow retention of salary.**—H., who was agent for pltfs., being desirous of retiring, deft. applied for the agency. H. was indebted to pltfs., & also claimed a commission for introducing customers. It was agreed that pltfs. should allow H. £52 on that account, & that deft. on taking the agency should allow pltfs. to retain six months' salary, which amounted to £52. In an action by pltfs. for money received by deft. as such agent, to which deft. pleaded a set-off for six months' salary:—*Held*: this was not an undertaking to answer for debt of another within Stat. Frauds, s. 4.

If a person agrees that whatever shall hereafter become due to him shall be disposed of in a particular way, such an agreement need not be in writing (POLLOCK, C.B.).—**WALKER v. HILL** (1860), 5 H. & N. 419; 157 E. R. 1244.

### C. "Debt, Default or Miscarriage."

**175. "Default"—Non-return of horse let on hire.**—**BIRKMYR v. DARNELL**, No. 2, *ante*.

**176. —Liability for tort.**—A. had wrongfully, & without the licence of B., ridden his horse, & thereby caused its death:—*Held*: a promise by a third person to pay the damage thereby sustained, in consideration that B. would not bring any action against A., was a collateral promise within Stat. Frauds, & should be in writing.

Now the word "miscarriage" has not the same meaning as the word "debt" or "default"; it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave & licence, & thereby causing its death, is clearly an act for which the party is responsible in damages; & therefore, in my judgment, falls within the meaning of the word "miscarriage" (ABBOTT, C.J.).

I think the term miscarriage is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract. . . . & I think that both the words "miscarriage" & "default" apply to a promise to answer for another with respect to the non-performance of a duty though not founded upon a contract (HOLROYD, J.).—**KIRKHAM v. MARTER** (1819), 2 B. & Ald. 613; 106 E. R. 490.

*Annotation*.—*Mentd.* Chapman v. Elty (1812), 1 Man. & G. 631.

**177. —Liability for debt payable in futuro.**—If there was a contract with reference to a liability not existing at the time by reason of the debt not being due at the time but being payable *in futuro* that would come under the word "default" (WILLES, J.).—**MOUNTSTEPHEN v. LAKEMAN** (1871), L. R. 7 Q. B. 196; 41 L. J. Q. B. 67; 25 L. T. 755; 36 J. P. 261; 20 W. R. 117, Ex. Ch.; *affd.* *sub nom.* LAKEMAN v. MOUNTSTEPHEN (1874), L. R. 7 H. L. 17, H. L.

*Annotations*.—*Mentd.* Wildes v. Dudlow (1874), L. R. 19 Eq. 198; Guild v. Conrad (1894), 63 L. J. Q. B. 721.

**PART III. SECT. 1, SUB-SECT. 1.—B.**  
**F. Promise to procure security for debt.**—"I will guarantee that the security offered by F. for the balance of your account will be executed within ten days":—*Held*: the writing was not sufficient to satisfy Stat. Frauds,

s. 4.—**LIGHTBOUND v. WARNOCK** (1882), 4 O. R. 187.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 1.—C.**  
**s. "Debt."**—An undertaking to become surety for another's debt need not, at common law, be in writing.—

**WOOD BROTHERS v. GARDNER** (1886), 5 E. D. C. 189.—**S. AF.**

**t. —**There is no rule in the law of Cape Colony, as there is in the English law, that an action cannot be brought upon an oral promise to answer for the debt of another, but the

**Sect. 1.—Statutory provisions: Sub-sect. 1, C., D. & E.; sub-sect. 2, A.]**

**178. "Debt"—Liability already incurred.]—**Pltf., a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, deft. promised that he would provide for the payment of those acceptances as they became due, upon pltf.'s giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done & the money was afterwards received by deft.:—*Held*: this was not a promise for the debt or default of another within Stat. Frauds; & pltf. might recover against deft. as well for the breach of agreement in not providing for the payment of the acceptances as also upon an account for money had & received.

I am clearly of opinion that this is neither an undertaking for the debt, default or miscarriage of another within the statute. It could not be for the debt but rather for the credit of another; for when the promise was made no debt was incurred from G. to pltf. (LORD ELLENBOROUGH, C.J.).

Deft. then procured from pltf. the securities upon the faith of this engagement; in entering into which he had not the discharge of G. principally in his contemplation but the discharge of himself. That was his moving consideration, though the discharge of G. would eventually follow. It is rather, therefore, a purchase of the securities which pltf. had in his hands. This is quite beside the mischief provided against by the statute (LORD ELLENBOROUGH, C.J.).

This is to be considered as a purchase by deft. of pltf.'s interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him but a promise by deft. to pay what pltf. would be liable to pay if pltf. would furnish him with the means of doing so (LAWRENCE, J.).—(CASTLING v. AUBERT (1802), 2 East, 325; 102 R. R. 393.

**Annotations.** *Consd.* Thomas v. Williams (1830), 10 B. & C. 661. *Refd.* Edwards v. Kelly (1817), 6 M. & S. 204; Rounce v. Woodyard (1846), 8 L. T. O. S. 186; Macrory v. Scott (1850), 5 Exch. 907; Couturier v. Hastie (1852), 8 Exch. 10; Fitzgerald v. Dressler (1859), 7 C. B. N. S. 374; Harburg India Rubber Comb Co. v. Martin, [1902] 1 K. B. 778. *Mentd.* Bampton v. Paulin (1827), 4 Bing. 261; Andrews v. Smith (1835), 2 Cr. M. & R. 627.

—Of another person.]—See Sect. 2, sub-sect.

**1, post.**  
**179. "Miscarriage"—Liability for tort—Over-riding horse.]—**KIRKHAM v. MARTER, No. 170, ante.

#### D. Promises partly within Statute.

*See, generally*, CONTRACT, Vol. XII., pp. 125–128, Nos. 829–851.

**180. Not severable—Cannot be sued upon.]—**The promise as to one part being void, it cannot be good for the other for it is an entire agreement & the action is brought for both the sums & indeed could not be otherwise without variance from the promise (*per CUR.*).—LEXINGTON (LORD) v. CLARKE (1889), 2 Vent. 223; 86 E. R. 406.

**Annotations.**—*Apld.* Thomas v. Williams (1830), 10 B. & C. 661. *Consd.* Wood v. Benson (1831), 2 Cr. & J. 94. *Refd.* Tatton v. Wade (1856), 4 W. R. 548.

evidence of such promise must be clear & conclusive.—KERR v. BLAKE (1893), 10 S. C. 30.—S. AF.

#### PART III. SECT. 1, SUB-SECT. 1.—E.

**a. Whether doctrine of part performance applicable to guarantee.]—A**

contract related to an interest in lands for one year, & the principal had gone into possession under the contract & retained possession the guarantee not complying with Stat. Frauds:—*Held*: the contract was binding on the surety, on the ground of part performance.—HURON COUNTY v. KERR

**181. ———.]—A parol promise to pay the debt of another & also to do some other things, is void by Stat. Frauds. Pltf. cannot separate the two parts of such a contract.—CHATER v. BECKETT (1797), 7 Term Rep. 201; 101 E. R. 931.**

**Annotations.**—*Consd.* Anstey v. Marden (1804), 1 Bos. & P. N. R. 124. *Apld.* Thomas v. Williams (1830), 10 B. & C. 661. *Consd.* Wood v. Benson (1831), 2 Cr. & J. 94; Savage v. Canning (1867), 16 W. R. 133. *Refd.* Falmouth v. Thomas (1832), 1 Cr. & M. 89; Harvey v. Grabham (1836), 5 Ad. & El. 61; Head v. Baldrey (1837), 6 Ad. & El. 459.

**182. ———.]—A. being indebted to pltf. for half a year's rent of a farm, due on Mar. 25, deft., an auctioneer, was about to sell the goods of A. on the premises in the month of Aug. On the day of the sale pltf., the landlord, came there to distrain for his rent. Dft., in consideration that pltf. would not distrain, verbally promised to pay him not only the rent due, but the rent that would become due at the Michaelmas following:—*Held*: (1) the promise to pay the accruing rent was a promise founded on a new consideration, distinct from the demand which the pltf. had against A., & therefore void by Stat. Frauds, s. 4; (2) the promises being entire & in the commencement void in part, were void altogether; & pltf., therefore, could not recover from deft. the rent due on Mar. 25.—THOMAS v. WILLIAMS (1830), 10 B. & C. 604; 5 Man. & Ry. K. B. 025; 8 L. J. O. S. K. B. 314; 109 E. R. 597.**

**Annotations.**—*As to* (1) *Consd.* Wood v. Benson (1831), 2 Cr. & J. 94; Fitzgerald v. Dressler (1859), 5 Jur. N. S. 598. *Refd.* Green v. Crosswell (1839), 10 Ad. & El. 453; Tatton v. Wade (1856), 4 W. R. 548; Harburg India-rubber Comb Co. & Winter v. Martin (1902), 71 L. J. K. B. 529. *As to* (2) *Refd.* Wood v. Benson (1831), 2 Cr. & J. 94; Falmouth v. Thomas (1832), 1 Cr. & M. 89; Head v. Baldrey (1837), 6 Ad. & El. 459; Harman v. Reeve (1856), 25 L. J. C. P. 257.

**183. Severable—Part outside statute may be sued upon.]—A surgeon attended a pauper for some time, giving credit to the pauper's father for payment of his bill; but he becoming unable to pay, & the pauper still continuing ill, the surgeon applied to the overseers of the poor, to know whether he should continue his attendances at their expense; they said they would give no authority, but if he brought in a reasonable bill, they would see it paid:—*Held*: the attendance of the surgeon being divisible, he might recover for the latter attendances on the credit of the overseers without proving a promise in writing.—LYDE v. HIGGINS (1804), 1 Smith, K. B. 305.**

**184. ———.]—WOOD v. BENSON, No. 83, ante.**

#### E. Part Performance.

Part performance generally, *see* CONTRACT, Vol. XII., pp. 168 *et seq.*

**185. Doctrine of part performance not applicable.]—Where a parol promise is to answer for the default of another & credit is given on the faith of such a parol guarantee to one who makes default the consideration cannot be restored & cannot be compensated for except by fulfilling the contract of guarantee. In these cases such a principle [of part performance] would render the statute a nullity (LORD BLACKBURN).—MADDISON v. ALDERSON (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 47 J. P. 821; 31 W. R. 820,**

(1888), 15 Gr. 265.—CAN.

**b. ———.]—The principle of part performance by which a case is taken out of the operation of Stat. Frauds is not applicable against one who has guaranteed the fulfilment of a contract for purchase of land, though the**



**H. L. ; affg. S. C. sub nom. ALDERSON v. MADDISON** (1881), 7 Q. B. D. 174, C. A.

**Annotations.**—*Refd.* Rawlinson v. Ames, [1925] Ch. 96. *Mentd.* Humphreys v. Green (1882), 10 Q. B. D. 148; A-G v. Hubbuck (1884), 13 Q. B. D. 275; *Re Hoetham, Ex p. Broderick* (1886), 18 Q. B. D. 380; Miles v. New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; McManus v. Cooke (1887), 35 Ch. D. 681; Gillman, Spencer v. Carbutt (1889), 61 L. T. 281; Lucas v. Dixon (1889), 22 Q. B. D. 357; Blackburn v. Blackburn (No. 1) (1891), 36 Sol. Jo. 27; Davis v. Leicester Corp., [1894] 2 Ch. 208; Hodson v. Houland, [1896] 2 Ch. 428; Licensees Insee. Corp. v. Guarantee Fund v. Lawson (1896), 12 T. L. R. 501; Coleman v. North (1898), 47 W. R. 57; Isaacs v. Evans (1899), 16 T. L. R. 113; Miller & Aldworth v. Sharp, [1899] 1 Ch. 622; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331; Thurst v. Eccles (1900), 70 L. J. Q. B. 91; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360; Chaproniere v. Lambert, [1917] 2 Ch. 356; Banbury v. Bank of Montreal, [1918] A. C. 626; Morris v. Baron, [1918] A. C. 1; *Re A Bankruptcy Notice*, [1921] 2 Ch. 76; Rawlinson v. Ames (1924), 69 Sol. Jo. 112.

**SUB-SECT. 2.—REPRESENTATIONS AS TO CREDIT, ETC.—STATUTE OF FRAUDS AMENDMENT ACT, 1828.**

**A. In General.**

*See, now, Statute of Frauds Amendment Act, 1828 (c. 14), s. 6.*

**186. False representation as to credit of third party—Not within Statute of Frauds, s. 4.**—A false affirmation made by deft. [as to the credit of a third person] with intent to defraud pltf., whereby pltf. receives damage, is the ground of an action of deceit. In such an action it is not necessary that deft. should be benefited by the deceit or that he should collude with the person who has been benefited by it.—*PASLEY v. FREEMAN* (1789), 3 Term Rep. 51; 100 E. R. 450.

**Annotations.**—*Expld.* Hayercraft v. Creaky (1801), 2 East, 92. *Consd.* Evans v. Bicknell (1801), 6 Ves. 171; Clifford v. Brooke (1806), 13 Ves. 131; *Ex p. Carr* (1814), 3 Ves. & B. 108; Lyde v. Barnard (1836), 1 M. & W. 101; Taylor v. Ashton (1838), 11 M. & W. 401. *Expld.* Money v. Jordan (1852), 15 Beav. 372; Robson v. Devon (1857), 29 L. T. O. S. 300. *Consd.* Hampshire v. Bolton (1869), L. R. 8 Eq. 294. *Refd.* Banbury v. Bank of Montreal, [1918] A. C. 626. *Refd.* Burrows v. Lock (1805), 10 Ves. 470; Bromage v. Prosser (1825), 4 B. & C. 217; Adamson v. Jarvis (1827), 5 L. J. O. S. C. P. 68; Langridge v. Levy (1837), 2 M. & W. 519; Collins v. Evans (1841), 5 Q. B. 820; Clelland v. Leech (1856), 27 L. T. O. S. 59; Bentley v. Mackay (1862), 31 Beav. 143; *Re Overend Gurney, Ex p. Oakes & Peck* (1867), L. R. 3 Eq. 576; *De Lussalle v. Guildford*, [1901] 2 K. B. 215; Nash v. Calthorpe, [1905] 2 Ch. 237; Heilbut, Symons v. Buckleton, [1913] A. C. 30; Guaranty Trust Co. of New York v. Hannay, [1918] 2 K. B. 623. *Mentd.* Eyre v. Dunsford (1801), 1 East, 318; Hamar v. Alexander (1806), 2 Bos. & P. N. R. 241; Nash v. Palmer (1816), 5 M. & S. 374; Ames v. Milward (1818), 8 Taunt. 637; Foster v. Charles (1830), 4 Moo. & P. 61; Pilmore v. Hood (1838), 6 Scott, 827; Cornfoot v. Powke (1840), 6 M. & W. 358; Pontifex v. Bignold (1841), 3 Man. & G. 63; Shrewsbury v. Blount (1841), 2 Scott, N. R. 588; Wilde v. Gibson (1848), 1 H. L. Cas. 105; Morley v. Attenborough (1849), 3 Exch. 500; Shortridge v. Bosanquet (1852), 16 Jur. 919; Rushby v. Ellis (1853), 17 Beav. 279; Randall v. Trimm (1856), 18 C. B. 746; Tatton v. Wade (1856), 4 W. R. 548; Childers v. Wooler (1860), 2 E. & E. 237; Sims v. Croucher (1860), 1 De G. F. & J. 518; Wright v. Leonard (1861), 11 C. B. N. S. 258; Sheen v. Bumpstead (1862), 8 Jur. N. S. 702; *Re Ward* (1862), 31 Beav. 1; Eichholz v. Bannister (1864), 17 C. B. N. S. 708; Hyde v. Bulmer (1868), 18 L. T. 293; L. v. Warburton (1870), 35 J. P. 116; Dixon v. Reuter's Telegraph Co. (1877), 46 L. J. Q. B. 197; Schroeder v. Mendl (1877), 37 L. T. 452; Joffro v. Baker (1883), 11 Q. B. D. 255; Smith v. Chadwick (1884), 9 App. Cas. 187; *Re London & Leeds Bank, Ex p. Carling*, Carling v. London & Leeds Bank (1887), 56 L. J. Ch. 321; *Re Dangar's Trusts* (1889), 58 L. J. Ch. 315; Derry v. Peek (1889), 14 App. Cas. 337; Wilkinson v. Downton, [1897] 2 Q. B. 57; Allen v. Flood, [1898] A. C. 1; Tolleran v. Dowling Radiant Heat Co., [1900] 1 Ch. 1; Cackett v. Keawick, [1902] 2 Ch. 456; *Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales*, [1902] 2 K. B. 732; Cavalier v. Pope

(1905), 74 L. J. K. B. 857; Nooton v. Ashburton, [1914] A. C. 932; Hulton v. Hulton, [1917] 1 K. B. 813; Janvier v. Sweeney, [1919] 2 K. B. 316.

**187.** — Above sect. requiring a written engagement for the debt or another, has been considerably cut down ever since the case of *Pasley v. Freeman*, No. 186, ante, at law; where this was determined; that, if you throw into the declaration an allegation, that the engagement was fraudulent, & in the form of a representation, that the party is of sufficient substance to pay the debt, the recovery is not of the debt, as debt, upon the contract, as contract; but a recovery of damages to compensate what they call a fraud. It was long, before I was reconciled to that; but with those doubts I know it has been settled as law by subsequent decisions. I do not therefore mean to deny this proposition as settled law; that, if a man asks, whether he may trust A. & the answer is, that he may, the person giving that answer, knowing at the time that he cannot be trusted, must pay in damages for the consequence of that misrepresentation; but, if the answer is, that he has so good an opinion of A.'s circumstances, that he will pay the debt, if A. does not, there can be no recovery (LORD ELDON, C.).—*Ex p. CARR* (1814), 3 Ves. & B. 108; 35 E. R. 420, L. C.

**188. Promise not amounting to representation of credit.**—A promise having been made to guarantee pltf., which is within the statute, there being no note in writing, he brings an action for the misrepresentation. This is nothing more than a guarantee within Stat. Frauds (LORD ELLENBOROUGH, C.J.).—*SMITH v. HARRIS* (1817), 2 Stark. 47, N. P.

**Annotation.**—*Mentd.* Brant v. Robinson (1821), 1 Ry. & M. 48.

**189. Representations within Statute of Frauds Amendment Act, 1828 (c. 14), s. 6—As to Incumbrances created by cestui que trust.**—A trustee of a certain fund being questioned as to the charges made by the *cestui que trust*, upon his interest therein, represented that it was only charged with three annuities, whereby the party making the inquiry was induced to advance a sum of money in the purchase of another annuity, to be secured on that fund; whereas the trustee knew, at the time, that it has mortgaged to a large amount beyond those annuities.—*Held:* (1) (LORD ARBINGER, C.B., GURNEY, B.) this was a representation within above sect. for which no action was maintainable it not being in writing; (2) (PARKER, B., ALDERSON, B.) it was not within the statute. — *LYDE v. BARNARD* (1836), 1 M. & W. 101; 1 Gale, 388; Tyr. & Gr. 250; 5 L. J. Ex. 117; 150 E. R. 303.

**Annotations.**—*As to (1) Consd.* Banbury v. Bank of Montreal, [1918] A. C. 626. *Refd.* Miller v. Salomons (1852), 7 Exch. 475; Tatton v. Wade (1856), 4 W. R. 548. *As to (2) Consd.* Banbury v. Bank of Montreal, [1918] A. C. 626. *Generally, Mentd.* A-G v. Sillim (1864), 2 H. & C. 431; Magee v. Lavell (1874), 30 L. T. 169; Curtis v. Stovin (1880), 22 Q. B. D. 513.

**190.** — Representation by partner as to credit of firm.—A representation made by deft. as to the credit of a firm in which he was partner:—*Held:* to be a representation as to the credit "of another person," within the meaning of above sect.—*DEVAUX v. STEINKELLER* (1839), 6 Bing. N. C. 84; 8 Dowd. 33; 8 Scott, 202; 9 L. J. C. P. 30; 3 Jur. 1053; 133 E. R. 33.

**Annotations.**—*Consd.* Banbury v. Bank of Montreal, [1918] A. C. 626. *Mentd.* Pearson v. Seligman (1883), 48 L. T. 842.

**191.** — Representation as to credit of third party.—A. being requested to supply goods to B.,

vendor entered into the contract on the faith of the alleged guarantee & the purchaser has gone into possession of the land.—*RINK v. MARCH & DONA-* WIL, [1921] 1 W. W. R. 919; 11 Bask. L. R. 176.—**CAN.**



**Sect. 1.—Statutory provisions: Sub-sect. 2, A. & B. Sect. 2: Sub-sect. 1, A. (a).]**

required a reference, & was directed to C., whose servant gave a verbal representation upon which goods were supplied. B. paid over the proceeds of those goods, which were sold under such circumstances as to raise a strong suspicion of fraud, to C. in discharge of prior liabilities:—*Held*: in an action by A. against C. for the value of those goods, evidence of the verbal representation was not admissible; & there not being evidence of fraud in C. independently thereof, the action was not maintainable.

We are of opinion that the case falls within the terms of the first part of the [above] sect.; & therefore, the representation could not be proved without a note in writing (LORD DENMAN, C.J.).—*HASLOCK v. FERGUSSON* (1837), 7 Ad. & El. 80; 2 Nev. & P. K. B. 209; 6 L. J. K. B. 247; 1 Jur. 689; 112 E. R. 403.

*Annotations*:—*Consd.* Banbury v. Bank of Montreal, [1918] A. C. 626. *Refd.* Pearson v. Seligman (1883), 48 L. T. 812.

**192. ——— Benefit obtained by party making representation.**—[Above sect. which provides that no action shall be brought whereby to charge any person upon a representation concerning the credit of any other person to the intent that such other person may obtain credit, money, or goods, unless such assurance be in writing signed by the party to be charged, applies to a case where the representation is made in order that the party to be charged may obtain a benefit from the credit, money or goods being obtained by such other person.—*PEARSON v. SELIGMAN* (1883), 48 L. T. 842; 31 W. R. 730, C. A. *Annotation*:—*Consd.* Banbury v. Bank of Montreal, [1918] A. C. 626.

**193. ——— Representations as to ability to pay.**—Declaration, in *assumpsit*, that deft., an attorney, requested plff. to lend J. £300, & to encourage plff. to do so, & to take no further security than J.'s promissory note, falsely & fraudulently represented to plff. that she might safely lend J. the £300, & take no further security than such note, because the title deeds to a certain estate, which deft. then asserted that J. had bought, were in deft.'s possession, & nothing could be done without deft.'s knowledge, & plff. would be perfectly safe in making such loan to J. on the terms aforesaid; that deft. by the representation induced plff. to lend, & plff. did lend, J. the £300 on J.'s note only, whereas plff. could not safely lend, etc., negating the representations as above stated; all which deft., at the time he made such representations, well knew: that J. had not paid or been able to pay, the £300, & had become bkpt. Plea, that deft.'s representations were representations concerning the ability of J. to repay, & were not in writing:—*Held*: good on demurrer, the representations being within above sect.—*SWANN v. PHILLIPS* (1838), 8 Ad. & El. 457; 3 Nev. & P. K. B. 447; 1 Will. Woll. & H. 374; 112 E. R. 912; *sub nom.* *SWANN v. PHILLIPS*, *CHERRINGTON v. PHILLIPS*, 7 L. J. Q. B. 200; *sub nom.* *SWARNE v. PHILLIPS*, 2 Jur. 494.

*Annotations*:—*Consd.* Bishop v. Balkis Consolidated Co. (1890), 59 L. J. Q. B. 565; Banbury v. Bank of Montreal, [1918] A. C. 626.

### PART III. SECT. 1, SUB-SECT. 2.—A.

**198 I. Representation must be fraudulent.**—*IRVING v. BURNS*, [1915] S. C. 260.—*SCOT*.

**198 II. ———**—*ROBINSON v. NATIONAL BANK OF SCOTLAND*, [1916] S. C. (H. L.) 154.—*SCOT*.

*c. Representations within Mercantile Law (Scotland) Amendment Act, 1856, s. 6—Fraudulent oral representations.*—All the representations as to credit were made orally:—*Held*: the terms of Mercantile Law (Scotland) Amendment Act, 1856, s. 6, were comprehensive & imperative that no

**194. ———**—*TURNLEY v. MACGREGOR* (1843), 6 Man. & G. 46; 6 Scott, N. R. 906; 12 L. J. C. P. 295; 134 E. R. 803.

**195. ——— Certification of transfer of shares.**—P., the registered owner of certain shares in deft. co., sold & transferred them to M. & B., & lodged his certificate with the co. to enable them to complete their title. P. subsequently purported to sell & transfer some of the same shares to L., who transferred them to plffs. Both transfers were certificated—*i.e.* had the words "certificate lodged" stamped upon them by the co.'s secretary, although no certificate was in fact lodged. Upon the faith of the certification upon the transfer from L. to plffs., they paid him the price of the shares. The co. having refused to recognise plffs.' title, they brought an action to recover the value of the shares:—*Held*: (1) plffs. had lost the price of the shares by reason of a merely careless misrepresentation for which no action would lie, & they had lost the shares, as distinguished from the price, because L. had no title to them: but the certification did not amount to a warranty of L.'s title, & as the loss of the shares was not due to any misrepresentation by the co., but to the invalidity of the transfer from P. to L., the co. were not estopped from denying its validity, & that the action was not maintainable; (2) the representation was not within above Act.—*BISHOP v. BALKIS CONSOLIDATED CO.* (1890), 25 Q. B. D. 512; 59 L. J. Q. B. 565; 63 L. T. 601; 39 W. R. 99; 6 T. L. R. 150; 2 Meg. 292, C. A.

*Annotations*:—*As to* (1) *Consd.* Tomkinson v. Balkis Consolidated Co., [1891] 2 Q. B. 614; Whitechurch v. Cavanagh, [1902] A. C. 117. *Refd.* *Re* Concessions Trust, McKay's Case, [1896] 2 Ch. 757; Dixon v. Kennaway, [1900] 1 Ch. 833; Longman v. Bath Electric Tramways, [1905] 1 Ch. 616; Peat v. Clayton, [1906] 1 Ch. 659. *As to* (2) *Consd.* Banbury v. Bank of Montreal, [1918] A. C. 626.

**196. Representation must be fraudulent.**—No action will lie for a false representation, unless the party making it knows it to be untrue, & makes it with the intention of inducing plff. to act upon it, & the latter does so act upon it & sustains damage in consequence.—*BEHN v. KEMBLE* (1859), 7 C. B. N. S. 260; 141 E. R. 816.

**197. ———**—Where information is asked of a banker concerning the financial position of one of his customers it must be shown, in order to render him liable for misrepresentation, that his statement is fraudulent in a legal sense; & it is no part of his duty to make inquiries elsewhere as to the solvency or otherwise of the customer respecting whom the inquiry is made, or to do anything more than answer the question put to him honestly from what he knows from the materials which he has before him.—*PARSONS v. BARCLAY & CO., LTD. & GODDARD* (1910), 103 L. T. 196; 26 T. L. R. 628, C. A.

**198. ———**—*BANBURY v. BANK OF MONTREAL*, No. 203, *post*.

**199. Representation partly verbal & partly written.**—An action will lie for a false representation in writing as to the character & circumstances of a third person, whereby plff was induced to give credit to such third person, although plff. might have been in part influenced by subsequent oral representations of deft., if the jury are satisfied that plff. was substantially

oral representations made with the intent specified in the sect. should be of any legal effect, however false & fraudulent.—*CLYDESDALE BANK, LTD. v. PATON*, [1896] A. C. 381.—*SCOT*.

—*IRVING v. BURNS*, [1915] S. C. 260.—*SCOT*.

*e. Representation by partner in firm*

induced by the written representation to give the credit.—**TATTON v. WADE** (1856), 18 C. B. 371; 4 W. R. 548; 139 E. R. 1413; *sub nom.* **WADE v. TATTON**, 25 L. J. C. P. 240; 2 Jur. N. S. 491, Ex. Ch.

*Annotations*.—**Consd.** **Banbury v. Bank of Montreal**, [1918] A. C. 626. **Mentd.** **Parkins v. Scott** (1861), 8 Jur. N. S. 593.

### B. Requisites of Memorandum.

Requisites generally, *see* Sect. 3.

**200. Signature of agent not sufficient.**—B., not a partner, but the son of A., signed a representation as to G.'s credit in the name of A.'s firm, "A. & Son," in the absence of A.:—*Held*: Statute of Frauds Amendment Act, 1828 (c. 14), s. 6, required the signature of the person to be charged, & an agent's signature was insufficient; & A., was not liable.—**WILLIAMS v. MASON** (1873), 28 L. T. 232; 37 J. P. 264; 21 W. R. 386.

*Annotations*.—**Consd.** **Swift v. Jewsbury** (1874), L. R. 9 Q. B. 301; **Hirst v. West Riding Union Banking Co.**, [1901] 2 K. B. 560. **Refd.** **Banbury v. Bank of Montreal**, [1918] A. C. 626.

**201. — Incorporated company.**—Pltf. sued J. & G. jointly for a false representation with respect to the solvency of R. Deft. J. was sued as the public officer of a banking co. formed under Country Bankers Act, 1826 (c. 46), & deft. G was the manager at one of their branches. Deft. was a customer of the S. bank, & requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to the manager of deft.'s banking co., requesting information whether R. was responsible to the extent of £50,000. Deft. G. replied in his own name, signing his letter as manager, & giving a favourable account of R.'s responsibility. Pltf., in consequence of this letter, supplied R. with goods, for which he never was paid, in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. Deft.'s banking co. had no knowledge, otherwise than through G., that such letter had been written, & gave him no express authority to write the letter; but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—*Held*: (1) G. was liable personally for the false representation; (2) by Statute of Frauds Amendment Act, 1825 (c. 14), s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, & not by an agent; & therefore, if G. were to be considered an agent, the banking co. was not liable; (3) the signature of G. to the letter could not be considered the signature of the banking co. itself; (4) the letter was the representation of G., & not the representation of the banking co.—**SWIFT v. JEWSBURY** (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319, Ex. Ch.; *varying*, S. C. *sub nom.* **SWIFT v. WINTERBOTHAM** (1873), L. R. 8 Q. B. 244.

*Annotations*.—*As to* (2) **Folld.** **Hosegood v. Bull & Kingdom** (1876), 36 L. T. 617. **Apld.** **Hirst v. West Riding Union Banking Co.**, [1901] 2 K. B. 560. **Consd.** **Banbury v. Bank of Montreal**, [1918] A. C. 626. **Refd.** **Pearson v. Soligman** (1883), 48 L. T. 842; **Bishop v. Balkis Consolidated Co.** (1890), 25 Q. B. D. 512. *As to* (4) **Refd.** **Barnetts, Hoares v. South London Tram. Co.** (1886), 2 T. L. R. 848; **British Mutual Banking Co. v. Charnwood Forest Ry.** (1887), 18 Q. B. D. 714; **Whitechurch v.**

*In firm name.*—Y., a partner of a firm, appended the firm-name to a letter, guaranteeing the financial standing of an appt. for the lease of a farm:—*Held*: as the letter had been subscribed by defender, although in the firm-name, it complied with Mercantile Law Amendment Act (Scot-

land), 1856, s. 6.—**FORTUNE v. YOUNG**, [1918] S. C. 1.—**SCOT.**

### PART III. SECT. 2, SUB-SECT. 1.—A. (a).

*1. Whether statute applicable.*—Where pltf. had been employed by A. in getting out timber, which A. after-

**Cavanagh**, [1902] A. C. 117; **Malcolm, Brunner v. Waterhouse** (1908), 24 T. L. R. 854. *Generally*, **Mentd.** **Richardson v. Silvester** (1873), L. R. 9 Q. B. 34; **Mackay v. Commercial Bank of New Brunswick** (1874), L. R. 5 P. C. 394; **Weir v. Barnett** (1877), 3 Ex. D. 32; **Cargill v. Bower** (1878), 10 Ch. D. 302; **Houldsworth v. City of Glasgow Bank** (1880), 5 App. Cas. 317; **Hamlyn v. Houston** (1902), 72 L. J. K. B. 72; **Kettlewell v. Refuge Assoc.**, [1908] 1 K. B. 545; **Parsons v. Barclay & Goddard** (1910), 103 L. T. 196.

**202. —**—*]*—The word "person" in Statute of Frauds Amendment Act, 1828 (c. 14), s. 6, includes a corpn.; & an incorporated co. is, under the terms of that sect. not liable for a false representation of the kind contemplated by the sect., made in a letter written & signed by their agent.—**HIRST v. WEST RIDING UNION BANKING CO.**, [1901] 2 K. B. 560; 70 L. J. K. B. 828; 85 L. T. 3; 49 W. R. 715; 17 T. L. R. 629; 45 Sol. Jo. 614, C. A.

*Annotations*.—**Apprvd.** **Banbury v. Bank of Montreal**, [1918] A. C. 626. **Mentd.** **Royal Naval School, Seymour v. Royal Naval School**, [1910] 1 Ch. 866.

**203. —**—*]*—(1) Statute of Frauds Amendment Act, 1828 (c. 14), s. 6, applies to fraudulent representation only.

(2) The word "person" in sect. 6 includes a corpn.

(3) Pltf. in 1911, went to Canada on pleasure & stayed at Montreal with the general manager of deft. bank, who gave him a letter of introduction to the branch manager asking them if he applied for assistance or advice to place themselves at his disposal. In 1912, he again visited Canada, seeking investments, & presented the letter of introduction to G., defts.' branch manager at V., upon whose oral advice he invested the sum of £25,000 upon a mtge. to secure a loan to a Canadian co., who were customers & debtors of the bank. The advice, which was honestly given, involved oral representations as to the credit of the co. The co., having failed to pay either interest or principal, pltf. brought an action against the bank, claiming damages for negligence & breach of duty while acting as his bankers & advisers. It was admitted that G. had no general authority to advise as to investments. At the trial judgment was entered for pltf. on the findings of the jury for £25,000:—*Held*: Statute of Frauds Amendment Act (Lord Tenterden's Act), 1828 (c. 14), s. 6, did not apply to the action.

(4) The writing required by Lord Tenterden's Act cannot be signed by an agent (**LORD PARKER**).—**BANBURY v. BANK OF MONTREAL**, [1918] A. C. 626; 87 L. J. K. B. 1158; 119 L. T. 446; 34 T. L. R. 518; 62 Sol. Jo. 665, H. L.

*Annotations*.—*Generally*, **Mentd.** **Calmenson v. Merchants' Warehousing Co.** (1920), 125 L. T. 129; **Dey v. Mayo**, [1920] 2 K. B. 346; **Everett v. Griffiths**, [1921] 1 A. C. 631; **Hearn v. Southern Ry.** (1925), 41 T. L. R. 305.

### SECT. 2.—GUARANTEES WITHIN STATUTORY PROVISIONS.

SUB-SECT. 1.—LIABILITY OF PRINCIPAL DEBTOR MUST EXIST OR BE CONTEMPLATED.

#### A. Existing Liability.

##### (a) In General.

**204. Liability of third party sufficient.**—**BIRKMYR v. DARNELL**, No. 2, ante.

wards sold to deft., who agreed orally with pltf. that he would pay pltf.'s wages, if he would assist in rafting the timber to Q., out of the proceeds of its sale there:—*Held*: the case was not within Stat. Frauds.—**MCDONELL v. COOK** (1845), 1 U. C. R. 542.—**CAN.**

g. —.]—**LEE & CAMERON v. n.**

*Sect. 2.—Guarantees within statutory provisions:*  
*Sub-sect. 1, A. (a) & (b).]*

205. —.—.]—GORDON v. MARTIN, No. 3, *ante*.

206. —.—.]—A. having commenced certain business for B. which he has undertaken, refused to proceed without a promise from C. to pay the further expenses. C. was not liable on such a promise without a note in writing. —BARBER v. FOX (1816), 1 Stark. 270, N. P.

207. —.—.]—A landlord having authorised a distress for rent, is liable for the necessary expenses, & although plff. was sent by deft. to take possession of the goods distrained, who promised to pay him, the latter will not be liable without a note in writing.

Since in this case there is a principal, namely, the landlord, who is responsible for the necessary expenses of the distress, the case is within Stat. Frauds & the debt is to be considered as the debt of another (LORD ELLENBOROUGH, C.J.). —COMMAN v. EYLES (1817), 2 Stark. 62, N. P.

208. —.—.] Declaration stated that B. had sued deft. in equity, & had retained plff. as his attorney, & that costs, viz. £30, had become due to plff. as such attorney for his costs in the suit; & that plff. & deft. had agreed, with the consent of B., that the suit should be discontinued, & deft. pay plff. the costs which were due. It then stated that, in consideration of the premises, & that B. had consented to discontinue, & plaintiff to accept his costs from deft., the latter promised plff. to pay him such costs, but did not. Plea, that the promise was an undertaking to pay the debt of another, & was not in writing. On demurrer: *Held*: such promise was a promise to pay the debt of another, within Stat. Frauds, s. 1. —TOMLINSON v. GELL (1837), 6 Ad. & El. 561; 1 Nev. & P. K. B. 588; Will. Woll. & Dav. 229; 6 L. J. K. B. 139; 112 E. R. 216.

*Annotation*: —Reid. Cripps v. Hartnoll (1862), 2 B. & S. 697.

209. —.—.]—R. having undertaken by a written contract, to build for the Corp. of H. a house on a farm occupied by A. engaged S. to do the carpenters' work; & the following agreement was made & signed by R. & S. & witnessed by A.: —"It having been arranged that A. shall build a new house on the farm occupied by Mr. A. it is hereby agreed & understood between R. & S., that S. shall do all the carpenters' work, etc., under the inspection & control of A. & that the amount of the work shall be paid by Mr. A. to S. only, & that this agreement shall be his guarantee for so doing." On the same day A. wrote to S. as follows: —"It having been agreed that R. shall build a new house on the farm occupied by me, & that,

by an agreement this day shown, me between you & S. you are to do the carpenters' work, etc., & that the payment, when done, is to be made by me to you, & to no other person, according to plan & specification, I hereby undertake to pay the same, by having a proper discharge": —*Held*: S. having done the work, could not maintain an action of *indebitatus assumpsit* for work & labour against A. for the value of it.

If it was an undertaking by deft. to pay so much as should be due from the Corp. to S. by R.'s assignment, then it would be a collateral undertaking for the Corp.; but if it meant that, if deft. had money in his hands, he was to pay on the assignment of R. then it would not be collateral, & he would be responsible on his simple parol promise (PARKE, B.). —SWEETING v. ASPLIN (1840), 7 M. & W. 105; H. & W. 6; 10 L. J. Ex. 3; 151 E. R. 723.

210. —.—.]—A promise to guarantee certain arrears of rent in consideration of the landlord's withdrawing a distress, is a promise to answer for the debt of another within Stat. Frauds, s. 4.

This agreement is within the very words of the statute & the test is in these cases whether the original debtor remains liable (LORD DENMAN, C.J.). —ROUNCE v. WOODYARD (1846), 8 L. T. O. S. 186.

*Compare* No. 182, *ante*, Nos. 212-244, *post*.

211. —.—.]—A written agreement signed by defts., plff. & the charterers, after reciting that the ship had arrived in port, & a stop had been put on the freight by the owners, & that a difficulty had arisen as to the settlement of the charterer's accounts, stated that the stop was to be immediately taken off, & that the commission on the charter party, payable to plff., was to be paid off by defts., & that no person signing that agreement was to put any stop on the freight: —*Held*: this was an agreement to answer for the debt of another, within the Stat. Frauds.

It was not a case of transfer of liability as if A. had agreed to accept C. a debtor of B. as his debtor in lieu of him. It is plain that although deft. agreed to pay plff. yet the debt to him still remained due from the owners by whom he was retained (POLLOCK, C.B.). —GULL v. LINDSAY (1849), 4 Exch. 45; 18 L. J. Ex. 354; 13 L. T. O. S. 305; 154 E. R. 1118.

212. —.—.]—Where one advances money at the request of another, & on his promise to repay it, to pay the debt of a third party, the payment creates no debt as against such third party if it was not made at all on his credit, & therefore the liability of the party, on whose request & promise it was made, is original, & not collateral; & his

MICHELL (1861), 23 U. C. R. 314.—CAN.

b. —.—.]—"In consideration of the sum of one hundred dollars, I guarantee the payment of the within note": —*Held*: the guarantee was sufficient within Stat. Frauds, s. 4. —PALMER v. BAKER (1873), 23 C. P. 302.—CAN.

k. —.—.]—A. being indebted to plff. for timber furnished, plff. refused to furnish any more, & deft. said if plff. would furnish further timber deft. would pay for it, on plff. getting an order from A.: —*Held*: the promise was void, under Stat. Frauds, not being in writing. —ROUNDS v. MAY (1874), 35 U. C. R. 367.—CAN.

l. —.—.]—A. had contracted to build houses for deft., & plff. agreed with A. to do the brick work; but having doubted as to A.'s ability to pay, plff. hesitated to go on. Deft. told plff. that he would see him paid, where-

upon plff. finished the work: —*Held*: deft.'s promise was within the statute, & being oral only, plff. could not recover. —BOND v. TREAHY (1875), 37 U. C. R. 360.—CAN.

m. —.—.]—A. contracted to build houses for deft., & sublet the plastering to plff. A. gave plff. a written order to the architects to give him certificates for the plastering as the work proceeded. After this plff. got money from time to time from the architects without reference to A. A. failed, & plff. stopped work for some weeks, when deft. told him to go on, & he completed the work: —*Held*: deft.'s promise being collateral, & oral, was void, under Stat. Frauds. —POUCHER v. TREAHY (1875), 37 U. C. R. 367.—CAN.

n. —.—.]—Deft. bought the stock of A., who was indebted to plff., & in order to induce plff. to continue with deft., deft. promised to see that he was

paid: —*Held*: Stat. Frauds was a bar to the action. —JAMES v. BALFOUR (1882), 7 A. R. 461.—CAN.

o. —.—.]—HOFFNER v. MERNER (1884), 7 O. R. 629.—CAN.

p. —.—.]—RICHARD v. STILLWELL (1885), 8 O. R. 511.—CAN.

q. —.—.]—Plff. was the holder of a promissory note of a co., & deft. orally promised to see him paid if he would forbear to sue & would renew: —*Held*: this was a promise of guarantee, & required by Stat. Frauds, s. 4, to be in writing. —BEATTIE v. DINNICK (1896), 27 O. R. 285.—CAN.

r. —.—.]—CLAPPERTON v. MUTCHMOR (1899), 30 O. R. 595.—CAN.

s. —.—.]—ALLEN v. SHEEHY (1902), 35 N. B. R. 635.—CAN.

t. —.—.]—SHEA v. LINDSAY & Co. (1910), 15 W. L. R. 362; 20 Man. L. R. 208.—CAN.

a. —.—.]—CONRAD v. KAPLAN (1914),

promise is not a promise to "answer for the debt of another" within Stat. Frauds.—*PEARCE v. BLAIGRAVE* (1855), 3 C. L. R. 338.

213. —[Pltf., the grantee of a bill of sale, having taken possession of the goods, deft., the brother of a grantee under a subsequent bill of sale, reimbursed pltf. part of the money he had paid to satisfy a distress for rent on the goods, & gave him his I.O.U. for the residue, upon an undertaking of pltf. not to sell or remove the goods:—*Held*: deft.'s promise was not a promise to pay the debt of another, & therefore, did not require to be in writing, under Stat. Frauds, s. 4.—*BAYNE v. HARE* (1859), 1 L. T. 10; *sub nom.* *BAIN v. HARRIS*, 8 W. R. 79.

214. —[—]—*LAKEMAN v. MOUNTSTEPHEN*, No. 211, *post*.

215. —[—]—Deft.'s husband having incurred a debt to pltf. in respect of dealings in stocks & shares, deft. verbally promised pltf. to pay the amount in consideration that legal proceedings were not taken against her husband:—*Held*: this was a promise to answer for the debt of another within Stat. Frauds, s. 4, & not being in writing could not be sued upon.—*BEARD v. HARDY* (1901), 17 T. L. R. 633, C. A.

Liability of principal debtor not immediate object of contract.]—*See* Sub-sect. 4, *post*.

#### (b) Release of Principal Debtor.

*See* Stat. Frauds, s. 4.

216. Statute not applicable—*Novation of contract*.]—A. sells goods to B., who being unable to pay transfers them to C., who promises A. to pay for them. This is a new sale to C. & not a mere promise by C. to pay the debt of B.—*BROWNING v. STALLARD* (1811), 5 Taunt. 450; 12 E. R. 764.

217. —[—]—A. being indebted to B.; & C., who was resident in the West Indies, being indebted to A., the latter proposed to assign to B., the debt due to him from C., & to this proposal B. assented. A. then, by letter directed the agents of C. in this country, "As soon as they should have funds belonging to C. in their hands, to pay to B. on his, A.'s, account, the amount of C.'s debt," & added that he would credit C. for the amount, having received his order to that effect. The agents of C. verbally promised to pay B. as soon as they should have funds in their hands belonging to C. A. afterwards gave an order to another creditor, authorising C. to pay to such creditor the amount of the debt due to him, A., & C. entered into an obligation to pay same to such creditor, but there was a clause annexed to the obligation, stating that it had been alleged that a payment had been made by some person to A. on account of C., & it was declared, that should such payment be proved to have been made, the amount should be deducted. The creditor to whom this order was given demanded payment of the debt from C. on his arrival in this country, but the latter refused to pay it, on the ground that his agents were liable to pay it to B., & same was in fact afterwards paid to B.:—*Held*: it was not necessary that the promise to

pay B. should be in writing, inasmuch as it was a promise by C. to pay his own debt, & not that of another.—*HODGSON v. ANDERSON* (1825), 3 B. & C. 812; 5 Dow. & Ry. K. B. 735; 107 E. R. 945.

*Annotations*:—*Wentd. Crowfoot v. Gurney* (1832), 9 Bing. 372; *Hutchinson v. Heyworth* (1838), 9 Ad. & El. 375; *Walker v. Roston* (1842), 9 M. & W. 411; *Hamilton v. Spottiswoode* (1849), 4 Exch. 200.

218. —[—]—Where A. was a creditor of B., & B. & C. entered into partnership, & by verbal agreement among the parties, A. was treated as the creditor of B. & C., such an agreement was held not to be affected by Stat. Frauds, & B. & C. having subsequently become bkpts., A. was permitted to prove against the joint estate.

If A. is creditor of B., & B. & C. propose to enter, or have entered, into partnership together, & address themselves to A., the creditor of B., & say "we wish that this debt, due hitherto from B. alone, shall be a debt from B. & C. together," & A. accedes to that, although no writing passes, that agreement is valid & effectual, & is not impeached or affected by Stat. Frauds. The effect of it is for a valuable consideration to extinguish the first, & for a valuable consideration to substitute for it the second (*KNIGHT-BRUCE, V. C.*).—*Re LENDON & LENDON, Ex p. LANE* (1846), De G. 300; 16 L. J. Bey. 4; 7 L. T. O. S. 118; 10 Jur. 382.

219. —[—]—Where a creditor released his principal debtor & accepted a third party as full debtor in his stead, & the surety for the former agreed to give a guarantee for the latter, & to continue his former guarantee till he did so, & then died without having given it:—*Held*: in an action by the creditor against his exors. that the debt having been extinguished by the release, the remedy against deceased was gone. Novation of debt operates as a complete release of the original debtor, & cannot be considered as a mere covenant not to sue him.—*COMMERCIAL BANK OF TASMANIA v. JONES*, [1893] A. C. 313; 62 L. J. P. C. 104; 68 L. T. 776; 57 J. P. 614; 42 W. R. 256; 9 T. L. R. 466; 1 R. 367, P. C.

*Annotations*:—*Distd. Perry v. National & Provincial Bank of England*, [1910] 1 Ch. 464. *Refd.* *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.

220. —[—]—*Release of debtor consideration for new contract*.]—Generally where there is a novation the release of the original debtor is the consideration for the contract. If there were some other consideration the new contract would probably be a contract of suretyship (*VAUGHAN WILLIAMS, J.*).—*Re ERRINGTON, Ex p. MASON*, [1894] 1 Q. B. 11; 10 Morr. 309; 10 R. 91; *sub nom.* *Re ERRINGTON, Ex p. OFFICIAL RECEIVER*, 69 L. T. 766, D. C.

221. —[—]—*Discharge of debtor from execution*.]—Where a deft., taken on a *ca. sa.* is discharged out of custody by consent of pltf., the debt itself is extinguished; & therefore, a promise by a third person to pay that debt, on condition of that discharge, is an original promise, & not within Stat. Frauds, s. 4. *Qu.*: whether under Stat. Frauds, s. 4, in order to charge a person with the debt of another the consideration for the promise, as well as the promise itself, must be in writing?—

28 W. L. R. 464; 6 W. W. R. 1061; 18 D. L. R. 37; 24 Man. L. R. 368. —CAN.

b. —[—]—*LUISER & Co. v. CANADIAN PACIFIC TIMBER & LOGGING CO. LTD.*, [1920] 1 W. W. R. 735.—CAN.

c. —[—]—*BATEMAN & MATTHEWS v. SPENCER*, [1923] 4 D. L. R. 170; 10 Sask. L. R. 474; [1923] 1 W.

W. R. 1281.—CAN.

d. —[—]—*FOOK LUNG FIRM v. LAI YUK FIRM* (1912), 7 Hong Kong L. R. 99. HONG KONG.

e. —[—]—*SEED v. MCCONNELL* (1840), 1 Crawl. & D. 410.—IR.

f. —[—]—*MARSHALL v. WILSON* (1869), 14 W. R. 699.—IR.

g. —[—]—*BRADLEY v. SCOTT*, [1923] N. Z. L. R. 1050.—N.Z.

#### PART III. SECT. 2, SUB-SECT. 1.—A. (b).

2161. Statute not applicable—*Novation of contract*.]—A. being indebted to B. & C. to A., a promise by C. that he will pay B. the debt due to him by A. in consideration that B. will discharge A., is not within Stat. Frauds.—*KINGSOCK v. WOODWARD* (1845), 1 U. C. R. 314.—CAN.

*Sect. 2.—Guarantees within statutory provisions:*  
*Sub-sect. 1, A. (b) & B. (a) & (b).]*

**GOODMAN v. CHASE** (1818), 1 B. & Ald. 207; 100 E. R. 110.

*Annotations:—*Distd. **Tomlinson v. Gell** (1837), 6 Ad. & El. 504. **Consd.** Lane v. Burghart (1811), 1 Q. B. 933. **Fold.** Butcher v. Stewart (1843), 11 M. & W. 857. **Refd.** Lane v. Burghart (1811), 3 Man. & G. 597. **Mentd.** Tanner v. Moore (1816), 7 L. T. O. S. 202.

**222.** ———— j—**MAGGS v. AMES**, No. 255, *post*.

**223.** ———— j—**Pltfs.** having issued execution against L. for debt, L. with the assent of pltf., conveyed all his property to deft. who thereupon undertook to pay pltf. the debt due from L., pltf. withdrawing the execution:—*Held*: deft.'s undertaking was not an undertaking to pay the debt of a third person, within the meaning of Stat. Frauds.—**BIRD v. GAMMON** (1837), 3 Bing. N. C. 883; 3 Ilodg. 224; 5 Scott, 213; 6 L. J. C. P. 258; 132 E. R. 650.

*Annotations:—***Mentd.** **Morrell v. Frith** (1838), 3 M. & W. 402; **Cheslyn v. Dalby** (1840), 4 Y. & C. Ex. 238; **Hartley v. Wharton** (1840), 11 Ad. & El. 934; **Waller v. Lacy** (1840), 8 Dow. 563; **Williams v. Griffith** (1849), 3 Exch. 335; **Smith v. Thorne** (1852), 18 Q. B. 131; **Deacon v. Gridley** (1854), 3 C. L. R. 129.

**224.** ———— j—**Pltfs.** having taken B. in execution for a debt discharged him upon the following undertaking of deft. "In consideration of your discharging B. out of custody I undertake that he shall pay the debt due to you by four half-yearly instalments," etc.: *Held*: pltf. might have proved unpaid instalments under a fiat in bkpy. against deft., & that deft.'s certificate was therefore a bar to an action upon the contract for instalments becoming due since his bkpy.

B. was in custody under a *ca. sa.* for the debt in question: & as that was entirely discharged by the execution, & he could no longer be sued for it, or make default in respect of it, it was argued on the authority of **Goodman v. Chase**, No. 221, *ante*, that this undertaking was an original one on the part of the bkpt. to pay the amount of the sum that had been due from B. . . . On consideration we agree that this is correct (**LORD DENMAN**, C.J.). **LANE v. BURGHART** (1811), 1 Q. B. 933; 1 Gal. & Dav. 311; 10 L. J. Q. B. 343; 6 Jur. 125; 113 E. R. 1389; *subsequent proceedings*, 3 Man. & G. 597.

**225.** ———— j—**The** declaration in an action of assumpsit alleged that pltf. sued out a *ca. sa.* against S., directed to the sheriff of M.; that the sheriff, by virtue thereof, duly took & arrested S., by his body; & that while S. was so in custody, in consideration that pltf. would procure the release of S. from & out of the custody under the writ, on payment of poundage & officer's fees, deft. promised to pay pltf. the amount of the debt, in a manner specified. The agreement, as produced in evidence, was intitled, in an action between pltf. & S., & appeared to be, that in consideration of pltf.'s having released S. from custody, deft. engaged to pay the money in the manner specified, & that, simultaneously with the signing & receipt of the above agreement, pltf. gave an order on the sheriff for the discharge of S., who was, however, detained in custody at the suit of other parties. It also appeared that the

*ca. sa.* was irregular on being issued into Middlesex, the venue being laid in Kent, & no previous *ca. sa.* had been issued into Kent:—*Held*: (1) the above agreement did not require to be in writing, under Stat. Frauds, s. 4; (2) the allegation that the sheriff duly arrested S., must be understood to mean that he did so under such circumstances as did not render himself a trespasser, & consequently the allegation was not disproved by the irregularity in the issuing of the writ.

If "duly" only means that the sheriff was not a trespasser & duly acted in pursuance of the writ put into his hands, the averment is proved, for the writ in his hands is sufficient authority to justify him. That is the way in which we ought to construe this declaration, & if so, there is ample evidence of the consideration alleged, to support this promise (**PARKE**, B.).—**BUTCHER v. STEUART** (1843), 11 M. & W. 857; 1 Dow. & L. 308; 12 L. J. Ex. 391; 1 L. T. O. S. 386; 7 Jur. 774; 152 E. R. 1052.

*Annotations:—*As to (1) **Refd.** **Bainbridge v. Wade** (1850), 16 Q. B. 89; **Reader v. Kingham** (1862), 13 C. B. N. S. 314. As to (2) **Apld.** **Goldshode v. Swan** (1847), 1 Exch. 151. **Refd.** **Tanner v. Moore** (1846), 9 Q. B. 1; **Steele v. Hoe** (1849), 14 Q. B. 431; **Colburn v. Dawson** (1851), 10 C. B. 765; **Broom v. Batchelor** (1856), 1 H. & N. 255.

**226.** ———— **Transfer to creditor of debt due from third party.**—A. is indebted to B. & Co. for goods sold, & upon being released from his liability, assigns to the latter debt which is due to him from C. & Co.; notice of the assignment is given to a partner in the house of C. & Co. who by parol, promises in the name of the firm to pay the debt to B. & Co. out of the partnership funds: *Held*: in an action by B. & Co. against C. & Co. for money had & received, the promise was not within Stat. Frauds.—**LACY v. M'NEILE** (1821), 4 Dow. & Ry. K. B. 7.

*Annotations:—***Mentd.** **Andrews v. Smith** (1835), 2 Cr. M. & R. 627; **Beale v. Caddick** (1857), 2 H. & N. 326.

*See, also*, **CHOSER IN ACTION**, Vol. VIII., p. 182, Nos. 502, 503.

### *B. Contemplated Liability.*

#### *(a) In General.*

*See* Stat. Frauds, s. 4.

**227. Whether statute applicable.**—A promise to see a man paid for goods to be sold to or work to be done for a third person, is not binding unless in writing, a promise to pay, is.—**WATKINS v. PERKINS** (1697), 1 Ld. Raym. 224; 91 E. R. 1016.

**228.** ———— j—**MAWBREY v. CUNNINGHAM** (1773), cited 2 Term Rep. at p. 81; 100 E. R. 41.

*Annotation:—***Consd.** **Matson v. Wharam** (1787), 2 Term Rep. 80.

**229.** ———— j—A parol promise to pay for goods sold to B., if B. did not pay for them, though made before delivery of the goods, is a collateral undertaking within Stat. Frauds.—**JONES v. COOPER** (1774), 1 Cowp. 227; 10 Pitt, 769; 98 E. R. 1058. *Annotations:—***Fold.** **Peckham v. Faria** (1781), 3 Doug. K. B. 13; **Matson v. Wharam** (1787), 2 Term Rep. 80.

**230.** ———— j—A. & B. came to pltf.'s warehouse & agreed on a parcel of goods for A. & B. said he would guarantee the payment. A. afterwards came alone & ordered other goods, when pltf.

promise was within Stat. Frauds, & not being in writing, deft. was not liable.—**HAMM v. MCAFEE** (1862), 5 All. 386.—**CAN.**

**227 iii.** ———— j—A guarantee that a promissory note made by another will be paid at maturity is within Stat. Frauds, s. 4, & therefore invalid unless in writing.—**WAMBOLD v. FOOTE** (1878), 3 A. R. 579.—**CAN.**

**227 iv.** ———— j—Where a contractor

made default, & the owner agreed orally that if the sub-contractor would finish the work he, the owner, would pay him:—*Held*: the agreement with the sub-contractor was not a contract to answer for the debt, default, or miscarriage of another within Stat. Frauds, s. 4, & was valid although not in writing.—**PETRIE v. HUNTER**, **GURST v. HUNTER** (1882), 2 O. R. 233; *affd.*, 10 A. R. 127.—**CAN.**

### **PART III. SECT. 2, SUB-SECT. 1.—** **B. (a).**

**227 i. Whether statute**  
**COURREIL v. HATFIELD** (1831), N. B. 112. 397.—**CAN.**

**227 ii.** ———— j—Deft. said to pltf., "If you give B. the horse, I'll be responsible if anything goes wrong." Pltf. thereupon let B. have the horse, & he injured him:—*Held*: such

sent to B. & asked him whether he would engage for A. B. replied, "I will pay you if he does not." The goods were subsequently delivered to A.:—*Held*: this was a collateral promise by B. & required to be in writing by Stat. Frauds.—*PICKHAM v. FARIA* (1781), 3 Doug. K. B. 13; 99 E. R. 514.

*Annotation*:—*Refd.* *Marshall v. Wilson* (1866), 14 W. R. 699.

231. —. ]—Though a tradesman be induced to send goods upon credit to another by a promise made in these words, "If you do not know him you know me, & I will see you paid;" yet this is void by Stat. Frauds, not being in writing. There is no distinction between a promise to pay for goods furnished for the use of another made before they are delivered & after.—*MATSON v. WHAREAM* (1787), 2 Term Rep. 80; 100 E. R. 41.

*Annotations*:—*Refd.* *Rains v. Storry* (1827), 3 C. & P. 130  
*Marshall v. Wilson* (1866), 14 W. R. 699.

(b) *Question of Fact.*

*See* Stat. Frauds, s. 4.

232. *Whether credit given to surety alone—Entries in account books.*—*Assumpsit* in consideration that A. would deliver goods to C. he B., would see him paid.

If B. desire A. to deliver goods to C. & promise to see him paid, then *assumpsit* lies against B., though in that case he always required the tradesman to produce his books to see whom credit was given to. But if after goods delivered to C. by A. B. says to A., "You shall be paid for the goods," it will be hard to saddle him with the debt (*Holt, C.J.*).—*ARSTEN v. BAKER* (1698), 12 Mod. Rep. 250; 88 E. R. 1299.

233. —. ]—When a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shown by unequivocal evidence that the credit was in fact given to another.—*STORR v. SCOTT* (1833), 6 C. & P. 211, N. P.

234. —. ]—A tradesman delivers goods to A. at the request & credit of B. who says, before the delivery, "I will be bound for the payment of the money as far as £800 or £1,000." This promise of B. not being in writing, is void by Stat. Frauds, if it appear that credit was given to A. as well as B.—*ANDERSON v. HAYMAN* (1789), 1 Hy. Bl. 120; 126 E. R. 75.

235. —. ]—What promise is not within Stat. Frauds. The case is not within Stat. Frauds; the whole credit was given to debt. & he is liable (*Eyre, C.J.*).—*GROFT v. SMALLWOOD* (1793), 1 Esp. 121.

236. —. ]—On a motion for a new trial by a debt. in an action against him for goods delivered to the use of a third person on his undertaking to see plff. paid, the ct. will take into consideration not only the expressions used, but the particular situation of debt. at the time of his undertaking, & the amount of the sum for which he will thereby be made liable.

The sum recovered is so large that it goes a great way towards satisfying my mind that it never could have been in contemplation of debt. to make himself liable or of the shopseller to furnish the goods on his credit to so large an amount (*Eyre, C.J.*).—*KRATE v. TEMPLE* (1797), 1 Bos. & P. 158; 126 E. R. 831.

*Annotations*:—*Refd.* *Prosser v. Allen* (1819), Gow. 117; *Cross v. Williams* (1862), 6 L. T. 131; *Mount Stephen v. Lakeman* (1871), 41 L. J. Q. B. 67.

237. —. ]—A mother took her son to school, & saw the master, but no evidence was given of what passed at that time. Afterwards a bill was

delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—*Held*: Stat. Frauds did not apply, & it was proper to leave it to the jury to say, under those circumstances, whether the original credit was not given to the uncle.—*DARNEIL v. TRATT* (1825), 2 C. & P. 82.

238. —. ]—A. applied to B. for goods; B. asked for a reference; A. referred him to C.; C. on being applied to, inquired the amount of the order, & on what terms the goods were to be furnished; & on being told, said, "You may send them, & I will take care that they are paid for at the time." He was afterwards written to, to accept a bill for the amount; to which he replied, that he was not in the habit of accepting bills, but that the money would be paid when due. After this B., the seller, wrote to C. about the goods, & spoke of them in his letter as goods which C. had "guaranteed"; the attorney of B.'s assignees, when he had become bkpt., wrote to A. for the money, & threatened process; but this letter was a circular, written in pursuance of a list made out for him by B. & without any knowledge of the circumstances under which the debt was contracted:—*Held*: on this evidence C. was not primarily liable, but only as a guarantor of the debt of A.—*RAINS v. STORRY* (1827), 3 C. & P. 30, N. P.

239. —. ]—Plff. & debt. went together to the shop of A. who knew plff., but not debt. Plff. having introduced debt., said in his presence to A.: "Have you any objection to supply this gentleman with some furniture? If you will, I will be answerable for it." A. asked how long credit would be wanted. Plff. replied, "I will see it paid at the end of six months"; adding, it would be about £10 or £50. A. sent goods to debt.'s house, & no payment having been made by debt. within six months, applied to plff. for the amount, without previously requesting debt. to pay. Plff. having paid the amount: *Held*: a jury was well warranted in finding that the credit was given by A. not to debt., or to him & plff. jointly, but to plff., whose promise to pay was heretofore original, & not collateral only, so as to require any writing within Stat. Frauds; & heretofore plff. might recover the amount against debt. as for money paid at his request. *Scumble*: the circumstances of each case must be considered in deciding whether a contract be original or collateral.—*SIMPSON v. PENTON* (1834), 2 Ir. & M. 430; 4 Tyr. 315; 3 L. J. Ex. 126; 119 C. It. 828.

*Annotation*:—*Refd.* *Andrews v. Smith* (1835), 2 Cr. M. & R. 627.

240. —. ]—Debt. having employed a builder to erect some houses, & given a guarantee for supply of materials to the builder to a certain amount, & afterwards an order for the further supply to a certain amount, & more materials having been supplied on the order of the builder, debt. being constantly on the premises:—*Held*: it was for the jury whether he had so acted as to lead plff. to believe that the latter supply was to be on his credit.—*SMITH v. RUDHALL* (1862), 3 C. & P. 143.

241. —. ]—A board of health had been formed in a town. L. was its chairman. M., a contractor, had, under the orders of the board, made a main sewer in the town, & under the orders of the board had purchased pipes which could be required to be used in making the connecting drains between certain private houses & the main sewer. The board had, under 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants

**Sect. 2.—Guarantees within statutory provisions:**  
*Sub-sect. 1, B. (b), (c), D., E., F. & G.; sub-sect. 2.]*

of certain streets to make these connecting drains, the effect of the notice being that if the inhabitants did not make those connecting drains the board might make them & charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts & working materials, when L. said to him, "What objection have you to making the connections?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment"; & L. replied "M., go on & do the work, & I will see you paid." M. did the work, & the board refusing to pay, sued L. for the amount: *Held*: the words of L. were properly left to the jury as evidence to sustain a claim against him personally, & they did not constitute a promise to pay the debt of another, so as to come within the operation of Stat. Frauds.

There can be no suretyship unless there be a principal debtor, who, of course, may be constituted in the course of the transaction by matters *ex post facto*, & need not be so at the time, but until there is a principal debtor there can be no suretyship (LORD SELBORNE). *LAKEMAN v. MOUNTSTEPHEN* (1871), L. R. 7 H. L. 17; 43 L. J. Q. B. 188; 30 L. T. 437; 38 J. P. 452; 22 W. R. 617, H. L.; *affg*. S. C. *sub nom.* *MOUNTSTEPHEN v. LAKEMAN* (1871), L. R. 7 Q. B. 196, Ex. Ch.

*Annotations*:—*Refd.* *Wildes v. Dudlow* (1874), L. R. 19 Eq. 198; *Guild v. Conrad* (1894), 63 L. J. Q. B. 721.

**C. Promise to pay Rent if Landlord will not Distrain.**  
*See Stat. Frauds, s. 4.*

**242. Promise before distress levied.]** A promise from a broker to the landlord to pay the rent to prevent distress need not be in writing.

The landlord had a legal pledge. He enters, to distrain: he has the pledge in his custody. Debt. agrees "that the goods shall be sold, & plff. paid in the first place." The goods are the fund: the question is not between T. & plff. Plff. had a lien upon the goods. L. was a trustee for all the creditors: & was obliged to pay the landlord, who had the prior lien. This has nothing to do with Stat. Frauds (LORD MANSFIELD, C.J.). *WILLIAMS v. LEFER* (1766), 3 Burr. 1886; 2 Wils. 308; 97 E. R. 1152.

*Annotations*:—*Apld.* *Castling v. Aubert* (1802), 2 East. 325; *Edwards v. Kelly* (1817), 6 M. & S. 204; *Bampton v. Paulin* (1827), 4 Bing. 261. *Distd.* *Thomas v. Williams* (1830), 10 B. & C. 661. *Expld.* *Fitzgerald v. Dressler* (1850), 7 C. B. N. S. 374; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778. *Refd.* *Andrews v. Smith* (1835), 1 Gale. 335; *Tomlinson v. Geil* (1837), 6 Ad. & El. 664; *Rounce v. Woodyard* (1846), 8 L. T. O. S. 186; *Couturier v. Hastie* (1852), 8 Exch. 40; *Reader v. Kingham* (1862), 13 C. B. N. S. 344.

**243. —.]**—An auctioneer employed to sell goods on certain premises for which rent was in arrear, was applied to by the landlord for the rent, the landlord saying, it was better to apply so than to distrain; the auctioneer answered, "You shall

be paid; my clerk shall bring you the money":—*Held*: an action lay on this promise without a note in writing.—*BAMPTON v. PAULIN* (1827), 4 Bing. 264; 12 Moore, C. P. 497; 5 L. J. O. S. C. P. 168; 130 E. R. 769.

*Annotation*:—*Refd.* *Rounce v. Woodyard* (1846), 8 L. T. O. S. 186.

**244. Promise after distress levied.]**—Plff. having distrained for rent-arrear goods which the tenant was at that time about to sell, agreed with debt. to deliver up the goods, & to permit them to be sold by one of debt. for the tenant, upon debt.' joint undertaking to pay to plff. all such rent as should appear to be due to him from the tenant; & he thereupon delivered up the distress:—*Held*: this agreement was not within Stat. Frauds.

It is only necessary to attend to the facts in order to see that this case is not within the statute. After plff. had distrained, he held in his own hands his remedy for recovering the rent, & the tenant was at that time no longer indebted; for so long as the landlord held the goods under distress the debt due from the tenant was suspended. What, then, I would ask, is the substance of this contract? It is as if debt. had proposed to plff. in these words; you must convert the goods into money in order to satisfy yourself the arrears due, if you will allow us to do this we will pay you. What would this have been but an independent contract between these parties? I think that the present case is neither within the letter nor mischief of the Act of Parliament, which was aimed at cases where a debt being due from one person, another engaged to pay it for him. But here, for the reason above stated, at the time when the promise was made, the debt was not owing from the tenant (*BAYLEY, J.*).—*EDWARDS v. KELLY* (1817), 6 M. & S. 204; 105 E. R. 1219.

*Annotations*:—*Refd.* *Thomas v. Williams* (1830), 10 B. & C. 661; *Rounce v. Woodyard* (1846), 8 L. T. O. S. 186; *Fitzgerald v. Dressler* (1850), 7 C. B. N. S. 374; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778.

*Refd.* *Leham v. Philpott* (1875), L. R. 10 Exch. 212.

**245. — Coupled with promise to pay rent to accrue.]** *THOMAS v. WILLIAMS*, No. 182, *ante*.

*Compare* No. 210, *ante*; No. 249, *post*.

**D. Promise to pay from Debtor's Money.**

**246. Promise to pay from money due to principal debtor.]**—*Qu.*: whether an undertaking to pay plffs. the amount due from debt. to B., for work to be done by B., in consideration that plff. will advance money to B. is a guaranty.—*PARKINS v. MORAVIA* (1824), 1 C. & P. 376, N.P.

**247. Promise to pay from debtor's money when received.]**—W. undertook to complete the carpenters' work in H.'s house & find all materials; W. being delayed for want of credit or funds to procure timber, it was supplied by M., on H.'s signing the following undertaking. "I agree to pay M. for timber to house in C., out of the money that I have to pay W., provided W.'s work is completed":—*Held*: this was not a guarantee to pay if W. should fail, but a direct undertaking

**PART III. SECT. 2, SUB-SECT. 1.—C.**

**242 i. Promise before distress levied.]**—Plff. declared on an oral promise to pay two quarters' rent due on premises which had been leased by plff. to G., the consideration being that plff. would forbear to distrain. When the promise was made only one quarter's rent was due:—*Held*: the promise, being void as to the second quarter's rent, was void altogether.—*HALL v. DENHOLM* (1854), 11 U. C. R. 334.

**—CAN.**

**244 i. Promise after distress levied.]**—Plff. having distrained the goods of C., his tenant, in consideration that he would withdraw the distress, debt. undertook, by parol, to pay the amount of the rent due:—*Held*: this was a collateral undertaking to pay the debt of another; & not being reduced to writing, was void, under Stat. Frauds.—*FENNELL v. MULCAHY* (1845), 8 L. L. R. 434.—*IR.*

**PART III. SECT. 2, SUB-SECT. 1.—D.**

**246 i. Promise to pay from money due to principal debtor.]**—Debt. deducted from an employee's wages an amount due by him to plffs. & promised plffs. to pay the amount to them:—*Held*: the promise was not to pay another's debt within Stat. Frauds & need not be in writing.—*STRUGGALL v. LYMBURGH* (1912), 14 W. A. L. R. 201.—*AUS.*



to pay when the work should be completed.—*DIXON v. HATFIELD* (1825), 2 Bing. 439; 10 Moore, C. P. 42; 130 E. R. 375; *sub nom.* *DICKSON v. HATFIELD*, 3 L. J. O. S. G. P. 59.  
*Annotation*:—*Refd.* *Sweeting v. Asplin* (1810), 7 M. & W. 163.

**248.** —.]—A declaration stating that H. was about to do some work, payment for which would pass through the hands of deft., & in consideration that pltf. would deliver materials to H. that the deft. promised to pay for them out of the moneys passing through his hands as H. should order, averred that deft. received moneys, & that H. made an order requiring deft. to pay:—*Held*: this contract was not within Stat. Frauds, the declaration not disclosing that H. was liable at all, or if he was, the contract was nothing more than a prospective assignment of a debt with the consent of the debtor.—*ANDREWS v. SMITH* (1835), 2 Cr. M. & R. 627; 1 Gale, 335; Tyr. & Gr. 173; 5 L. J. Ex. 80; 150 E. R. 267.

*Annotation*:—*Refd.* *Sweeting v. Asplin* (1810), 7 M. & W. 165.

**249.** Promise to pay from produce of debtor's goods.—Deft., in consideration of pltf.'s withdrawing a distress for rent, undertook to pay the sum due for rent out of the sale of the produce of the effects:—*Held*: it was a positive engagement to pay, if the goods were sufficient, & therefore, in an action on the guarantee, proof that the goods produced the amount of rent entitled pltf. to recover, although there were prior claims.—*STEPHENS v. PELL* (1834), 2 Cr. & M. 710; 2 Dowl. 629; 3 L. J. Ex. 214; 149 E. R. 947.

#### *E. Promises in consideration of Stay or Withdrawal of Proceedings.*

**250.** Liability of third person not established.—A promise to pay damages by a third person in case pltf. will withdraw his record, is not within Stat. Frauds.—*READ v. NASH* (1751), 1 Wils. 305; 95 E. R. 632.

*Annotations*:—*Distd.* *Fish v. Hutchinson* (1759), 2 Wils. 94. *Consd.* *Williams v. Loper* (1766), 3 Burr. 1586; *Chater v. Beckett* (1797), 7 Term Rep. 201. *Distd.* *Kirkham v. Marter* (1819), 2 B. & Ald. 613. *Apld.* *Bird v. Gammon* (1837), 3 Bing. N. C. 883. *Refd.* *Tomlinson v. Gill* (1756), Amb. 330; *Harris v. Huntbach* (1757), 1 Burr. 373; *Edwards v. Kelly* (1817), 6 M. & S. 204; *Jones v. Bright* (1829), 3 Moo. & P. 305; *Reader v. Kingham* (1862), 13 C. B. N. S. 311.

**251.** Liability of third party still subsisting.—Pltf. declares that V. was indebted to him in a certain sum of money, & he had commenced an action for same. Deft. in consideration that pltf. would stay his action against V. promised to pay pltf. the money owed by V.

The case is very clearly within the Statute, for here is the debt of another person still subsisting & a promise to pay it (*per Cur.*).—*FISH v. HUTCHINSON* (1759), 2 Wils. 94; 2 Keny. 537; 95 E. R. 704.

**252.** —.]—*KIRKHAM v. MARTER*, No. 176, *ante*.

**253.** Promise to execute bail bond to avoid arrest in civil action.—A promise by a party to execute a bail bond on a writ to be sued out against A. in consideration of pltf. forbearing to arrest A. on a writ already sued out, is not a promise to answer for the debt, etc., of another, under Stat. Frauds, s. 4.—*JARMAN v. ALGAR* (1826), 2 O. & P. 240; Ry. & M. 318, N. P.

#### *F. Promises to be answerable for Persons under Disability.*

**254.** Infant.—A note of hand acknowledging the receipt of money, & promising to be accountable for it, will support a count for money lent & advanced.

The infant was not liable, & therefore it could not be a collateral undertaking. It was an original undertaking of deft. to pay the money (*FOSTER, J.*).—*HARRIS v. HUNTBAUGH* (1757), 1 Burr. 373; 2 Keny. 28; 97 E. R. 355.  
*Annotation*:—*Refd.* *Mountstephen v. Lakeman* (1870), 39 L. J. Q. B. 275.

**255.** Married woman.—*Assumpsit*:—*Held*: a plea that deft.'s undertaking was for the default of another, without writing, & without consideration, might be pleaded, although the facts might have been given in evidence under the general issue. So, a plea that the person for whom deft.'s undertaking was given, was a *fenie covert*.

If A. had been discharged out of custody upon a primary & absolute undertaking that deft. would pay the debt at all events or accept a bill for the amount we are all of opinion that the discharge of A. from imprisonment would be a sufficient consideration for such a promise, & that deft. would be liable (*PARK, J.*).—*MAGGS v. AMES* (1828), 1 Bing. 470; 1 Moo. & P. 291; 6 L. J. O. S. G. P. 75; 130 E. R. 819.

*Annotations*:—*Mentd.* *Loaf v. Tuton* (1812), 10 M. & W. 393; *Cannan v. S. E. Ry.* (1852), 19 L. T. O. S. 204.

#### *G. Indemnities.*

*See Part XII., post.*

#### SUB-SECT. 2.—PROMISE MUST BE MADE TO CREDITOR.

**256.** Promise to principal debtor.—*CASTLING v. AUBERT*, No. 178, *ante*.

**257.** —.]—W., landlord to P., having the power to distrain for rent in arrear, & having actually distrained for part, & being a creditor of P. for money lent, as well as for rent in arrear, upon P.'s representing to him that he was also indebted to G. to the amount of about £900, for which he was in fear of arrest & about to leave the country, undertook that if P. would give up to him the farm, & execute an assignment of all his property, he would pay G.'s debt in the first instance, out of the proceeds, & apply the residue in satisfaction of his own demand, & the surplus, if any, to P., who executed a bill of sale to W. accordingly on the faith of such undertaking. Upon the bill of G. & P., this agreement was enforced against W. to the extent of £900, the alleged amount of G.'s debt, but no further; the actual debt having proved to exceed that amount; & not prevented from having effect, either by the circumstances that P.'s property fell short of the estimated amount, or of P.'s being at the time indebted to other persons besides G. & W., which formed no part of the consideration for the agreement, although noticed in W.'s undertaking as having been represented otherwise. The engagement not to pay G. in the first instance, not being made, directly to G., but through the medium of P., by whom also the consideration was

#### PART III. SECT. 2, SUB-SECT. 1.—F.

**h. Infant—Member of firm.**—Pitts, appointed the firm of A. & B. sales agents on terms expressed in a written agreement which, in consequence of A. being an infant, was not

executed in the firm name, but was signed by B., in his own name, & by H., the father of A.:—*Held*: H. was liable as surety for the goods supplied the firm under the terms of the agreement.—*FAKE v. HANCOCK* (1897), 30 N. S. R. 33.—*CAN.*

**k. —.]**—*PEARSON v. CALDER* (1916), 9 O. W. N. 424; 35 O. L. R. 524.—*CAN.*

**l. —.]**—*R. v. NOVAK*, [1920] 1 W. W. R. 136; 50 D. L. R. 412; 30 Man. L. R. 86.—*CAN.*



*Sect. 2.—Guarantees within statutory provisions:*  
*Sub sects. 2 & 3.]*

furnished:—*Held*: P. was a trustee for G. Qu.: if plffs. could recover at law upon such an agreement.

It is said, that supposing it is upon the first agreement that G. is to proceed, they ought to have gone to law & to have recovered as upon an undertaking in writing to pay the debt of another person. Now it may be a doubt whether they could have recovered at law upon this agreement for the engagement is not made directly to A.; it is made to P. only & the consideration is furnished by P. . . . G. himself is no party to the contract. P. acts as his trustee, & G. may derive an equitable right through the mediation of P.'s agreement. So G. has a right to insist upon the benefit of the promise made to P. (GRANT, M.R.).—GREGORY v. WILLIAMS (1817), 3 Mer. 582; 36 E. R. 224.

*Annotations*:—*Apld.* Lloyd's v. Harper (1880), 16 Ch. D. 290. *Refd.* English, Scottish & Australian Chartered Bank v. Royal Mail Steam Packet Co. & European & Australian Royal Mail Co. (1862), 7 L. T. 211; Drew v. Martin (1861), 2 Hem. & M. 130; Touche v. Metropolitan Rly. Warehousing Co. (1871), 6 Ch. App. 671; *Re* Empress-Engineering Co. (1880), 16 Ch. D. 125. *Mentd.* Grundy v. Heathcote (1863), 1 Hem. & M. 172; *Re* Flavell, Murray v. Flavell (1883), 25 Ch. D. 89.

258. —.]—Where A., at the request of B., entered into a bond with him & C. to indemnify D. against certain debts due from C. & D., & B. promised to save A. harmless from all loss by reason of the bond:—*Held*: this promise was binding, although not in writing, & A. might recover from B. the whole of the moneys which he was compelled to pay by virtue of the bond.—THOMAS v. COOK (1828), 8 B. & C. 728; 3 Man. & Ry. K. B. 441; 7 L. J. O. S. K. B. 49; 108 E. R. 1213.

*Annotations*:—*N.F.* Green v. Chesswell (1839), 10 Ad. & El. 453. *Consd.* Cripps v. Hartnoll (1863), 4 B. & S. 414. *Apld.* Wildes v. Dudlow (1874), L. R. 19 Eq. 198. *Follid.* Guild v. Conrad, [1894] 2 Q. B. 885. *Refd.* Hargreaves v. Parsons (1844), 13 M. & W. 561; Reader v. Kingham (1862), 13 C. B. N. S. 344; *Re* Bolton (1892), 8 T. L. R. 608; Harburg India Rubber Comb Co. v. Martin, [1902] 1 K. B. 778; Davys v. Buswell, [1913] 2 K. B. 47.

259. —.]—A promise to a debtor to pay his debt to a third person, is not a promise to answer for the debt of another, within Stat. Frauds, s. 4, which applies only to promises made to the person to whom another is answerable.—EASTWOOD v. KENYON (1840), 11 Ad. & El. 438; 3 Per. & Dav. 276; 9 L. J. Q. B. 409; 4 Jur. 1081; 113 E. R. 482.

*Annotations*:—*Consd.* Hargreaves v. Parsons (1844), 13 M. & W. 561. *Follid.* Reader v. Kingham (1862), 13 C. B. N. S. 344. *Refd.* Leaf v. Tuton (1842), 10 M. & W. 393; Rosecorla v. Thomas (1842), 3 Q. B. 234; Wolff v. Koppell (1843), 22 L. J. Ex. 103, n.; Cripps v. Hartnoll (1863), 4 B. & S. 414; Guild v. Conrad, [1894] 2 Q. B. 885. *Mentd.* Veitch v. Russell (1842), Car. & M. 362; Beaumont v. Reeve (1846), 8 Q. B. 483; Linagar v. Hodd (1848), 17 L. J. C. P. 106; Fisher v. Bridges (1854), 1 Jur. N. S. 157; Flight v. Reed (1863), 1 H. & C. 703. *Jayawickreme v. Anarasuriya*, [1918] A. C. 869.

260. —.]—A., at the request of & on a verbal offer by B. to indemnify him against loss, joined with C. in a joint & several promissory note which he was afterwards compelled to pay:—*Held*: the offer to indemnify A. was not an agreement within Stat. Frauds, & therefore, need not be in writing, & A., having afterwards become the exor. of B., was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate.

I accordingly decide that where one person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement within Stat. Frauds, & does not require to be in writing. This is a case in which a father induced his son to guarantee th

debt of his son-in-law upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him (MALINS, V.-C.).—WILDES v. DUDLOW (1874), L. R. 19 Eq. 198; 44 L. J. Ch. 341; 23 W. R. 435.

*Annotations*:—*Follid.* *Re* Bolton (1892), 8 T. L. R. 608; Guild v. Conrad, [1894] 2 Q. B. 885. *Refd.* *Re* Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 84; Harburg India Rubber Comb Co. v. Martin, [1902] 1 K. B. 778. *Mentd.* Roshier v. Williams (1875), L. R. 20 Eq. 210.

261. —.]—If A. undertakes a liability at the request of B., & upon a promise by B. to pay to A. what he pays under the liability, B.'s promise is not within Stat. Frauds (CHITTY, J.).—*Re* BOLTON (1892), 8 T. L. R. 608; *sub nom.* *Re* BOLTON, MORANT v. BOLTON, 36 Sol. Jo. 608.

*Annotations*:—*Follid.* Guild v. Conrad, [1894] 2 Q. B. 885. *Refd.* *Re* Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 84.

262. —.]—GUILD & Co. v. CONRAD, No. 12, ante.

263. Promise to stranger.]—LOVE'S CASE (1706), 1 Salk. 28; 91 E. R. 28.

*Annotation*:—*Mentd.* Pilkington v. Green (1800), 2 Bos. & P. 151.

264. — Widow of principal debtor.]—(1)

One promises, if the widow of intestate would permit him to be joined with her in letters of administration, he would make good any deficiency of assets to pay debts:—*Held*: the promise was binding, & not within Stat. Frauds.

(2) Distinction where a promise is to pay the original debt on the foot of the original contract, & where it is a new consideration; the former is within Stat. Frauds, the latter is not.—TOMLINSON v. GILL (1756), Amb. 330; 27 E. R. 221.

*Annotations*:—*As to* (1) *Refd.* Griffith v. Sheffield (1758), 1 Eden, 73; Lloyd's v. Harper (1880), 16 Ch. D. 290. *Generally*, *Mentd.* *Re* Flavell, Murray v. Flavell (1883), 25 Ch. D. 89.

265. —.]—Deft. & P. agreed for the sale by P. to deft. of the "put or call" of fifty foreign railway shares, at a certain price per share premium, at any time on or before Feb. 18, 1844. Before that day deft. agreed to resell the option to pltf., & to guarantee the performance of the contract by P. On Feb. 16, pltf. called the shares, i.e. required the delivery of them pursuant to the agreement, but it was at the same time verbally agreed between him & deft. & P., that they should be delivered by P. to pltf., not on Feb. 18, but on Mar. 3 at Paris:—*Held*: this was not an agreement by deft. to be answerable for the default of P., but an original promise by deft. for the delivery of the shares by P., for which a note in writing was not required by Stat. Frauds.—HARGREAVES v. PARSONS (1844), 13 M. & W. 561; 14 L. J. Ex. 250; 4 L. T. O. S. 213; 153 E. R. 235.

*Annotations*:—*Follid.* Reader v. Kingham (1862), 13 C. B. N. S. 344; Cripps v. Hartnoll (1863), 4 B. & S. 414; Guild v. Conrad, [1894] 2 Q. B. 885. *Refd.* Mountstephen v. Lakeman (1870), L. R. 5 Q. B. 613.

266. —.]—Pltf., the bailiff of a county et., being about to arrest H. under a warrant of contempt for non-payment of a judgment debt, deft., in consideration that he would forbear to execute the warrant, promised to pay pltf. £17 on a given day or surrender H.:—*Held*: this was not an agreement by deft. to be answerable for the debt or default of H., but an original promise by deft. to pay the money or surrender H., for which a note in writing was not required by Stat. Frauds.—READER v. KINGHAM (1862), 13 C. B. N. S. 344; 1 New Rep. 94; 32 L. J. C. P. 108; 7 L. T. 789; 9 Jur. N. S. 797; 11 W. R. 360; 143 E. R. 137.

*Annotations*:—*Follid.* Wildes v. Dudlow (1874), L. R. 19 Eq. 198; Guild v. Conrad, [1894] 2 Q. B. 885.

267. —.]—(1) Where a person, at the

request of another, enters into a recognisance of bail for the appearance of a third to answer a criminal charge, this is not a "special promise to answer for the debt, default or miscarriages of another person" within Stat. Frauds, s. 4. (2) *Concessum*, that, in order to bring a case within that sect., the debt or default must be towards the promisee. (3) *Qu.*: of the case of *Green v. Cresswell*, No. 1806, *post*, where, a *capias* having been issued against a party, another entered into a bail bond for him, in consideration of which a third made a verbal promise to indemnify him against the consequences, it was held that the case came within the above sect.—*CRIPPS v. HARTNOLL* (1863), 4 B. & S. 414; 2 New Rep. 453; 32 L. J. Q. B. 381; 8 L. T. 765; 10 Jur. N. S. 200; 11 W. R. 933; 122 E. R. 514, Ex. Ch.

*Annotations*:—As to (1) *Refd.* *Reader v. Kingham* (1862), 13 C. B. N. S. 344; *Guild v. Conrad*, [1891] 2 Q. B. 885; *Davys v. Buswell*, [1913] 2 K. B. 47. As to (2) *Refd.* *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 84. *Generally, Refd.* *Mountstephen v. Lakeman* (1871), 25 L. T. 755; *Hermann v. Jeuchner* (1885), 54 L. J. Q. B. 310; *Consolidated Exploration & Finance Co. v. Musgrave* (1899), 69 L. J. Ch. 11.

### 238. Promise to firm of which promisor partner.]

—A., being a member of a partnership firm consisting of A., B., & C., verbally agreed with B. & C. to guarantee his partners against loss in respect of an existing debt due to it from his son, or, according to another version, to guarantee to the firm the balance which should be found due. A. died having by his will given a share of his estate to his son's wife & children; &, after referring to his son's indebtedness to the firm & stating that "he had guaranteed" the firm against loss in respect of the debt, he directed that the amount of the debt should be brought into hotchpot in ascertaining the share given by his will. By a codicil he "confirmed the guarantee mentioned in his will":—*Held*: (1) the verbal guarantee was not a promise which fell within sect. 4 of Stat. Frauds.

(2) The note or memorandum in writing must exist at the time when the action is commenced, so that an action cannot be supported by a memorandum obtained after its commencement. As the statute [of Frauds] affects only the mode of proof, this rule must be considered anomalous; but it is founded on the wording of the statute (*LINDLEY, L.J.*).

(3) The question is not one of intention of the party who signs the document, but simply one of evidence against him. The ct. is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him & containing the terms of the contract is sufficient for that purpose (*BOWEN, L.J.*).—*Re HOYLE, HOYLE v. HOYLE*, [1893] 1 Ch. 84; 62 L. J. Ch. 182; 67 L. T. 674; 41 W. R. 81; 37 Sol. Jo. 46; 2 R. 145, C. A.

*Annotations*:—As to (2) *Refd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Generally, Refd.* *Sutton v. Grey* (1893), 69 L. T. 354; *Guild v. Conrad* (1894), 63 L. J. Q. B. 721. *Mentd.* *Pattle v. Hornbrook* (1896), 75 L. T. 475.

*Indemnities.*]—See Part XII., *post*.

### SUB-SECT. 3.—LIABILITY MUST RESULT FROM GUARANTEE ONLY.

269. *General rule.*]—A. through the agency of B., a broker, sold a parcel of linseed to C., who through the same broker sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the

delivery order for the seed. The broker took him to A., from whom the clerk obtained the order upon the faith of his engagement that D. would pay A. for the seed. D. on the following day sent the broker a cheque for £900 on account, the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A. under his contract with C. was £971 15s. 6d. In an action by A. against D. to recover the difference between that sum and the £900 cheque:—*Held*: (1) the agreement by D.'s clerk was not a contract or promise to pay the debt of a third person within the Stat. Frauds, s. 4, the seed, the giving up the delivery order for which was the consideration for that purpose, being the property of D., subject only to A.'s lien for the contract price.

We are all agreed that the case is not within Stat. Frauds. The law upon this subject is, I think, correctly stated in the notes to *Firth v. Stanton*, 1 Wms. Saund. 211e, where the learned editor thus sums up the result of the authorities: "There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (s. 4) or not, depends, not on the considerations for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of debt. or his property, except such as arises from his express promise." I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz. an absence of prior liability on the part of debt. or his property, it being as I think truly stated there as the result of the authorities that if there be something more than a mere undertaking to pay the debt of another, as where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest, the case is not within the provision of the statute which was intended to apply to the case of an undertaking to answer for the debt, default or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking (*COCKBURN, C.J.*).

(2) There being no evidence that D.'s clerk had communicated to him the bargain he had made with A.'s clerk when he obtained the delivery order, D. was not liable.—*FITZGERALD v. DRESSLER* (1859), 7 C. B. N. S. 374; 29 L. J. C. P. 113; 33 L. T. O. S. 43; 5 Jur. N. S. 598; 7 W. R. 190; 141 E. R. 861.

*Annotations*:—As to (1) *Consd.* *Haiburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778. *Refd.* *Reader v. Kingham* (1862), 13 C. B. N. S. 344; *Sutton v. Grey*, [1894] 1 Q. B. 285; *Davys v. Buswell*, [1913] 2 K. B. 47.

270. —.]—*SUTTON & Co. v. GREY*, No. 285, *post*.

271. *Application of rule*—*Promise to be answerable for payment by promisor's agent.*]—*Deft.* sold *pltf.* a horse for eight guineas, & promised *pltf.* that if he did not like the horse, & delivered him to one B. that B. should repay *pltf.* the eight

**Sect. 2.—Guarantees within statutory provisions:**  
**Sub-sects. 3, 4 & 5.]**

guineas; & if B. did not repay, debt. would:—**Held:** this was not a collateral contract to pay for the debt of another, but the whole was one entire contract upon the sale & no special request in such case.—**MASTERS v. MARRIOT** (1693), 3 Lev. 363; Holt, K. B. 26; Skin. 347; 12 Mod. Rep. 44; 83 E. R. 732.

**272.** — — — — — **SCHOLES v. HAMPSON & MERRIOT** (1806), Fell on Mercantile Guarantees, 2nd ed., p. 27.

**273.** — — — — — **Promise to pay where jointly interested with another.]**—If a person promise to pay a sum of money on a matter in which he & another are interested, the promise is good, although it be not reduced into writing.—**STEPHENS v. SQUIRE** (1696), 5 Mod. Rep. 205; 87 E. R. 610; *sub nom.* **STEVENS v. SQUIRE**, Comb. 362.

**Annotation:** — **Reid.** *Reader v. Kingham* (1862), 13 C. B. N. S. 311.

**274.** — — — — — **Request to defend action in which promisor interested.]** When a party desires an action brought against another person to be defended, in which action he is concerned, & may be benefited by the event; & such is defended, & the party fails, he is liable to pay the expenses of the defence; nor is it within Stat. Frauds in such case, requisite to have a note in writing.—**HOWES v. MARTIN** (1794), 1 Esp. 162, N. P.

**Annotations:** — **Reid.** *Gairard v. Cottrell* (1817), 10 Q. B. 679. **Mentd.** *Lewis v. Campbell* (1819), 8 C. B. 511; *Williams Torrey v. Knight, The Lord of the Isles*, (1891) P. 312.

**275.** — — — — — **Promise to answer for promisor's own debt.]**—If a cheque drawn upon any person is sent by another to know if it is good before he will receive it, & such person says it will be honoured, as he is indebted to the drawer of it, though the cheque turns out to be void, as being post-dated, the holder may nevertheless, recover on the ground of the sum due to the drawer of the cheque being so appropriated. **ARDERS v. ROWNEY** (1805), 5 Esp. 251, N. P.

**276.** — — — — — **HODGSON v. ANDERSON**, No. 217, *ante*.

**277.** — — — — — **The widow of a publican employed an undertaker to conduct the funeral of deceased, & deposited with him the beer & spirit licences of the house as a security for the payment of his bill. A., one of the firm of distillers who supplied the house with spirits, by arrangement with the widow, took out administration; B., the other partner in the firm, promised the undertaker that, if he would give up the licences to him, he would pay his bill for the funeral: Held:** the undertaker, having given up the licences to B., might recover his bill against B., although the widow was his original employer, & although he had made out his account, charging the administrator as his debtor.

It is a new contract; it has nothing to do with Stat. Frauds. It is not "I will pay, if the debtor cannot"; but it is "in consideration of that which is an advantage to me I will pay you this money" (**TINDAL, C.J.**).—**WALKER v. TAYLOR** (1834), 6 C. & P. 752, N. P.

**Annotation:** — **Consd.** *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778.

**278.** — — — — — **Testator appointed his son & three other persons his exors. & trustees. The son disclaimed & renounced probate, & afterwards purchased a portion of testator's property. The other legatees raised a claim for losses incurred by the trustees; & the son's solr. wrote, on his behalf, to claimants, agreeing to pay £3,000 in**

satisfaction of the alleged losses:—**Held:** this letter was not within Stat. Frauds, as an agreement to answer the debt, default or miscarriage of another; & it was not invalid for want of consideration. The claim was, therefore, allowed against the son's estate.—**ORRELL v. COPPOCK** (1856), 26 L. J. Ch. 269; 28 L. T. O. S. 170; 2 Jur. N. S. 1244; 5 W. R. 185.

**279.** — — — — — **FITZGERALD v. DRESSLER**, No. 269, *ante*.

**280. What interest sufficient to take out of statute—Not interest as shareholder.]** **HARBURG INDIA RUBBER COMB CO. v. MARTIN**, No. 286, *post*.

**281. — — — — — Not interest as debenture holder.]**—The mere fact that a person, who guarantees payment of a debt due from a co., is induced to do so by reason of his having a floating charge on the assets & business of the co. will not take the case out of Stat. Frauds, s. 4. Debt. in an action counterclaimed upon a promise by plff. to be answerable for the price of goods supplied by debt. to a limited co. Plff. was the holder of a large number of shares in & had lent money to the co., as security for which money he held a debenture of the co., which was a "floating" security on their business & assets. Debt. had been in the habit of supplying goods to the co. for the purposes of their business. A balance being due to him in respect of goods so supplied, he was threatening, unless this was paid, not to supply any more goods to the co. Thereupon plff. made an oral agreement with debt., the effect of which the jury found to be that he agreed to be answerable for the price of goods supplied to the co. by debt., if the co. made default. The jury further found that plff. was induced to enter into the agreement by the fact (*inter alia*) that he had a debenture charge upon the assets of the co.: **Held:** upon the above facts, the agreement was a guarantee which came within Stat. Frauds, s. 4, & the agreement not being in writing, & there being no memorandum of it in writing, signed by the party to be charged, the counter-claim failed.—**DAVYS v. BUSWELL**, [1913] 2 K. B. 47; 82 L. J. K. B. 499; 108 L. T. 211, C. A.

**SUB-SECT. 4. MAIN OBJECT MUST BE PAYMENT OF DEBT OR LIABILITY OF PRINCIPAL DEBTOR.**

**282. General rule.]**—**CASTLING v. AUBERT**, No. 178, *ante*.

**283.** — — — — — **MACRORY v. SCOTT**, No. 322, *post*.

**284. Promise that debtor shall not leave country.]**—Promise to forbear suit in consideration debt. promised, that the debtor should not leave the kingdom without paying plff. his debt. Whether within the Stat. Frauds.—**ELKINS v. HEART** (1731), Fitz-G. 202; 94 E. R. 720.

**285. Payment of debt ulterior consequence.]**—Plffs. who were stockbrokers, entered into an oral agreement with debt. that he should introduce clients to them, & that plffs. should transact business on the Stock Exchange for the clients thus introduced, upon the terms that, as between plffs. & debt., debt. should receive half the commission earned by plffs. in respect of any transactions by them for any clients introduced by debt., & that he should pay to plffs. half of any loss which might be incurred by them in respect of such transactions. Plff. claimed to recover from debt. half the loss which they had incurred in Stock Exchange transactions which they had entered into on behalf of one R., who had been

introduced to them by deft. :—*Held* : deft. having an interest in the transactions, equally with plffs., & the main object of the contract being to regulate the terms of the deft.'s employment, the contract was not within Stat. Frauds, s. 4, & the action was maintainable, though the contract was not in writing.

Is such a contract a simple contract of guarantee, "a special promise to answer for the debt or default of another person" so as to bring it within Stat. Frauds, s. 4, or is it a contract of indemnity? Whether any contract is the one or the other is often a very nice question. . . . The test given is whether deft. is interested in the transaction either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transactions, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, & sect. 4 does not apply (*LORD ESHER, M.R.*). *SUTTON & Co. v. GREY*. [1891] 1 Q. B. 285; 63 L. J. Q. B. 633; 69 L. T. 673; 42 W. R. 195; 10 T. L. R. 93; 38 Sol. Jo. 77; 9 R. 106, C. A.

*Annotations* :—*Distd.* Harburg India Rubber Comb Co. v. Martin, [1902] 1 K. B. 778; *Davys v. Buswell*, [1913] 2 K. B. 17. *Refd.* *Guild v. Conrad* (1891), 42 W. R. 612.

**236. Payment of debt incident of larger contract.]** Deft., who was a director of & had a large interest as a shareholder in a co., which he had also financed, orally promised plffs., who were judgment creditors of the co., & who had delivered to the sheriff a writ of *fi. fa.*, which they had issued upon their judgment, on which the sheriff had failed to levy because he could not effect an entry, that he, deft., would indorse bills for the amount of the debt :—*Held* : (1) this promise was not a contract of indemnity, but was a "promise to answer for the debt of another" within Stat. Frauds, s. 4. & as it was not in writing, an action for the breach of it could not be maintained; (2) the case was not excepted from s. 4 by reason of the interest which deft. had as a shareholder & otherwise in freeing the goods of the co. from the execution, he having no legal interest in or charge upon the goods.

If I go to a banker or to another person who holds documents as security for a debt & I ask him to hand over the documents to me on payment of the debt, that is simply a purchase of the security. Although in this way I have become answerable for the debt of another, that is not the main object of the contract (*COZENS HARDY, L.J.*).

Whether you look at the "property cases" or at the "*del credere* cases," it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the sect. because of the object of the contract. In each of those cases there was in truth a main contract, a larger contract, & the obligation to pay the debt of another was merely an incident of the larger contract. As I understand those cases, it is not a question of motive, it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property, the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockbroker's office, in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere

fact that as an incident to it, not as the immediate object, but indirectly, the debt of another to a third person will be paid does not bring the case within the sect. This definition or rule for ascertaining the kind of cases outside the sect. covers both "property cases" & "*del credere* cases" (*VAUGHAN WILLIAMS, L.J.*).—*HARBURG INDIA RUBBER COMB Co. v. MARTIN*, [1902] 1 K. B. 778; 71 L. J. K. B. 529; 86 L. T. 505; 50 W. R. 449; 18 T. L. R. 428; 46 Sol. Jo. 357, C. A.

*Annotation* :—As to (1) & (2) *Consd.* *Davys v. Buswell*, [1913] 2 K. B. 47.

**Promise of *del credere* agent.]** *See AGENCY*, Vol. I., p. 283, Nos. 145, 146.

***Del credere* agents generally.]** *See AGENCY* Vol. I., p. 280, Nos. 120-127.

#### SUB-SECT. 5.—AGREEMENT MUST NOT AMOUNT TO SALE OF DEBT OR SECURITY FOR DEBT.

##### **237. Promise to pay on creditor foregoing lien.]**

—If a tradesman, having goods in his possession, upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within Stat. Frauds.—*HOULDITCH v. MILNE* (1800), 3 Esp. 86, N. P. *Annotations* :—*Refd.* *Edwards v. Kelly* (1817), 6 M. & S. 100; *Clancy v. Piggott* (1835), 2 Ad. & El. 173; *Rounce v. Woodyard* (1816), 8 L. T. O. S. 186.

**238.** —[Declaration stated, that A. undertook to pay B. a sum due to him from C., if B. would give up a lien which he had upon C.'s goods; that B. gave up the lien, but A. did not pay. Plea, that the supposed promise was a special promise to answer for the debt of another person; that no agreement relating thereto, nor any memorandum or note thereof, stating the consideration, was in writing & signed by deft. or any person authorised by him, pursuant to the statute; & that the supposed promise was contained in a memorandum in writing signed by deft., which was as follows: "I agree to see you paid within three months the amount of £50 due to you on account of C." Plff. demurred specially, on the grounds that the declaration stated a sufficient consideration for the promise, but the memorandum in the plea stated none; & that the plea, instead of denying the promise in the declaration, stated facts to raise a conclusion as to its not having been made; and that it did not confess & avoid, nor traverse; and that it was not necessary that the promise in the declaration should be written, etc.: *Held* : the written agreement did not satisfy Stat. Frauds; plff., by his demurrer, admitted that agreement to be the contract between him & deft.; & he having so admitted, & the case being one in which by statute, the whole contract ought to be set out in writing, plff. could not assume that there were other terms, not embodied in the memorandum, which might have been proved *à Nisi Prius*.—(*CLANCY v. PIGGOTT* (1835), 2 Ad. & El. 473; 4 M. & S. 496; 1 Har. & W. 20; 4 L. J. N. B. 75; 111 E. R. 183.

**239. Purchase of security from creditor.]**—*CASTLING v. AUBERT*, No. 178, *ante*.

**240.** —[—]*HARBURG INDIA RUBBER COMB Co. v. MARTIN*, No. 286, *ante*.

**241. Purchase of debts from creditors for composition.]**—A. being insolvent, a verbal agreement was entered into between several of his creditors & B. whereby B. agreed to pay the creditors 10s. in the pound in satisfaction of their debts, which they agreed to accept, & to assign their debts to

**Sect. 2.—Guarantees within statutory provisions:**  
**Sub-sect. 5. Sect. 3: Sub-sect. 1, A. & B.;**  
sub-sect. 1, A. & B. 1.

15. —**Held:** this agreement was not within Stat. Frauds, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts. —**ANSTEY v. MARDEN** (1804), 1 Bos. & P. N. R. 124; 2 Smith, K. B. 426; 127 E. R. 406.  
**Annotations:—****Reid.** Fitzgerald v. Dressler (1859), 7 C. B. N. S. 374; Harbong India Rubber Comb Co. v. Martin, [1902] 1 K. B. 778.

**292. Purchase of goods from creditor with uncontrolled power of sale.]—**There must be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise.

A count averring that A. made a bill of sale of goods to pltf., in consideration of a debt of £122 19s., due from A. to pltf., & that pltf. being about to sell the goods in satisfaction of his debts, deft. undertook to pay him £122 19s. if he would forbear to sell, does not show with sufficient distinctness that this is a promise to pay the debt of another, so as to bring the case within Stat. Frauds.

What is this but the case of a man who having the absolute uncontrolled power of selling goods refrains upon the request of another (**LORD MANSFIELD, C.J.**).—**BAURELL v. TRUSSELL** (1811), 4 Taunt. 117, 128 E. R. 273.

### SECT. 3. WRITTEN EVIDENCE REQUIRED.

#### SUB-SECT. 1.—TIME FOR MAKING MEMORANDUM.

##### A. In General.

**See CONTRACT, Vol. XII., pp. 129, 130, Nos. 857-866.**

**293. When memorandum may be made—After parol contract.]—**Although a promise, on a consideration not to sue out execution on a judgment against another, be at its commencement by parol, if it be afterwards acknowledged in writing to a third party, it is not within Stat. Frauds, s. 4.

The Stat. Frauds requires some note or memorandum in writing; such note exists in the present case; the agreement is fully proved by it, & therefore the promise, though originally by parol, is not within the statute (**LAWRENCE, J.**).—**LONGFELLOW v. WILLIAMS** (1804), Peake, Add. Cas. 225, N. P.

**294. When memorandum must be made Before action brought.]—**Where a memorandum in writing is to be proved as a compliance with the statute [Stat. Frauds] it differs from a contract in writing in that it may be made at any time after the contract, if before the action commenced (**ERLE, J.**).—**SIEVEWRIGHT v. ARCHIBALD** (1851), 17 Q. B. 103; 17 L. T. O. S. 264; 117 E. R. 1221; *sub nom.* **SIVEWRIGHT v. ARCHIBALD**, 20 L. J. Q. B. 529; 15 Jur. 947.

**Annotations:—****Consd.** **Re Hoyle, Hoyle v. Hoyle**, [1893] 1 Ch. 81. **Reid.** **Fiscenden v. Levy** (1863), 11 W. R. 259; **Keyworth v. Knight** (1864), 4 New Rep. 288; **Parson v. Crofts** (1864), 16 C. B. N. S. 11; **Lucas v. Dixon** ("..."), 22 Q. B. D. 357.

**295. ———.]—**Under Stat. Frauds, s. 4, the memorandum or note must be in existence at the time the action is brought (**HOWEN, L.J.**).—**LUCAS v. DIXON** (1889), 22 Q. B. D. 357; 58 L. J. Q. B. 161; 37 W. R. 370, C. A.

**Annotations:—****Reid.** **Re Hoyle, Hoyle v. Hoyle**, [1893] 1 Ch. 81; **Re Holland, Gregg v. Holland**, [1902] 2 Ch. 360. **mentd.** **Hawkins v. Duche**, [1921] 3 K. B. 226.

**PART III. SECT. 3, SUB-SECT. 1.—A.**  
**293. 1. When memorandum may be made—After parol contract.]—****THOMSON v. EDEE** (1895), 22 A. R. 105.—**CAN.**

**296. ———.]—****Re HOYLE, HOYLE v. HOYLE**, No. 268, *ante*.

#### B. Revival of Statute-barred Guarantee.

**See, now, Statute of Frauds Amendment Act, 1828 (c. 14); LIMITATION OF ACTIONS.**

**297. Original promise in writing—Renewal by parol.]—**Deft., having entered into a guarantee in writing, & become liable upon it at a period of more than six years before the commencement of the suit, verbally promised within six years that the matter should be arranged: & afterwards on an action being brought pleaded *actio non accrevit*, etc.:—**Held:** Stat. Frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of Stat. Limitations, that the latter promise should also be in writing.—**GIBBONS v. Mc'ASLAND** (1818), 1 B. & Ald. 690; 106 E. R. 253.

#### SUB-SECT. 2.—TO WHOM MEMORANDUM GIVEN OR ADDRESSED.

**See CONTRACT, Vol. XII., pp. 130, 131, Nos. 867-873.**

**298. To third party.]—**A letter addressed by deft. to G., who was pltf.'s attorney, stating that "the bearer, W., has a sum of money to receive from a client of mine some day next week, & I trust you will give indulgence till that day, when I undertake to see you paid," & signed by deft., is evidence within Stat. Frauds, s. 4, to charge him with the debt due from W. to pltf., upon parol proof of its amount, & that G., to whom it was addressed, was the attorney of pltf., & received the letter in that character, from W., the bearer, & not as the principal & creditor.

The parol evidence received did not go to extend the terms of the agreement in writing; it only went to show that the letter was addressed to him as the attorney for pltf. & not as the principal & creditor (**LORD ELLENBOROUGH, C.J.**).—**BATLMAN v. PHILLIPS** (1812), 15 East, 272; 104 E. R. 847.

**Annotations:—****Consd.** **Sheets v. Thimbleby** (1897), 76 L. T. 709. **Reid.** **Jenkins v. Reynolds** (1821), 3 Brod. & Bing. 11; **Holmes v. Mitchell** (1859), 7 C. B. N. S. 361; **Williams v. Byrnes** (1863), 1 Moo. P. C. C. N. S. 154. **mentd.** **Higgins v. Senior** (1841), 11 L. J. Ex. 199; **North Staffordshire Ry. Co. v. Peck** (1860), E. B. & E. 986; **Plant v. Bourne** (1897), 76 L. T. 820.

**299. ———.]—**(1) W. undertook to save harmless J. from his liability on a bond conditioned for the payment by him to W. J. of £300, "at or before the expiration of six months' notice." W. J., the obligee of the bond, brought an action against J., the obligor, of which action W. had notice, & recovered the £300 debt & the costs. In a subsequent action by J., the obligor, against W., on his underwriting, it was not proved that six months' notice was given to pltf. before she was sued on the bond:—**Held:** the action on the bond was itself a sufficient notice to satisfy the condition of the bond, & J. was bound to pay £300; & therefore deft. W. was liable for the damage sustained by the breach of his undertaking.

(2) Deft.'s undertaking was contained in two letters, addressed to C. J., the brother of pltf.'s intestate J., in the first of which he pressed C. J. to join, & to induce his brothers to join, in a security

#### PART III. SECT. 3, SUB-SECT. 2.

**m. Not addressed to any person—**  
**validity.]—****Held:** a letter was effectual

is a guarantee notwithstanding that it was not addressed to any one.—**FORTUNE v. YOUNG** [1918] S. C. 1.—**ICOT.**

for the repayment of money to be advanced to deft. for carrying on a suit in Ch.; & in the second he again urged that they should lend their names for this purpose, & added, "I should consider it a matter of favour to myself if your brothers will join, & I will see that they come to no harm." J., in consequence, executed the bond in question:—*Held*: the letters amounted to an actual guarantee, on which deft. was liable to pltf., & not merely to a representation, with a view to the parties doing an act against the consequences of which they should afterwards be protected.—*JONES v. WILLIAMS* (1841), 7 M. & W. 493; 11. & W. 80; 9 Dowl. 252; 10 L. J. Ex. 120; 151 E. R. 800.

*Annotations*:—As to (1) *Refd.* *Gray v. Lewis, Parker v. Lewis* (1873), 8 Ch. App. 1035. As to (2) *Refd.* *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 151.

### SUB-SECT. 3.—FORM OF MEMORANDUM.

#### A. In General.

*See, generally*, CONTRACT, Vol. XII., pp. 131–143, Nos. 874–967.

**300. No special form necessary.**—*JONES v. WILLIAMS*, No. 299, *ante*.

**301.** —.]—Deft., an attorney, wrote to pltf.: "W. has handed me your letter of the 3rd respecting the non-payment of the bill for £91 due on Saturday. I am now making arrangements for an advance to W., to enable him to pay this & other claims upon him, & if you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up." Pltf. had no further communication with the deft., & on the receipt of the latter was not aware that deft. was an attorney:—*Held*: in an action against the attorney as surety for the amount of the bill of exchange, this letter did not render deft. personally liable.—*ALLAWAY v. DUNCAN* (1867), 16 L. T. 264; 15 W. R. 711.

**302.** —.]—*SEATON v. HEATH, SEATON v. BURNAND*, No. 1, *ante*.

**303.** —.]—*Re DENTON'S ESTATE, LICENSES INSURANCE CORPN. & GUARANTEE FUND, LTD. v. DENTON*, No. 9, *ante*.

**304. Memorandum by creditor's agent—In presence of surety.**—A memorandum written by a clerk of pltf., in the presence of deft., that deft. had called to say that he would be responsible for pltf., is not a sufficient undertaking within Stat. Frauds.—*DIXON v. BROOMFIELD* (1814), 2 Chit. 205. *Annotation*:—*Refd.* *Simpson v. Panton* (1831), 4 Tyl. 315.

**Bill of exchange.**—*See* CONTRACT, Vol. XII., p. 133, Nos. 892–894.

#### B. Liability arising on Bills or Notes.

**305. Obligation implied by law merchant—Written evidence unnecessary.**—*WILKINSON v. UNWIN*, No. 705, *post*.

**306.** —.]—The rule that a drawer of a bill of exchange cannot sue an indorser, only applies where circuitry of action would otherwise arise. Where the contract between a creditor, debtor, & surety is embodied in a bill of exchange, in an action by the creditor against the surety on the bill, no other evidence save the bill is required to satisfy Stat. Frauds, if the obligation revealed on the face of the bill is the precise obligation the surety has agreed to undertake.—*HOLMES (J. W.) & Co. v. DURKEE* (1883), Cab. & El. 23.

*Annotation*:—*Refd.* *Jenkins v. Comber* (1898), 67 L. J. Q. B. 780.

**307. Name put on incomplete bill—Before**

**indorsement by drawer.**—*SINGER v. ELLIOTT* (1888), 4 T. L. R. 524, C. A.

**308.** —.]—It was agreed between pltf. & A., who owed them money, that they should draw a bill on him, & that deft., who was A.'s father, should indorse it to guarantee payment. They accordingly drew a bill on A., to their own order & without indorsing it to A., who returned it to them accepted by himself, & indorsed by deft. They then indorsed it, & it was not paid at maturity. In an action against deft.:—*Held*: he was not liable as indorser under Bills of Exchange Act, 1882 (c. 61), s. 55, nor as having incurred the liabilities of indorser under s. 56, since at the time he put his name on the bill it was not complete & regular on the face of it, as it lacked pltf.' indorsement; nor was he liable on a contract of suretyship, since the provisions of Stat. Frauds were not satisfied.—*JENKINS & SONS v. COOMBER*, [1898] 2 Q. B. 168; 67 L. J. Q. B. 780; 78 L. T. 752; 47 W. R. 48; 14 T. L. R. 425.

*Annotations*:—*Expld.* *Glenie v. Bruce-Smith*, [1908] 1 K. B. 263. *Fold.* *Shaw v. Holland*, [1913] 2 K. B. 15. *Refd.* *Harburg Indiarubber Comb Co. & Winter v. Martin* (1902), 71 L. J. K. B. 529; *Re Gooch, Ex p. Judd*, [1921] 2 K. B. 593; *McDonald v. Nash*, [1921] A. C. 625.

**309.** —.]—It had been arranged between pltf. & a co. that pltf. would supply goods to the co., to be paid for by bills of exchange accepted by the co., if defts., who were directors of the co., would indorse the bills by way of security for their payment. In a series of transactions thereafter entered into the course pursued in each case was as follows. Pltf., for the price of goods supplied, drew a bill of exchange payable to their own order on the co., & without indorsing it, sent it to the co., who returned it accepted by the co. with defts.' signatures indorsed thereon. Pltf. then placed their signature on the back thereof below the signatures of defts. These bills were duly met. In the case of a subsequent bill the same course was pursued with regard to the drawing & acceptance of & the indorsements on, the bill. This bill was not paid at maturity. In an action by pltf. against defts. on this last-mentioned bill, or, alternatively, as having guaranteed payment of it: *Held*: defts. were not liable as indorsers of the bill or as having incurred the liabilities of indorsers of the bill under Bills of Exchange Act, 1882 (c. 61), s. 56, & they were not liable as on a contract of guarantee since the provisions of Stat. Frauds, s. 4, were not satisfied. *SHAW (M. T.) & Co., LTD. v. HOLLAND*, [1913] 2 K. B. 15; 18 Com. Cas. 153; 82 L. J. K. B. 592; 108 L. T. 543; 29 T. L. R. 341, C. A. *Annotations*:—*Distd.* *Re Gooch, Ex p. Judd*, [1921] 2 K. B. 593. *Refd.* *McDonald v. Nash*, [1921] A. C. 625.

**310.** —.]—J. sold certain goods to C. Ltd. of which G. was managing director & in which he was largely interested. In payment for these goods J. drew a bill of exchange to his own order at three months for £150 upon C. Ltd., who accepted it, & it was indorsed by G. before J. had indorsed it as payee, & his name appeared below that of G. The bill was indorsed by G. in order to enable J. to discount it, & for no consideration moving from J. to G., who was to be under no liability to J. The bill was discounted by J.'s bank & was not met at maturity. An arrangement was subsequently made by which C. Ltd. paid £100 in cash to the bank in part satisfaction, & the bank received two bills drawn by J. to his own order & accepted by C. Ltd., for £175 each at one month & two months respectively. These bills were indorsed by G. before they were signed by J. either as drawer or payee. They were afterwards indorsed by J.

**Sect. 3.—Written evidence required: Sub-sect. 3, B. & C.]**

whose name appeared on the bills below that of G. The first bill not having been met at maturity, J. took it up & sued C. Ltd. & G. upon the bill & recovered judgment, & afterwards presented a petition in bkpy. in the county ct. against G., founded on the judgment debt upon which a receiving order was made against him. On appeal:—*Held*: (1) there was sufficient consideration passing from J. to G. to entitle J. to sue G. on the bill notwithstanding the order in which the signatures appeared on the bill; (2) by reason of the agreement between J. & G., G. could not, according to the authority of *Willinson v. Unwin*, No. 705, *post*, have set up any defence against J. arising out of his own prior indorsement.—*Re Gooch, Ex p. Judd*. [1921] 2 K. B. 593; 90 L. J. K. B. 932; 125 L. T. 563; [1921] B. & C. R. 100, C. A.

*Annotation*:—*Refd. McDonald v. Nash*, [1921] A. C. 625.

**311. Guarantee indorsed on bill & signed.]**—A bill of exchange bore an indorsement to the effect that in case of non-payment by the acceptors the bill was to be presented to deft. This indorsement was signed by deft.:—*Held*: he could not be sued as indorser, but was liable as a guarantor.—*STAGG, MANTLE & Co. v. BRODRICK* (1895), 12 T. L. R. 12, C. A.

**312. Name indorsed on blank acceptance.—Subsequently filled in by drawer.]**—Deft. entered into an agreement with plff. to guarantee the payment by T. for goods sold to him by plff., & for that purpose to indorse bills accepted by T. for the amount. In pursuance of that agreement T. wrote his acceptances across the face of two blank stamped bill forms, & deft. indorsed them. T. then handed the bill forms to the plff., who filled up the body of the bill for the agreed amount, making them payable to his order, signed them as drawer, & also indorsed them. Plff. duly delivered the goods to T., who eventually was unable to pay for them: *Held*: as deft. agreed to be liable for the price of the goods supplied by plff. to T., & indorsed the bills for that purpose, he was liable on those bills. *GLENIE v. SMITH*, [1908] 1 K. B. 263; *sub nom. GLENIE v. TUCKER*, 177 L. J. K. B. 193; 98 L. T. 515; 24 T. L. R. 177, C. A.

*Annotation*:—*Consd. Shaw v. Holland & Neal* (1913), 82 L. J. K. B. 592. *Follid. Re Gooch, Ex p. Judd*, [1921] 2 K. B. 593. *Consd. McDonald v. Nash*, [1921] A. C. 625.

**313. Promise to pay in collateral writing.—Not indorsed on bills.]**—A., an agent for some manufacturers, sold to B., who likewise acted as an agent, a quantity of shoes & received certain bills of exchange in payment. B., being pressed to indorse them, refused, but wrote a letter to A., in which he inclosed the bills & added, “that should they not be honoured when due, he (B.) would see them paid”:—*Held*: this was a sufficient agreement within Stat. Frauds, s. 4, to bind B. to pay for the goods, in default of his principal.—*MORRIS v. STACEY* (1816), Holt, N. P. 163, N. P.

*Annotations*:—*Follid. Boehm v. Campbell* (1819), 3 Moore, C. P. 15. *Refd. Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14.

**314. ———.]—OVEREND, GURNEY & Co.**

**PART III. SECT. 3, SUB-SECT. 3.—B.**

**311. Guarantee indorsed on bill & signed.]**—A cheque purporting to be drawn on plff. was endorsed by deft. to plffs. as follows:—“I know this to be a genuine firm”:—*Held*: the endorsement did not amount to such a guarantee as to render deft. liable

to plffs. for payment made.—*ULSTER BANKING CO. v. MAHAFFY* (1881), 15 L. T. 94.—IR.

**PART III. SECT. 3, SUB-SECT. 3.—C.**

**n. Together constituting memorandum.—Guarantee & invoice.]**—A guarantee for the price of goods did

(LIQUIDATORS) *v.* ORIENTAL FINANCIAL CORPN. (LIQUIDATORS), No. 1341, *post*.

Note payable by instalments.—Provision as to giving time.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 23, Nos. 131–133.

**C. Connected Documents.**

*See* CONTRACT, Vol. XII., pp. 136–143, Nos. 916–967.

**315. Together constituting memorandum.—Letters.]**—An agent in this country for merchants, the sellers of goods in Russia, who guarantees that the shipment shall be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that in default, the consequence, shall rest with the sellers, makes himself personally responsible to the buyer. In a declaration upon such a guarantee against the agent, it is unnecessary to allege any application for indemnity to the principals. Such a guarantee is not within Stat. Frauds, if the terms of the agreement can be collected from the written correspondence between the parties.—*REDHEAD v. CATOR* (1815), as reported in 1 Stark. 14, N. P.

**316. — Letter proposing terms of guarantee.—Subsequent guarantee.]**—Where deft. undertook to guarantee to plffs., assignees of a bkpt., the payment of £100 due to the estate of bkpt. from S., for articles delivered to the latter for the use of his trade, so that the guarantee should not be put in force against deft. for two whole years from the date thereof; & deft. previously to the guarantee, wrote a letter to plffs., proposing the terms on which it was to be given, & afterwards recognised it:—*Held*: the correspondence & guarantee were to be taken together, & constituted a sufficient consideration for a promise within Stat. Frauds, s. 4, although it was objected that no consideration was expressed on the face of the guarantee itself.—*COE v. DUFFIELD* (1822), 7 Moore, C. P. 252.

*Annotation*:—*Expld. James v. Williams* (1834), 5 B. & Ad. 110.

**317. — Letter & envelope.]**—There is such physical connection between a piece of letter paper & the envelope containing it as to constitute them one document, just as in older times when people used to address a letter written on four sheets, on the fourth sheet thereof it would be plain that such letter & the address constituted one document. The old law relating to admission of parol evidence connecting two documents has not been altered by cases. I am at liberty to infer that the superscription on the envelope in this case referred to the document itself (*CHARLES, J.*).—*FREEMAN v. FREEMAN* (1891), 7 T. L. R. 131.

**318. — Letters on successive days.]**—In 1879 defts. wrote to plff., by letter dated Sept. 15: “Burton, Balderson. Dear Sir,—We hereby guarantee the safety of the above investments”; & by letter dated Sept. 16: “We acknowledge to have received from you the sum of £710 as under; a mtge. on the estate at T. the property of Mr. Burton, £360; a mtge. on the estate at F. the property of Mr. Balderson, £350”; plff. A. advanced to Burton on mtge. of the estate at T. the sum of £360 through defts. In 1891 plff. A. conveyed & transferred to plff. B. in consideration

not contain the name of the vendor who was to be indemnified, but it was attached by the guarantor to an invoice of the goods:—*Held*: the two documents were to be considered as one, & were a sufficient contract.—*McEWAN v. DYNON* (1877), 3 V. L. R. 271.—AUS.



of £300, the benefit of the mtge. In 1896, plffs. sued defts. to recover the sum of £360, from them as guarantors of the mtge.:—*Held*: the two letters could be read together & were a sufficient memorandum of the contract within Stat. Frauds, s. 4.

It cannot be doubted that although since the passing of Mercantile Law Amendment Act, 1856 (c. 97), s. 3, parol evidence may be given to supply the consideration, yet parol evidence cannot be given to explain the promise, & unless the whole promise be in writing the memorandum will not be sufficient (LOPES, L.J.).

If the whole promise does not sufficiently appear in writing parol evidence of the consideration is not admissible to supply the defect (CHITTY, L.J.).

—*SHEERS v. THIMBLEBY & SON* (1897), 76 L. T. 709; 13 T. L. R. 451; 41 Sol. Jo. 558, C. A.

*Annotations*:—*Refd.* Stokes v. Whiteher, [1920] 1 Ch. 411  
Wade v. L. & N. W. Ry., [1921] 1 K. B. 582.

219. — *Indorsement on letter.*—A., by a letter in which the consideration of the transaction sufficiently appeared, entered into an agreement with B., & B. became party to the engagement by writing a few lines at the bottom of a copy of A.'s letter. C. became guarantee for B. to A. by an indorsement on the back of this copy of A.'s letter, in which indorsement reference was made to the terms of the agreement on the other side:—*Held*: only one stamp was required on this paper, & the reference in the indorsement to the terms of the agreement was a sufficient memorandum of the consideration for the guarantee within Stat. Frauds.—*STEAD v. LADDARD* (1823), 1 Bing. 196; 8 Moore, C. P. 2; 1 L. J. O. S. C. P. 52; 130 E. R. 79.

+:—*Refd.* Mayfield v. Robinson (1815), 9 Jur. 826; Fishmongers' Co. v. Dunsdale (1852), 22 L. J. C. P. 41.

320. — *Indorsement on principal contract.*—A. contracted to purchase of B. the goodwill, etc., of a public-house. On the back of the agreement was the following memorandum written & signed by C. after the execution of the agreement by A. & B. "I hereby undertake that my daughter B. shall perform all the covenants & conditions named in the annexed agreement & hold & consider myself responsible for her." The whole was described by the witness as having been one entire transaction, her action against C. to recover back the deposit on the purchase going off by default of the vendor:—*Held*: the agreement & indorsement might be looked at together for the purpose of making out a consideration for deft.'s promise.—*COLDHAM v. SHOWLER* (1846), 3 C. B. 312; 2 Car. & Kir. 261; 15 L. J. C. P. 261; 7 L. T. O. S. 230; 10 Jur. 552; 136 E. R. 126.

321. — *Defective memorandum—Subsequent letter.*—Defts., who were in partnership as railway contractors under the name of W., A. & Co., contracted with a railway co. to do certain works. U. & R. made a sub-contract with defts. to do part of the work; & for that purpose requiring coals to make bricks, A., without the knowledge or assent of his co-partners, signed in the name of the firm & delivered to plffs. a guarantee, not addressed to any person, for payment of coals to be supplied to U. & R. Plffs. having pointed out the omission, a clerk of W., A., & Co., by the direction of A., wrote to plffs., stating that the guarantee was intended for them. The clerk, also without the knowledge of the other partners, wrote to plffs. certain letters amounting to evidence of an account stated in respect of the amount due on the guarantee:—*Held*: (1) the guarantee & subsequent letter constituted a sufficient notice

in writing within Stat. Frauds; (2) the guarantee did not bind the firm, there being no evidence that it was necessary for carrying into effect the partnership contract, or that the other partners had adopted it.—*BRETTEL v. WILLIAMS* (1819), 4 Exch. 623; 19 L. J. Ex. 121; 14 L. T. O. S. 255; 154 E. R. 1363.

*Annotations*:—*As to* (2) *Refd.* *Re* West of England Bank, *Ex p.* Booker (1830), 14 Ch. D. 317; *Small v. Smith* (1881), 10 App. Cas. 119.

322. — *Reference to attached document—Subsequent detachment.*—Debt on an Irish judgment. Plea, that the judgment was recovered against deft. as surety for S. & Co., to secure payment of moneys advanced to them by plff.; & that S. & Co. paid all moneys due from them to plff., for which the judgment was to be such security. Replication, that, after the recovery of the judgment, an indenture was made between S. & Co. & plff., whereby, after reciting the judgment, & various unsettled accounts between S. & Co. & plaintiff, it was witnessed, that, for the sake of winding-up the transactions, S. & Co. & plff. agreed (*inter alia*) that plff. should advance to a certain banking co. £800 guaranteed by him on behalf of S. & Co., & should also advance to S. & Co. £200, & that £1,000 should be the debt thenceforth due from S. & Co., which should be payable with interest, & that the agreement should be without prejudice to the judgment against deft. Averment, that, after the making of the indenture, & before the execution thereof by plff., in consideration that plff. would execute it, & would advance the sums of £800 & £200, deft. promised plff. that the judgment should remain as a security for the repayment of the £1,000 & interest; that plff. executed the deed & advanced the sums of £80 & £200; but that S. & Co. had not repaid same. Rejoinder, that deft. did not promise *modo et forma*, & issue thereon. At the trial, plff. gave in evidence the following memorandum, which was signed by deft. & another surety before plff. executed the deed: "We hereby consent to the within deed being executed by & between the parties thereto, & that same shall be without prejudice to plff.'s rights & remedies under his judgment against us, & that the judgment shall remain in full force & effect." This memorandum had been annexed to the deed, but was detached & sent to deft., who signed it without seeing the deed: *Held*: assuming this was a transaction within Stat. Frauds, s. 4, which *seem* it was not, there was a sufficient memorandum in writing to satisfy the statute, since the document signed by deft. incorporated so much of the deed as formed the consideration & promise.

I do not think this is a case within that statute [of Frauds]. It is not directly a promise to pay the debt of another but an agreement stating that property already pledged for one debt shall remain pledged for another. Although the ultimate effect is that the debt may be paid yet the immediate object is merely to appropriate the fund in a different manner (PARKE, B.).—*MACGOWRY v. SCOTT* (1850), 5 Exch. 907; 20 L. J. Ex. 90; 16 L. T. O. S. 216; 155 E. R. 396.

323. — *Reference to document containing terms.*—If there is a signed paper, signed by an agent duly authorised thereto, which paper though agreeing to do something, leaves the subject-matter of the agreement unexplained, the two may be connected together, so as to constitute a contract valid under Stat. Frauds. The contract so constituted by the act of A.'s duly authorised agent will be binding on A. though the second paper may have been sent by the agent to A.'s solr., to put it



**SECT. 3.—Written evidence required: Sub-sect. 3, C.; sub-sect. 4, A. & B. (a) & (b); sub-sect. 5, A.]**

into form, provided that the agent & the person with whom he was dealing, agreed that it should be sent for that purpose; but not otherwise. The act of sending such a paper to a solr. to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form.—*RIDGWAY v. WHARTON* (1857), 6 H. L. Cas. 238; 27 L. J. Oh. 46; 29 L. T. O. S. 390; 4 Jur. N. S. 173; 5 W. R. 804; 10 E. R. 1287, H. L.

**Annotations:—***Expld.* *Barker v. Allan* (1859), 5 H. & N. 61; *Lee v. Griffin* (1861), 30 L. J. Q. B. 252. **Refd.** *Heys v. Astley* (1863), 4 De C. J. & Sm. 34; *Jones v. Victoria Graving Docks Co.* (1877), 2 Q. B. D. 314; *Cave v. Hastings* (1881), 7 Q. B. D. 125. **Mentd.** *James v. Rice* (1854), 5 De G. M. & G. 461; *Bigg v. Strong* (1857), 3 Sm. & G. 592; *Chinnock v. Ely* (1864), 13 W. R. 176; *Hornfray v. Fothergill* (1866), L. R. 1 Eq. 567; *Raumann v. James* (1868), 3 Ch. App. 508; *Brook v. Hook* (1871), L. R. 6 Exch. 89; *Valo of Neath Colliery Co. v. Furness* (1876), 45 L. J. Ch. 276; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Long v. Miller* (1879), 4 C. P. D. 450; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90; *Oliver v. Hunting* (1890), 44 Ch. D. 205; *Durant v. Roberts & Keighley, Maxsted*, (1900) 1 Q. B. 629; *Thirkell v. Camb.*, [1919] 2 K. B. 590; *Wade v. L. & N. W. Ry.* (1920), 90 L. J. K. B. 593.

**SUB-SECT. 4.—CONTENTS OF MEMORANDUM.**

**A. Parties.**

See *CONTRACT*, Vol. XII., pp. 143-148, Nos. 908-1014.

**324. Signature by guarantor—Omission of name of person to whom guarantee given.]**—Deft. wrote, signed, & handed to T. & O. the following document: "Sir, I beg to inform you that I shall see you paid to the sum of £800 for the ensuing building which you undertake to build for Messrs. T. & O. Thomas Lake." He intended it to be handed over by T. & O. as a guarantee to J., who was then negotiating with T. & O. to erect for them the building referred to. T. & O., however, having agreed with pltf., instead of J., that pltf. should erect the building, delivered the document to pltf., without deft.'s knowledge or authority. Deft. afterwards heard of & ratified this delivery. Pltf., having erected the building, sued deft. on the document, as a guarantee:—**Held:** the document was not a sufficient written agreement, or note or memorandum thereof, by deft. to answer for the debt or default of T. & O., within the Stat. Frauds, s. 4; inasmuch as the name of the person for whom the document was intended did not in any way appear upon the face of it, so that it did not contain the names of both the parties to the contract.—*WILLIAMS v. LAKE* (1859), 2 E. & E. 349; 29 L. J. Q. B. 1; 1 L. T. 56; 6 Jur. N. S. 45; 8 W. R. 41; 121 E. R. 132.

**Annotations:—***Expld.* *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154. **Refd.** *Vandenbergh v. Spooner* (1866), L. R. 1 Exch. 316; *Potter v. Duffield* (1874), L. R. 18 Eq. 4; *Callin v. King* (1877), 25 W. R. 550.

**325. ———.]—Stat. Frauds, s. 17;**

incorporated into Statute of Frauds Amendment Act, 1828 (c. 14), s. 7, requires, to make a contract, or bargain, effectual that "some note of memorandum of the bargain be made & signed by the parties to be charged by such contract or their agents thereunto lawfully authorised." Upon a contract of guarantee for the purchase of a steam engine not addressed to any one, & in which the name of the person by whom the steam engine was to be furnished did not appear, though he was known to the party by whom the memorandum was made, the contract being in these words: "I will furnish H. with funds for the purchase of a steam engine, & machinery for a flour mill, on his suiting himself with same, & notifying the purchase to me":—**Held:** in an action brought upon such contract, there being no acceptance of the contract in writing, it was not a sufficient note, or memorandum in writing, of the bargain, to satisfy Stat. Frauds.

**Semle:** the liability of a party who advertises generally a reward for information to any one not named in the advertisement, who shall first give the information asked for, is a liability at common law, & not a contract within Stat. Frauds.—*WILLIAMS v. BYRNES* (1863), 1 Moo. P. C. C. N. S. 154; 2 New Rep. 47; 8 L. T. 69; 9 Jur. N. S. 363; 11 W. R. 487; 15 E. R. 660, P. C.

**Annotations:—***Consd.* *Potter v. Duffield* (1874), L. R. 18 Eq. 4. **Refd.** *Rossiter v. Miller* (1877), 25 W. R. 890; *Lovesy v. Palmer*, [1916] 2 Ch. 233.

**326. — Omission of name of person supplying consideration.]**—"I hereby guarantee you the payment of the proceeds of the goods you have consigned to my brother, & also any future shipments you may make, in consideration of 2s. 6d. paid me":—**Held:** a sufficient memorandum, within Stat. Frauds, to make the subscriber liable to the vendor, notwithstanding it did not expressly disclose by whom the 2s. 6d. was paid.—*DUTCHMAN v. TOOTH* (1839), 5 Bing. N. O. 577; 7 Scott, 710; 132 E. R. 1222.

**327. — Letter addressed to third party.]**—*MARSDEN & SON v. CAPITAL & COUNTIES NEWSPAPER CO., LTD.* (1901), 16 Sol. Jo. 11, C. A.

**B. Terms.**

**(a) In General.**

**328. Must contain all essential terms.]**—Deft., having verbally agreed to pay a debt of a third party provided pltf. delivered up certain leases on which he claimed a lien, gave an I.O.U. for the amount upon which the leases were given up:—**Held:** there being no release of the debt, there was no consideration for the I.O.U. & as a guarantee it was bad, as it did not constitute a memorandum in writing to satisfy Stat. Frauds.—*NOKES v. THOMPSON* (1853), 2 W. R. 78.

**329. ———.]—HOLMES v. MITCHELL, No. 410, post.**

—**See** *CONTRACT*, Vol. XII., pp. 148, 149, Nos. 1015-1025.

**PART III. SECT. 3, SUB-SECT. 4.—A.**

**324i. Signature by guarantor—Omission of name of person to whom guarantee given.]**—"I hereby guarantee to pay the fee agreed to 10s. 6d. per week for the keep of the child of Agnes Robertson, should the father T. McDonald fail to do so as long as it is in its present home":—**Held:** the document contained references which would sufficiently enable the party entitled to benefit by the

promise to be identified, so as to satisfy the Stat. Frauds.—*SIMS v. ROBERTSON* (1921), 21 S. R. N. S. W. 246.—**AUS.**

**324 ii. ———.]—An undertaking as surety must name the person to whom it is given.**—*HURON COUNTY v. KERU* (1868), 15 Gr. 265.—**CAN.**

**324 iii. ———.]—A memorandum of a contract of guarantee is not insufficient by reason merely that a blank space left for inserting the name**

of the party whose account is guaranteed has not been filled in, if it appears from the whole document that a person of ordinary capacity must have been able to infer whose account it was intended to guarantee.—*KELLY, DOUGLAS & CO. v. LOCKLIN* (1912), 17 B. C. R. 331; 8 D. L. R. 1039; 3 W. W. R. 15.—**CAN.**

**324 iv. ———.]—MACDONALD & CO. v. FLETCHER (1915), 22 B. C. R. 298.—**CAN.****

## (b) Consideration.

See, now, Mercantile Law Amendment Act, 1856 (c. 97), & generally, CONTRACT, Vol. XII., pp. 172 *et seq.*

**330. Consideration must be stated or implied—Former law.]**—Where A. promised in writing to pay the debt of B. without stating on what consideration:—*Held*: parol evidence of the consideration was inadmissible by Stat. Frauds & consequently such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum* & gave no cause of action.—*WAIN v. WARLTERS* (1804), 5 East, 10; 1 Smith, K. B. 299; 102 E. R. 972.

*Annotations*:—*Expld.* Egerton v. Mathews (1805), 6 East, 307; *Er p.* Gardom (1808), 15 Ves. 286. *Distd.* Stapp v. Lill (1808), 1 Camp. 212; Boehm v. Campbell (1819), 8 Taunt. 679. *Apld.* Jenkins v. Reynolds (1821), 3 Brod. & Bing. 11. *Consd.* Morley v. Boothby (1825), 3 Bing. 107. *Distd.* Newbury v. Armstrong (1829), 6 Bing. 201. *Apld.* James v. Williams (1831), 5 B. & Ad. 1109. *Expld.* Hawes v. Armstrong (1835), 1 Bing. N. C. 761; Laythorp v. Bryant (1836), 2 Bing. N. C. 755. *Consd.* Holmes v. Mitchell (1859), 7 C. B. N. S. 361. The recent statute Mercantile Law Amendment Act, 1856 (c. 97), s. 3, abrogates the rule laid down in *Wain v. Warlters*, & enables a party to give parol evidence of the consideration for a guarantee (WILLIAMS, J.). *Refd.* *Er p.* Minet (1807), 14 Ves. 189; Redhead v. Cator (1815), 1 Stark. 14; Morris v. Stacey (1816), Holt, N. P. 153; Sandilands v. Marsh (1819), 2 B. & Ald. 673; Saunders v. Wakefield (1821), 4 B. & Ald. 595; Benson v. Hippus (1828), 1 Moo. & P. 246; Hemming v. Perry (1828), 2 Moo. & P. 375; Lees v. Whitcomb (1828), 5 Bing. 34; Haigh v. Brooks (1840), 10 Ad. & El. 309; Price v. Richardson (1846), 15 M. & W. 539; Taunce v. Woodyard (1846), 8 L. T. O. S. 186; Bainbridge v. Wade (1850), 16 Q. B. 89; Thackwell v. Gardiner (1851), 5 De G. & Sm. 58; Powers v. Fowler (1855), 4 E. & B. 511; Oldershaw v. King (1857), 2 H. & N. 399; North Staffordshire Ry. v. Peck (1860), E. B. & E. 586; Fielder v. Marshall (1861), 30 L. J. C. P. 158; *Re Frost*, (1898) 2 Ch. 556; Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162. *Mentd.* Phillips v. Bateman (1812), 16 East, 356; Goodman v. Chase (1818), 1 B. & Ald. 297; Pace v. Marsh (1823), 8 Moore, C. P. 59; Gibbons v. Voulton (1819), 11 Jur. 66; Williams v. Byrnes (1863), 1 Moo. P. C. N. S. 151; Malpas v. L. & S. W. Ry. (1866), L. R. 1 C. P. 336.

**331. Effect of Mercantile Law Amendment Act, (c. 97), s. 3—Consideration need not appear on face of contract.]**—WHITFIELD v. MOORE, No. 355, *post*.

**332. — Does not make bad promise good.]**—HOLMES v. MITCHELL, No. 410, *post*.

**333. — Memorandum containing bad consideration.]**—WOOD v. PRIESTNER, No. 639, *post*.

**334. — On memorandum to satisfy statute.]**—HOLMES v. MITCHELL, No. 410, *post*.

**335. — Admission of parol evidence to supply consideration.]**—HOLMES v. MITCHELL, No. 410, *post*.

**336. — — —.]**—SHEERS v. THIMBLEBY & SON, No. 318, *ante*.

## SUB-SECT. 5.—SIGNATURE TO MEMORANDUM.

## A. In General.

See, generally, CONTRACT, Vol. XII., pp. 152 160, Nos. 1053–1143.

**337. Only by party charged.]**—E. & Co. being indebted to plffs. who were bankers, defts. by a writing expressed to be made between plffs. & defts., in consideration of the agreement thereafter contained on behalf of plffs., agreed that they would pay all moneys which then were or at any time should be due from E. & Co. to plffs., not exceeding £35,000, by instalments of £3,000 a year for five years, & two subsequent annual instalments of £10,000; & in consideration of the above plffs. agreed that they would not charge more than 5 per cent. interest to E. & Co.; & when all debts of E. & Co., except £15,000 should have been paid would grant them a full release. This agreement was signed by defts. & handed by them to plffs. who had pressed for it. Plffs. had acted upon, but never executed it:—*Held*: the agreement was binding upon defts. notwithstanding that it had not been executed by plffs.—*LIVERPOOL BOROUGH BANK v. ECCLES* (1859), 4 H. & N. 139; 28 L. J. Ex. 122; 32 L. T. O. S. 244; 157 E. R. 789.

*Annotations*:—*Refd.* Williams v. Lake (1859), 6 Jur. N. S. 45; Rouss v. Treckley (1866), L. R. 1 Exch. 312.

**338. What is sufficient signature—Indorsement by guarantor correcting mistake—On guarantee already signed by him.]**—Plff., at the request of deft., sold to C. some wine, to be paid for by bills, & received from deft. the following guarantee, signed by him: "Upon your handing me your two drafts upon C. respectively for £200 & £146, at six months from this date, I undertake to get them accepted by him, & to see that they are duly paid." It was afterwards discovered that the draft for the wine mentioned as for £146, should have been for £150; & accordingly plff. drew bills, for £200 & £150, which deft. got accepted by C., & gave to plff., & then wrote across the guarantee as follows: "I have received the two drafts (one being for £150 instead of £146, there being an error in the invoice of £1), both accepted by C." Plff. signed this receipt, but not deft. Plff. having declared on the above instrument as a contract, in consideration that plff. would, at his own expense, procure stamps for & draw two bills, one for £200, & the other for £150, at six months, & deliver them to deft., he would get them accepted & see them paid:—*Held*: the instrument was a valid memorandum of the contract declared on, within sect. 4 of Stat. Frauds, since the indorsement, having been made for the

## PART III. SECT. 3, SUB-SECT. 4.—B. (b).

*o. Consideration must be stated or implied.]*—JOHNSON v. FRASER (1832), 1 B. Dig. 397.—CAN.

*p. —.]*—LOCK v. RIND (1842), 6 O. S. 295.—CAN.

*s. —.]*—MARKS v. SCOTT (1845), 2 Kch. 638.—CAN.

*r. —.]*—BEATTIE v. GARBUTT (1854), 3 All. 1.—CAN.

*s. —.]*—MANNING v. MILLS (1855), 12 U. C. R. 515.—CAN.

*t. —.]*—AYTON v. BALLOCH (1859), 4 All. 321.—CAN.

*a. —.]*—PERRIN v. BINGHAM (1862), 12 C. P. 306.—CAN.

*b. —.]*—PALGRAVE v. MURPHY (1864), 14 C. P. 153.—CAN.

*c. —.]*—JOINT v. MOSTYN (1824), J.—VOL. XXVI.

## 2 Fox &amp; S. Ir. 4. IR.

*d. —.]*—ADAMS v. HARTLAND (1840), 2 Jebb & S. 155, 1 L. L. R. 190.—IR.

*e. —.]*—HAMILTON v. MCKAY (1861), 6 Nfld. L. R. 313.—NFLD.

*f. — Consideration need not appear on face of contract.]*—Plff.'s son having taken deft. into partnership, plff. guaranteed deft. against loss in respect of the liabilities of a former partnership. Instead of the guarantee, plff. gave to deft. a bill for £320. Dft. wishing to dissolve the partnership, by letter became security for the repayment of £320, borrowed to pay off the bill, & undertook to pay half profits until that sum was paid: *Held*: the letter being an express contract in writing, signed by deft., it need not show any consideration on its face.—

FORBES v. CLARION (1878), 4 V. L. R. 22.—AUS.

*g. —.]*—THOMPSON v. CUMMINGS (1811), 3 Ont. Dig. 5692.—CAN.

## PART III. SECT. 3, SUB-SECT. 5.—A.

*h. What is sufficient signature—Signature on blank form—Form subsequently filled up.]*—Dft., M.'s wife, had been in the habit of signing blank notes for M., & M. having a blank form of note signed by her, filled it up as follows: "Apr. 3, 1871, Four months after date I promise to pay to H., or order, \$1,264, at the Bank of T. here. This note to be held as collateral security. Value received." *Held*: if the instrument was a guarantee, there was nothing to show that deft. ever signed or intended to sign it.—*HALL v. MERRICK* (1877), 40 U. C. R. 566.—CAN.

*Sect. 3.—Written evidence required: Sub-sect. 5, A., B. & C.; sub-sect. 6. Sect. 4: Sub-sect. 1.]*

purpose of correcting the mistake, & being written by deft. on the same piece of paper as the original undertaking, must be considered as authenticated by the signature of deft.—*BLUCK v. GOMPERTZ* (1852), 7 Exch. 802; 21 L. J. Ex. 278; 19 L. T. O. S. 285; 155 E. R. 1109.

*Annotation:—Refd. Koenigsblatt v. Sweet, [1923] 2 Ch. 314.*

**339. — Guarantor deaf & blind.]**—Where an instrument of guarantee was signed by a man who was blind & deaf, but it was shown that the contents were fully submitted to his consideration by persons around him who could communicate with him by means of his fingers; it appearing, further, that an alteration was made in the instrument in consequence of a rational & properly expressed wish of his, & the allegation that the signature had been obtained by fraud & misrepresentation having totally failed, the guarantee was upheld against his estate.—*VICKERS v. BELL, BELL v. VICKERS* (1863), 9 L. T. 600; on appeal (1864), 4 De G. J. & Sm. 274, 1 L. J. J.

*Annotations:—Mentd. Rayner v. Koehler* (1872), L. R. 14 Eq. 262; *Cooto v. Whittington* (1873), L. R. 16 Eq. 531; *Re Lovett, Ambler v. Landsay* (1876), 3 Ch. D. 198.

**340. Signature by one guarantor—Of instrument drawn as joint guarantor.]**—*NORTON v. POWELL*, No. 40, *ante*.

**341. Intention of person signing immaterial.]**—*Re HOYLE, HOYLE v. HOYLE*, No. 268, *ante*.

#### *B. By Agent.*

*See CONTRACT*, Vol. XII., pp. 155–160, Nos. 1099–1143.

**342. Who may be an agent to sign—Minor.]**—Evidence that the son of deft., a minor, has in three or four instances signed bills of exchange for his father, is sufficient in an action against the father on a guarantee, to warrant the reading of an instrument, purporting to be a guarantee by the father in the handwriting of the son.—*WATKINS v. VINCE* (1818), 2 Stark. 308, N. P.

**343. — Solicitor.]**—Y. & S. were attorneys in partnership. S. gave an undertaking that, in consideration of pltf. in an action giving deft. in that action his discharge from custody, “we hereby agree” to pay such pltf. the debt & costs on a day named. S. signed this, “Y. & S., deft.’s attorneys,” but afterwards struck out the words “def’t.’s attorneys.” It was not proved that deft. had employed the firm, but only that S. had been employed by him to wind up his affairs; nor was any evidence given of recognition or knowledge by Y., or of authority from him to S., by previous practice or otherwise, to give such a guarantee:—*Held: Y. was not liable on the guarantee.*—*HASLEHAM v. YOUNG* (1844), 5 Q. B. 833; 1 Dav. & Mer. 700; 13 L. J. Q. B. 205; 3 L. T. O. S. 34; 8 Jur. 338; 114 E. R. 1463.

*Annotation:—Apld. Brettel v. Williams* (1849), 1 Exch. 623. —[*See CONTRACT*, Vol. XII., pp. 156, 157, Nos. 1104–1114.

**344. — Partner on behalf of firm.]**—A firm of S. & Co. consisted of three partners, F., R., & N., & carried on business in London. Another firm of N. & Co. consisted of five partners, F., R., N., H., & M., & carried on business in India. In Sept. 1872, N. & Co. applied by letter to a bank for a credit, agreeing to deliver to the bank as security “the personal obligation of this firm & individual partners, & a guarantee by S. & Co.” The bank granted the credit, & under it N. & Co. received large advances. In Feb. 1874, a letter was

addressed to the bank, signed by S. & Co. & also by F., R., & N., saying, “We hereby guarantee you payment of all sums which are or may at any time become due to you by N. & Co. under the credit applied for in Sept. 1872, & granted by you.” This letter & the signature of S. & Co. to it were written by F., & he had negotiated the original transaction with the bank. S. & Co. filed a liquidation petition, & N. & Co. stopped payment, a large sum being due to the bank under the credit:—*Held: the letter of Feb. 1874, pledged to the bank the joint liability of the firm of S. & Co., & also the separate liability of each of the three partners who signed it, & the bank were entitled to prove against the separate estate of F. for the amount due to them by N. & Co. under the credit.*—*Re SMITH, FLEMING & Co., Ex p. HARDING* (1879), 12 Ch. D. 557; 48 L. J. Bey. 115; 41 L. T. 517; 28 W. R. 158, C. A.

*—See, generally, PARTNERSHIP.*

**— Auctioneer.]**—*See AUCTION & AUCTIONEERS*, Vol. III., pp. 8, 9, Nos. 51–60.

**— Not one contracting party for other.]**—*See AGENCY*, Vol. I., pp. 277, 278, 633, Nos. 92–95, 2559.

**345. Sufficiency of signature—Agent acting in his own interests.]**—Where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted *bona fide*, repudiate liability on the contract on the ground that the agent, in making it, acted in his own interests, & not in those of his principal.—*HAMBRO v. BURNAND*, [1901] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 20 T. L. R. 398; 48 Sol. Jo. 369; 9 Com. Cas. 251, C. A.

*Annotations:—Refd. British Marine Mutual Insec. Assn. v. Draffon, Read & Morgan* (1903), 47 Sol. Jo. 672; *Willis, Faber v. Joyce* (1911), 104 L. T. 576. *Mentd. Ruben v. Great Fingall Consolidated*, [1904] 2 K. B. 712; *Malcolm, Brunker v. Waterhouse* (1908), 21 T. L. R. 851; *Cuthbert v. Roberts, Lubbock*, [1909] 2 Ch. 226; *Lloyd v. Grace, Smith*, [1912] A. C. 716; *Underwood v. Bank of Liverpool, Underwood v. Barclay’s Bank*, [1924] 1 K. B. 775.

**Revocation of authority to sign.]**—*See AGENCY*, Vol. I., p. 699, Nos. 3000, 3002.

**Ratification of authority to sign.]**—*See AGENCY*, Vol. I., pp. 415, 421, Nos. 1109, 1112, 1113, 1153.

**Signature to memorandum under Statute of Frauds Amendment Act, 1828 (c. 14).]**—*See Sect. 1, sub-sect. 2, B., ante.*

#### *C. By Directors of Company.*

*See Part II., Sect. 3, sub-sect. 5, ante.*

#### SUB-SECT. 6.—ADMISSIBILITY OF PAROL EVIDENCE.

*See Part IV., Sects. 2, 3, post.*

#### SECT. 4. STAMP DUTIES.

SUB-SECT. 1. —WHAT DOCUMENTS MUST BE STAMPED.

*See, generally, REVENUE; Stamp Act, 1891 (c. 39), Sched. I.*

**346. Separate instruments written on same material—Indorsement making payment on promissory note conditional.]**—Upon an instrument in the common form of a joint & several promissory note, signed by three persons, there is an indorsement written at the time of signing it, stating

that the note is taken as a security for all balances to the amount of the sum within specified which one of the three might happen to owe to the payee; that the note should be in force six months; & that no money should be liable to be called for sooner in any case. In an action against one of the sureties, the payee cannot declare upon this instrument, as a promissory note, payable either on demand, or at six months after date. Between these parties, the instrument is an agreement & must be stamped & declared upon as such.—*LEEDS v. LANCASHIRE* (1809), 2 Camp. 205, N. 1.

*Annotations*.—*Reid*, *Maillard v. Page* (1870), L. R. 5 Exch. 312. *Ment*, *Clarke v. Perolval* (1831), 2 B. & Ad. 660; *Bolton v. Dugdale* (1833), 4 B. & Ad. 619; *Brill v. Crick* (1836), 1 Gale, 441; *Davies v. Wilkinson* (1839), 10 Ad. & El. 98.

**347. — Indorsement affecting use of promissory note.**—A., B., & C. made a joint & several promissory note for £100, payable to pliffs., trustees of a banking co., or their order, on demand. A memorandum, indorsed on the note at the same time, signed by A., B., & C., stated that the note was given to secure floating advances made by the co. to A., from the respective times when such advances had been or might be made, together with commission, etc., not exceeding in the whole, at any one time, the sum of £100. In an action by the payees of the note against C., to which he pleaded Stat. Limitations, pliffs. proved payments by A., in reduction of the floating balance, within six years, & sought to use the memorandum indorsed on the note to show that such payments had reference to the note: *Held*: it could not be read in evidence without an agreement stamp.—*CHOLMELEY v. DARLEY* (1845), 14 M. & W. 341; 14 L. J. Ex. 328; 5 L. T. O. S. 267; 153 E. R. 507.

**348. — Signature by surety of promissory note while in hands of payee—Previous agreement as to signatures.**—A note beginning "I promise to pay," signed by two parties, is joint & several. A promissory note is signed by A., & subsequently by B., whilst in the hands of the payee, as surety for A.; unless such signature of B. is in virtue of a previous agreement at the time of making the note, it will be void, without an additional stamp.—*CLERK v. BLACKSTOCK* (1816), Holt, N. P. 471, N. P.

*Annotations*.—*Reid*, *Wright v. Kingshaw* (1842), 6 Jur. 857. *Ment*, *Hall v. Smith* (1823), 1 B. & C. 407; *Re Smith, Ex p. Yates* (1857), 27 L. J. Bey. 10, n.; *Steele v. McKinlay* (1880), 29 W. R. 17.

**349. — One stamp only necessary.**—*STEAD v. LIDDARD*, No. 319, ante.

**350. —**—Where a bond was to secure to creditors a composition on the amount of their debts, & contained also an indemnity by one of the sureties for the composition to his co-surety:—*Held*: (1) the stamp of £1 15s. was sufficient, without requiring an *ad valorem* stamp on the amount of the debts; (2) the distinct provision for indemnifying one of the sureties did not render a second stamp necessary.—*ANNANDALE v. PATTISON* (1829), 9 B. & C. 919; 8 L. J. O. S. K. B. 60; 109 E. R. 342.

*Annotations*.—*As to* (2) *Reid*, *Dickson v. Cass* (1830), 1 B. & Ad. 345; *Wharton v. Walton* (1815), 9 Jur. 638; *Sturup v. Whiston* (1846), 8 L. T. O. S. 90.

**351. —**—A. mortgages to B. for £900; by the same deed, C. becomes surety for the payment of a sum not exceeding £350 by the mtgor. to the mtgee.:—*Held*: the deed did not require an additional stamp in respect of C.'s guarantee.—*STURUP v. WHISTON* (1846), 8 L. T. O. S. 90.

*See, now*, Stamp Act, 1891 (c. 39), s. 3 (2).

**352. — Guarantee by third party in lease of licensed premises.**—A., by written contract,

agreed to take a public-house of S. at a certain rent, & to buy of S. all the beer which should be sold & consumed on the premises, under a penalty of £30 for every barrel bought of any other person; & to quit on six months' notice, under a penalty of £30 per month for holding over. At the end of this instrument was written: " & it is further agreed by O." (who was not previously made party to the contract) " that he will hold himself responsible for any amount of money which may become due from A. to S., that is to say to the amount of £30." The names of S., O. & A. were subscribed:—*Held*: in an action by S. against O. on the guarantee, a lease stamp was not sufficient, but that an agreement stamp was necessary in respect of O.'s guarantee, for the payment of penalties.—*WHARTON v. WALTON* (1815), 7 Q. B. 171; 14 L. J. Q. B. 321; 5 L. T. O. S. 171; 9 Jur. 638; 115 E. R. 567.

*Annotations*.—*Consd*, *Lovelock v. Franklyn* (1847), 8 Q. B. 371. *Reid*, *Mayfield v. Robinson* (1815), 7 Q. B. 486; *Worthington v. Warrington* (1848), 5 C. B. 635; *Doc d. Croft v. Tidbury* (1853), 2 C. L. R. 317.

**353. Agreement of three persons to indemnify another.**—By a written agreement, three persons bound themselves that in consideration of A.'s discharging a debt due from B. to C., amounting to £200, with the costs thereupon, each of the three would severally pay £50, & one fourth part of such costs, & give a bond, bill, or note for his own proportion:—*Held*: the agreement required only one stamp.—*RAMSBOTTOM v. DAVIS, RAMSBOTTOM v. GOSDEN* (1839), 4 M. & W. 581; 7 Dowl. 173; 1 Horn & H. 461; 8 L. J. Ex. 80; 150 E. R. 1553.

**354. Memorandum of guarantee not stating consideration.**—A document may require a stamp under Stamp Act, 1815 (c. 184), s. 1, to render it admissible in evidence, even though in itself it does not constitute an entire agreement or show a liability, but requires further parol evidence to show consideration:—*Held*: a document in the following form required a stamp: " Aug. 2. According to H.'s request, the land at B. under E. I will be bound for till next Lady day; rent £18."—*GLOVER v. HALKETT* (1857), 2 H. & N. 487; 26 L. J. Ex. 416; 29 L. T. O. S. 261; 3 Jur. N. S. 1083; 5 W. R. 881; 157 E. R. 201.

**355. —**—An articulated clerk held liable on a guarantee given on behalf of his principal. The consideration not appearing on the face of the guarantee, a stamp held nevertheless necessary.

By Mercantile Law Amendment Act, 1856 (c. 97), it is not necessary that the consideration should appear on the face of the document, & its not appearing does not invalidate the contract (*HILL, J.*).—*WHITFIELD v. MOOJEN* (1858), 1 F. & F. 290, N. P.

**356. Guarantee for due performance of charter-party.**—Defts., who were brokers, signed a properly stamped charterparty as agents for their principals, & then, at the request of the owner of the ship signed a guarantee as follows: " In consideration of our having signed the charter-party of A. as agents of B., we hereby guarantee the due fulfilment of same."—*Held*: this document was sufficiently stamped with a sixpenny stamp, as an agreement, & need not be stamped as a charterparty, or an agreement for or relating to the freight or conveyance of money, goods & effects on board a ship, under 5 & 6 Vict. c. 79.—*REIN v. LANE* (1867), L. R. 2 Q. B. 144; 8 B. & S. 83; 36 L. J. Q. B. 81; 15 L. T. 466; 15 W. R. 345; 2 Mar. L. C. 448.

*Annotation*.—*Reid*, *Horsley v. Graham* (1869), L. R. 3 C. P. 9.

**Sect. 4.—Stamp duties: Sub-sects. 1, 2 & 3. Part IV. Sect. 1: Sub-sect. 1.]**

**357. Guarantee collateral or auxiliary security.]**—*BRITISH-ITALIAN CORPN., LTD. v. INLAND REVENUE COMRS.*, [1921] W. N. 220, C. A.

**Stamp duties on bills of exchange, promissory notes, etc., generally.]**—*See* **BILLS OF EXCHANGE**, Vol. VI., pp. 493 *et seq.*

**Stamp duties on bonds generally.]**—*See* **BONDS**, Vol. VII., pp. 256-259, Nos. 973-1005.

**Stamp duties on indemnities to bailiffs levying distress.]**—*See* **DISTRESS**, Vol. XVIII., p. 330, Nos. 630, 631.

*See* Revenue Act, 1903 (c. 40), s. 7.

**SUB-SECT. 2.—EXEMPTIONS.**

**358. Guarantees upon sale of goods.]**—A broker when he bought goods for his principal agreed for  $\frac{1}{2}$  per cent. to indemnify him from any loss on the re-sale:—*Held*: the agreement, if reduced to writing, need not be stamped, because it was a contract relating to the sale of goods.—*CURRY v. EDENSOR* (1790), 3 Term Rep. 523; 100 E. R. 713.

*Annotations.*—*Consd.* *Warrington v. Furber* (1807), 8 East, 242; *Disd.* *Smith v. Cator* (1819), 2 B. & Ald. 778. *Refd.* *Huxton v. Bedall* (1803), 3 East, 303; *Southgate v. Bohn* (1816), 16 M. & W. 34; *Relu v. Lane* (1867), L. R. 2 Q. B. 144.

**359. —.]**—A guarantee in writing for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of Stamp Act, 1783 (c. 58), s. 4, "a contract for or relating to the sale of goods," & need not be stamped. The vendee having accepted a bill of exchange for the price of the goods, & becoming bkpt. before the bill became due, the guarantee who paid the vendor after the bkpy. of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; & the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however, it might still be competent for the vendee to defend himself against this action by the guarantee, by showing that if a demand for payment had been made upon him by the holder, the bill would have been paid.—*WARRINGTON v. FURBER* (1807), 8 East, 242; 103 E. R. 334.

*Annotations.*—*Consd.* *Phillips v. Astling* (1809), 2 Taunt. 206. *Refd.* *Boydell v. Drummond* (1809), 11 East, 142; *Murray v. King* (1821), 5 B. & Ald. 165; *Holborow v. Wilkins* (1822), 2 Dow. & Ry. K. B. 59; *Van Wart v. Woolley* (1821), 3 B. & C. 439; *Camidge v. Allenby* (1827), 6 B. & C. 373; *Hitchcock v. Humfrey* (1843), 5 Man. & G. 559; *Rein v. Lane* (1867), L. R. 2 Q. B. 144; *Horsely v. Graham* (1869), 21 L. T. 530; *Barber v. Mackrell* (1892), 67 L. T. 108. *Mentd.* *Armtyage v. Wilkinson* (1878), 3 App. Cas. 355.

**360. —.]**—*MARTIN v. WRIGHT*, No. 638, *post*.

**361. —.]**—Upon an agreement for the purchase of a quantity of tares, the bulk, when delivered, did not accord in quality with the order given, & the purchaser refused to receive them; whereupon, to settle dispute, the following

guarantee was given: "In consideration of your accepting B.'s Bordeaux draft, due to Feb. 24, £763 8s. 6d., being against invoice of 410 $\frac{1}{2}$  qrs. tares, dated Nov. 21, I undertake to guarantee those tares equal in every respect to the terms of your order":—*Held*: a sufficient contract relating to the sale of goods to bring it within the exception of Stamp Act, 1815 (c. 184), so as to render it admissible in evidence without a stamp.—*KILBECK v. VANDER VYVER* (1847), 2 New Pract. Cas. 129; 8 L. T. O. S. 451.

**362. —.]**—The following document is within the exemption of Stamp Act, 1815 (c. 184), relating to the "sale of goods, wares, & merchandise":—"Gentlemen in consideration of your consigning to my friends, Messrs. H. & Co., of Calcutta, sixteen casks of sherry wine, & engaging to pay me 1 per cent. on the amount of the proceeds, I hereby agree to guarantee to you the proper sale of the said wines, & the payment of the proceeds in due time.—J.J."—*SADLER v. JOHNSON* (1847), 16 M. & W. 775; 2 New Pract. Cas. 229; 16 L. J. Ex. 178; 9 L. T. O. S. 79; 153 E. R. 1403.

*Annotation.*—*Mentd.* *Goodchild v. Needham* (1815), 10 L. T. O. S. 318.

**363. —.]**—Deft. was indebted to plff. in £17; & C. & W. were indebted to deft. in £18. By agreement between C. & W., plff. & deft., the following document was delivered to plff.: "To Messrs. C. & W. I request you will supply Mr. C." (plff.) with such parcels of Roman cement as he shall require, to the amount of £18 & charge to the account standing with you to my credit. R.C." (deft.). Under this was written: "To Mr. C." (plff.). "On the consideration above named we agree to supply to your order, when you shall require it, Roman cement to the amount of £18. C. & W."—*Held*: this was an agreement relating to the sale of goods within the exemption in Stamp Act, 1815 (c. 184), Sched. Part I, & therefore did not require a stamp.—*HATFIELD v. COX* (1852), 18 Q. B. 321; 21 L. J. Q. B. 279; 19 L. T. O. S. 104; 16 Jur. 591; 118 E. R. 120.

*See, now*, Stamp Act, 1891 (c. 39), Sched. I.

**364. Guarantee given up as consideration for promise.]**—*BROOKS v. HAIGH*, No. 402, *post*.

**365. Agreement to give time to principal debtor.]**—A promissory note by principal & surety, stamped as a note, had a clause stating that time might be given to either without the other's consent, & the makers' signatures then followed:—*Held*: the note did not require an agreement stamp to enable the payee or the holder to sue thereon.—*YATES v. EVANS* (1892), 61 L. J. Q. B. 416; 66 L. T. 532; 56 J. P. 565; 36 Sol. Jo. 274, D. C.

*Annotation.*—*Refd.* *Kirkwood v. Carroll*, [1903] 1 K. B. 551.

**SUB-SECT. 3.—TIME FOR STAMPING.**

*See, now*, Stamp Act, 1891 (c. 39), s. 15.

**366. For proof on bankruptcy.]**—A guarantee, though not stamped at the date of the bkpy., may be proved when stamped.—*Re* *SHEPPARD, Ex p. NICHOLSON* (1810), 10 L. J. Bcy. 8; 4 Jur. 1066.

## Part IV.—Interpretation.

## SECT. 1.—RULES OF CONSTRUCTION.

## SUB-SECT. 1.—IN GENERAL.

See, generally, CONTRACT, Vol. XII., pp. 607 *et seq.*; BONDS, Vol. VII., pp. 182 *et seq.*; DEEDS, Vol. XVII., pp. 242 *et seq.*

**367. General rule—Construction as ordinary contract.]**—WOOD v. PRIESTNER, No. 639, *post*.

**368. ———.]**—A guarantee, like every other contract, must be construed reasonably, it must be construed by the words used, but also with regard to the surrounding circumstances (FRY, J.).—LLOYD'S v. HARPER (1880), 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452, C. A.

*Annotations:—*Reid. *Re Flavell*, Murray v. Flavell (1883), 25 Ch. D. 89; *Re Crace*, Balfour v. Crace, [1902] 1 Ch. 733. *Mentd.* Shephard v. Bray, [1906] 2 Ch. 235; *Re Cavendish Browne's Settlement*, Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27; Barker v. Stickney, [1918] 2 K. B. 356.

**369. ———.]**—Whole document to be considered.]—PARKER v. WISE, No. 545, *post*.

**370. ———.]**—LONDON ASSURANCE Co. v. BOLD, No. 406, *post*.

**371. ———.]**—Extraneous facts excluded.]—LONDON ASSURANCE Co. v. BOLD, No. 406, *post*.

—Ordinary meaning of words.]—See DEEDS, Vol. XVII., p. 266, No. 786.

**372. ———.]**—Construction from language used.]—FABER v. LATHOM (EARL), No. 607, *post*.

**373. Whether strictly construed against surety.]**—STRATON v. RASTALL, No. 1471, *post*.

**374. ———.]**—MASON v. PRITCHARD, No. 635, *post*.

**375. ———.]**—BACON v. CHESNEY, No. 709, *post*.

**376. ———.]**—HARGREAVE v. SMEE, No. 641, *post*.

**377. ———.]**—(1) A guarantee in the following words, "I hereby agree to be answerable for the payment of £50 for T. In case T. does not pay for the gin, etc., which he receives from you, & I will pay you the amount":—*Held*: it was not a continuing guarantee.

(2) It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly & intelligibly point out to the party giving the guarantee the extent to which he expects that liability is to be carried (BAYLEY, B.).—NICHOLSON v. PAGET (1832), 1 Cr. & M. 48; 5 C. & P. 395; 3 Tyr. 164; 2 L. J. Ex. 18; 149 E. R. 309.

*Annotations:—*As to (1) *Distd.* Mayer v. Isaac (1840), 6 M. & W. 605. *As to* (2) *Distd.* Mayer v. Isaac (1840), 6 M. & W. 605; Horlor v. Carpenter (1857), 3 C. B. N. S. 172; Wood v. Priestner (1866), L. R. 2 Exch. 66. *Consd.* Chalmers v. Victors (1868), 18 L. T. 481. *Reid.* Heffeld v. Meadows (1869), 20 L. T. 746.

## PART IV. SECT. 1, SUB-SECT. 1.

**367 i. General rule—Construction as ordinary contract.]**—A guarantee should be construed as all other contracts.—KASTNER v. WINSTANLEY (1869), 20 C. P. 101.—CAN.

**369 i. ———.]**—Whole document to be considered.]—BANK OF HAMILTON v. BAMFIELD, [1918] 2 W. W. R. 953; 40 D. L. R. 482.—CAN.

**373 i. Whether strictly construed against surety.]**—The ct. always construes a guarantee strictly against the guarantor, & the ct. always leans against a construction which would make the guarantee illusory.—JONES v. MARON (1892), 13 N. S. W. L. R. 157; 8 N. S. W. W. N. 142.—AUS.

**373 ii. ———.]**—THORNE v. CARMAN (1844), 2 Kerr, 381.—CAN.

**373 iii. ———.]**—KASTNER v. WINSTANLEY (1869), 20 C. P. 101.—CAN.

**373 iv. ———.]**—The rule that *verba cartarum fortius accipiuntur contra proferentem* should not be applied to guarantee, but the claim against a surety is to be considered *strictissimi juris*.—HITCHINSON v. BOYD (1854), 6 Ir. Jur. 353.—IR.

**381 i. Surrounding circumstances to be considered.]**—JONES v. MARON (1892), 13 N. S. W. L. R. 157; 8 N. S. W. W. N. 142.—AUS.

**381 ii. ———.]**—KASTNER v. WINSTANLEY (1869), 20 C. P. 101.—CAN.

**378. ———.]**—(1) "In consideration of your supplying my nephew V. with china & earthenware, I guarantee the payment of any bills you may draw on him on account thereof, to the amount of £200":—*Held*: a continuing guarantee, & deft. was liable upon it, although after it was given, goods to a greater amount than £200 had been supplied to & paid for by V.

(2) *Qu*: whether the doctrine laid down by the ct. in *Nicholson v. Paget*, No. 377, *ante*, that a guarantee is to be construed liberally in favour of the party who gives it be law.

(3) The generally received principle of law is that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be: &, on the other hand, that the party who receives the instrument, & parts with the goods on the faith of it should rather have a construction put upon it in his favour, because the words are not his, but those of the other party (ALDERSON, B.).—MAYER v. ISAAC (1840), 6 M. & W. 605; 9 L. J. Ex. 225; 4 Jur. 437; 151 E. R. 551.

*Annotations:—*As to (2) *Consd.* Horlor v. Carpenter (1857), 3 C. B. N. S. 172. *As to* (3) *Reid.* Horlor v. Carpenter (1857), 3 C. B. N. S. 172; Heffeld v. Meadows (1869), 20 L. T. 746.

**379. ———.]**—WOOD v. PRIESTNER, No. 639, *post*.

**380. Ut res magis valeat quam pereat.]**—BROOM v. BATCHELOR, No. 103, *ante*.

**381. Surrounding circumstances to be considered.]**—HODD v. GRACE, No. 427, *post*.

**382. ———.]**—At time guarantee given.]—WOOD v. PRIESTNER, No. 639, *post*.

**383. ———.]**—BURGESS v. EVE, No. 666, *post*.

**384. ———.]**—Position of parties.]—LAURIE v. SCHOLEFIELD, No. 658, *post*.

**385. ———.]**—BURGESS v. EVE, No. 666, *post*.

**386. ———.]**—What included under.]—MORRELL v. COWAN, No. 81, *ante*.

**387. ———.]**—Plffs. brought an action upon a written guarantee signed by deft. Deft. did not plead Stat. Frauds. At the trial plffs. gave evidence of a verbal contract, & in answer to the case so set up deft. sought to rely upon Stat. Frauds:—*Held*: if the evidence was admissible at all, deft. was not debarred from relying on the statute by the fact that he had not pleaded it in the first instance, & the judge should have directed the necessary amendments to be made in the pleadings. *Semble*: the evidence was not admissible.

I will assume now that we are to look at what are called the surrounding circumstances. But

**381 iii. ———.]**—In construing a contract of guarantee the ct. is entitled to look at the surrounding circumstances & other matters which existed at the time of the making of the contract, but is not entitled to look at any negotiations that may have previously taken place.—NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD. v. WILLIS, [1920] N. Z. L. R. 379.—N.Z.

**k. ———.]**—Inclusion of parties.]—KASTNER v. WINSTANLEY (1869), 20 C. P. 101.—CAN.

**l. ———.]**—RAM GOPAL MOOKERJEE v. MANSEYK (1860), 2 W. R. 43; 8 Moo. Ind. App. 239.—IND.

**m. Question for court alone.]**—In

## Sect. 1.—Rules of construction: Sub-sect. 1 &amp; 2,

one has to be very cautious in construing those words, not to let in, under the name of surrounding circumstances, other & totally different causes of action (LORD HALSBURY, C.).—BRUNNING v. ODHAMS BROTHERS, LTD. (1890), 75 L. T. 602; 13 T. L. R. 65, H. C.; *reversg.* S. C. *sub nom.* ODHAMS BROTHERS v. BRUNNING, 74 L. T. 370, C. A.

*Annotations*—*Consd.* Marsden v. Capital & Counties Newspaper Co. (No. 1) (1901), 46 Sol. Jo. 11. *Mentd.* Pritchard v. Crouch (1913), 57 Sol. Jo. 342.

SUB-SECT. 2.—RECITAL AND CONDITION.  
A. In General.

**Effect of recital upon other terms.**—*See*, BONDS, Vol. VII., pp. 183, 184, Nos. 212-216; DEEDS, Vol. XVII., pp. 362 *et seq.*

## B. Variance between Recital and Condition.

*See, generally*, BONDS, Vol. VII., p. 183; DEEDS, Vol. XVII., pp. 362 *et seq.*

**388. General rule—Special recital—General condition Whether restraint on condition.**—C., by a written guarantee reciting that M. had been a member of a late firm, & required to borrow money to meet the engagements of such late firm, agreed to be surety to B. for all debts contracted, or that might be contracted, to & in favour of B., & generally for all the present & future liabilities of M. towards B. M. for some time traded alone, & afterwards traded along with other parties, & contracted debts with B., which had no reference to the late firm, or to his sole trading:—*Held*: though the recital of the guarantee was special, it did not control the generality of the subsequent operative words.

It often happens that an engagement is given more extensive than is absolutely necessary for the limited object for which it is required, but it does not follow therefrom that the general engagement is necessarily to be cut down (LORD CRANWORTH, C.).—BANK OF BRITISH NORTH AMERICA v. CUVILLIER (1861), 14 Moo. P. C. O. 187; 4 L. T. 159; 15 E. R. 275, P. C.

**389. Appointment as bailiff—Particular locality—Condition for execution of all warrants.**—STOUGHTON v. DAY (1647), Aleyn, 10; Sty. 18; 82 R. R. 887.

*Annotations*—*Consd.* Arlington v. Merricke (1672), 2 Saund. 403. *Refd.* Weston v. Mason, Weston v. Chapman (1765), 3 Burr. 1725; Wright v. Russell (1774), 3 Wils. 530; Barclay v. Lucas (1784), 1 Term Rep. 291, n.

**390. Restriction on duration of liability—Though enlarged by condition—Fidelity bond.**—“During all the time” shall be intended but only during the six months recited in the condition (HALE, C.J.).—ARLINGTON (LORD) v. MERRICKE (1672), 2 Saund. 403; 3 Keb. 45, 59; 85 E. R. 1215.

—*Apld.* Barker v. Parker (1786), 1 Term Rep. 287. *Consd.* Strange v. Lee (1803), 3 East, 484. *Foll.* Liverpool Water Works Co. v. Atkinson (1805), 6 East, 507. *Consd.* Parker v. Wise (1817), 6 M. & S. 238; Chapman v. Beckinton (1842), 3 Q. B. 703; Berwick v. Murray (1850), 14 Jur. 659; N. W. Ry. v. Whinray (1854), 10 Exch. 77; Oswald v. Berwick-upon-Tweed Corp'n. (1856), 6 H. L. Cas. 856. *Refd.* Wright v. Russell (1774), 3 Wils.

an action of guarantee alleged to be contained in a letter & telegram in which there were no words of doubtful trade meaning, & the extrinsic facts not being in controversy:—*Held*: the question whether the words used amounted to a contract of guarantee was for the determination of the ct.

alone.—BANK OF MONTREAL v. MONTREAL BANK (1876), 1 R. 11 C. L. 47.—*IR.*

**PART IV. SECT. 1, SUB-SECT. 2.—B. n. Restriction & duration of liability—Though lessened by recital.**—

530; Barclay v. Lucas (1784), 1 Term Rep. 291, n.; Hassell v. Long (1814), 2 M. & S. 363; Leadley v. Evans (1824), 2 Bing. 32; Smith v. Holtzmeier (1829), 8 L. J. 30; O. S. K. B. 105; Bamford v. Iles (1849), 3 Exch. 380; Kitson v. Julian (1855), 4 E. & B. 854; Backhouse v. Hall (1865), 6 B. & S. 507; Skillett v. Fletcher (1867), L. R. 2 C. P. 469; Leathley v. Spyer (1870), 6 R. 5 C. P. 595. *Mentd.* Bridgewater v. Bolton (1704), 6 Mod. Rep. 106; Stibbs v. Clough (1719), 1 Stra. 227; Gale v. Reed (1806), 8 East, 80; Hickinbotham v. Leach (1842), 11 L. J. Ex. 341; Buccleuch v. Metropolitan Board of Works (1870), L. R. 6 Exch. 221; Harper v. Godsell (1870), L. R. 5 Q. B. 422; Danby v. Coutts (1885), 29 Ch. D. 500; Hatcliffe v. Evans, (1892) 2 Q. B. 524.

**391.** — — — — —]—The condition of a bond recited that deft. had agreed with plffs. to collect their revenues from time to time for twelve months” & after words stipulating that “at all times thereafter during the continuance of such his employment, & for so long as he should continue to be employed” he would justly account & obey orders, etc., confines the obligation to the period of twelve months mentioned in the recital.—LIVERPOOL WATERWORKS Co. v. ATKINSON (1805), 6 East, 507; 2 Smith, K. B. 654; 102 E. R. 1382.

*Annotations*—*Foll.* St. Saviour's, Southwark v. Bostock (1806), 2 Bos. & P. N. R. 175. *Distd.* Sansom v. Bell (1809), 2 Camp. 39. *Consd.* Oswald v. Berwick-upon-Tweed Corp'n. (1856), 5 H. L. Cas. 856. *Refd.* Hassell v. Long (1814), 2 M. & S. 363; Leadley v. Evans (1824), 2 Bing. 32; Aurego v. Keen (1836), 1 M. & W. 390; Berwick v. Murray (1850), 14 Jur. 659; Kitson v. Julian (1855), 24 L. J. Q. B. 202. *Mentd.* Danby v. Coutts (1885), 29 Ch. D. 500.

**392.** — — — — —]—A bond made by deft.'s testator as surety for E. with a condition reciting that E. had been & still was collector of the land tax & all other taxes & duties imposed by several Acts of Parliament on the inhabitants of the parish of C., by means whereof he received from the inhabitants of the parish of C. divers sums of money & conditioned for the due payment by E. from time to time & at all times thereafter, to the receiver general of taxes, etc., all & every such sum which he, E., should from time to time collect & receive from the inhabitants of the parish for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed by any Act of Parliament, was held to be confined to the current year for which E. was, at the date of the bond, collector, although it did not appear on the condition that he was only appointed for a year; it being shown by deft.'s plea that the said office of collector was an annual office & held as such by E. at the date of the bond, although it appeared by the replication that E. held the office not only for that year, but from thence to the time of exhibiting plff.'s bill.

Here is an express mention of duties thereafter to be imposed, which shows that the surety meant to continue his responsibility beyond the period of the current year; inasmuch as it could not be supposed probable that any duties would be imposed, so as to come into collection between Dec. 5 & Apr. 5 following. On the construction of this part of the condition the whole question turns. Assuming it to be improbable that taxes should be imposed between the times above stated, still it was not impossible, & the words might have been introduced *ex abundanti cautela*; & certainly they do not necessarily import that the duties should be collected by him after the expiration of the current year. The words of

A., the secretary of a board, & B., as his surety, gave a bond of office, reciting that it was required that security should be given for the faithful performance of & all duties pertaining to such office, & conditioned that A. should correctly keep any moneys & papers belonging to the board, &



the recital which afford the best ground for gathering the meaning of the parties, do not advert to any such collection. Besides, as the consequence of giving to the condition a more enlarged construction, so as to extend the responsibility beyond the current year, would be of so grievous & burdensome a nature, we think it requires more clear & certain words than are to be found in this instrument. If the bond may continue beyond the current year, it may do so for the life of the collector during the whole period of his remaining in office; it will attach on the surety whenever the person for whom he undertakes is in default; & we know of no means subsisting at common law by which the surety can redeem himself from this interminable risk. All the cases from *Arlington v. Merrick*, No. 390, *ante*, to *St. Saviour's (Southwark) v. Bostock*, No. 1248, *post*, have narrowed the construction of conditions of this sort to the actual term of office (*LORD ELLENBOROUGH, C.J.*).—*HASSELL v. LONG* (1814), 2 M. & S. 363; 105 E. R. 416.

*Annotations*:—*Consd.* *Peppin v. Cooper* (1819), 2 B. & Ald. 431. *Apld.* *Leadley v. Evans* (1824), 2 Bing. 32. *Refd.* *Parker v. Wise* (1817), 6 M. & S. 239; *London Assoc. v. Bold* (1844), 6 Q. B. 514.

393. ————]—A bond, with one surety only, taken by comrs. of taxes under 43 Geo. 3, c. 99, s. 13, is not, therefore, void.

The office of collector under that Act is an annual office; &, therefore, where a bond, after reciting the appointment of W. to be collector under the Act, was conditioned for the due collection by W. of the rates & duties at all times thereafter:—*Held*: the due collection of the rates for one year was a compliance with the condition of the bond.

It is true that the words "at all times hereafter" in the condition of the bond, would, taken by themselves, extend the liability of the surety beyond that period, but these words must be construed with reference to the recital & to the nature of the appointment there mentioned, & the recital is that W. & P. had been appointed collectors under the Act. If the statute make it an annual office it is unnecessary to state that either in the bond or in pleading (*ABBOT, C.J.*).—*PEPPIN v. COOPER* (1819), 2 B. & Ald. 431; 106 E. R. 423.

*Annotations*:—*Apld.* *Leadley v. Evans* (1824), 2 Bing. 32. *Consd.* *Cambridge Corp'n. v. Dennis* (1854), E. B. & E. 660. *Refd.* *Birmingham Corp'n. v. Wright* (1851), 16 Q. B. 623; *Kitson v. Julian* (1855), 1 Jur. N. S. 754. *Meatd.* *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453.

394. ————]—A bond given to secure faithful performance of the office of a collector of parochial rates, who was by Act of Parliament to be appointed by trustees for a year & then to be capable of re-election, was conditioned that, "from time to time & at all times thereafter, during such time as he should continue in his said office, whether by notice of his said appointment or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the said trustees, or their successors, to be elected in the manner directed by the said Act, he should use his best endeavours to collect the moneys received by means of the rates, in the then present or any subsequent year," etc.:—*Held*: the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed.—*AUGERO v. KEEN* (1836), 1 M. & W. 390; 2 Gale, 8; 3

*Nev. & M. M. C.* 560; *Tyr. & Gr.* 709; 5 L. J. Ex. 233; 150 E. R. 485.

*Annotations*:—*Distd.* *Bamford v. Iles* (1849), 3 Exch. 380. *Refd.* *Birmingham Corp'n. v. Wright* (1851), 16 Q. B. 623; *Oswald v. Berwick-upon-Tweed Corp'n.* (1854), 23 L. T. O. S. 272; *Kitson v. Julian* (1855), 3 C. L. R. 1201.

395. ————]—*Defts.*, J. & S., gave a joint & several bond to *pltf.*; the condition whereof recited that J. had been appointed clerk to *pltf.*, & that, upon such appointment being made, it was agreed that J., & S. as surety for J., should enter into the bond for the due execution of his said office; & the condition was declared to be that, if J. should, "from time to time & at all times, so long as he shall continue to hold the said office or employment," duly account for & pay to *pltf.* all sums of money received by him "by virtue or in execution of his said office," & account for & deliver to *pltf.* all books & things "which shall, at any time or times, be received by or come to his hands by virtue or in execution of his said office or employment," & should "at all times" regularly keep accounts of such sums, books, etc., & should "faithfully & diligently, in all respects, demean & conduct himself in the said office or employment, & in all matters & things relating to or concerning the same," the bond should be void. *Pltf.* declared on the bond against *defts.* J. & S. *Plea* after setting out the condition: that the appointment of J. to the said office & employment was for one year, from, etc., to etc., & no longer; & that J. did well & truly observe, perform, etc., all the articles, etc., in the condition specified. *Replication*: that J., with the assent of *defts.* & *pltf.*, remained in the said office & employment after the expiration of the year for a long period, & during such last mentioned period, & before the commencement of the suit, omitted to account, etc. for sums received by him "under & by virtue & in execution of his said office during such period." On demurrer to the replication:—*Held*: (1) the allegation in the plea, as to the time for which J. was in fact appointed, had the same effect as if the period of the appointment were recited in the condition; (2) the plea showed a good defence, the liability of *deft.* on the bond not extending beyond the specified year; (3) the replication did not answer the plea, for that it did not show more than a fresh appointment by parol, which would not be comprehended in the condition of the bond.—*KITSON v. JULIAN* (1855), 4 E. & B. 854; 3 C. L. R. 1201; 24 L. J. Q. B. 202; 25 L. T. O. S. 64; 1 Jur. N. S. 754; 3 W. R. 371; 119 E. R. 317.

396. Liability for particular agency—Condition for general agency—Receipt of money.]—In construing an agreement in the form of a bond, in which a surety became liable for the due fulfilment of an agent's duties, therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, & controlled by reference to the prior clauses specifying the extent of the agency:—*Held*: moneys received by an agent on account of his employers, during the time of his agency, but not in pursuance of the particular agency disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligation "that during the whole time the said B., the agent, shall continue to act as agent foresaid, in consequence of the above recited agreement, he shall well & truly account for & pay to us, the employers

for any moneys which at any time thereafter might come into his hands as such secretary, & A. received & made default in respect of moneys improperly paid to him as

such secretary:—*Held*: the condition must be read with reference to the recital, & its scope might be thereby restricted, & reading the two together B. was not liable for the moneys so

received by A., which were outside the duties pertaining to his office.—*KIRTH v. FENELON FALLS, UNION SCHOOL SECTION* (1882), 3 O. R. 194.—*CAN.*



*Sect. 1.—Rules of construction: Sub-sect. 2, B.*  
*Sect. 2: Sub-sect. 1.]*

all sums of money received by him on our account.”  
*—NAPIER v. BRUCE (1812), 8 Cl. & Fin. 470; 8 E. R. 184, H. L.*

**397. Appointment “during pleasure”—Condition for performance while holding office—Rate collector.]**—A person appointed to act as overseer for collecting borough rate in a portion of a parish, under 7 Will. 4, & 1 Vict. c. 81, s. 3, is not one of the borough officers who are to be appointed “in every year” under 5 & 6 Will. 4, c. 76, s. 58. *Qu.*: whether such an officer can legally be appointed for an indefinite time, during the pleasure of the council.

Where parties had become sureties in a bond reciting that B. had been appointed to act as overseer for making & levying borough rates in that part of parish A. which lay within the borough of B., during the pleasure of the council, & the bond was conditioned for performance of the duties during such time as A. should act as such overseer:—*Held*: the sureties were liable beyond the expiration of the year, A. continuing in office; for there was no law limiting the duration of the office to a year, so as to control the express stipulations of the bond.—*BIRMINGHAM CORPN. v. WRIGHT (1851), 16 Q. B. 623; 20 L. J. Q. B. 211; 16 L. T. O. S. 459; 15 J. P. 510; 15 Jur. 749; 117 E. R. 1019.*

**398. Retrospective liability—Condition following words of statute.]**—Debt on bond made by C. & his sureties, with a condition reciting 27 Geo. 2, c. 35, & that C., four years before the date of bond, was appointed . . . collector of the poor rates to be levied & raised in the parish, & conditioned that C. should account as often as required, for all moneys so collected & received by him, by virtue of the Act, etc. Breach, for not accounting for moneys collected & received since the making of the bond, etc. Plea, that C. accounted for all the moneys collected & received by him before the making of the bond; that the office of collecting is an annual office; that C. accounted for all the moneys collected & received by him within the current year of office in which the bond was made: *Held*: both pleas were ill, for by the words of the statute the appointment was prospective, to collect future rates, & not retrospective only, & the condition was in the words of the statute without any restraining words.

Upon the question whether the obligation is prospective or retrospective only, there is nothing in the recital to show it retrospective only; & if it had not been intended to go along with the office one would have expected words in the condition to restrain its effect. But the words in the condition are the very words of the Act. Therefore it must be intended that they were meant to be prospective the same as the Act (*BAXLEY, J.*).—*CURLING v. CHALKLEN (1815), 3 M. & S. 502; 105 E. R. 698.*

*Annotation:—Reid. Kiltson v. Julian (1855), 4 E. & B. 854.*

**399. Liability during appointment at fixed salary—Change in method of remuneration.]**—In Jan. 1851, deft. as surety, executed a bond to a railway co., which, after reciting that the co. had agreed to appoint L. as their clerk or agent, for the purpose of selling coal, at a yearly salary of £100, was conditioned for the due accounting by L. of all moneys received by him for the use of the co. L. performed the duties of such clerk or agent at the above salary until May, 1851,

when it was agreed between L. & the co. to substitute for such salary a commission of 6d. per ton on all coal for which he should obtain orders. From that time L. was paid for his services by such commission, which amounted to a larger sum than the fixed salary. In 1852, L. was indebted to the company for sums which he did not pay over; & the co. having sued deft. on the bond:—*Held*: the condition of the bond was restrained by the recital, so that deft. as surety, only undertook to be responsible for the faithful conduct of L. whilst he continued clerk at such fixed salary & consequently deft. was not liable after the change in the mode of remuneration.—*NORTH WESTERN RY. CO. v. WHINRAY (1854), 10 Exch. 77; 2 Q. L. R. 1207; 23 L. J. Ex. 261; 23 L. T. O. S. 163; 156 E. R. 363; sub nom. LONDON & NORTH WESTERN RY. CO. v. WHINRAY, 2 W. R. 523.*

*Annotations:—Distd. Sanderson v. Aston (1873), L. R. 8 Exch. 73. Consd. Holme v. Brunskill (1878), 3 Q. B. D. 495. Reid. Stewart v. McKean (1855), 21 L. J. Ex. 115.*

**400. Specified port of embarkation—Embarkation at another port—No port specified in condition.]**

—Deft. as surety, executed a bond, the condition of which recited an agreement between the directors of an East Indian Ry. Co. & P., whereby it was agreed that P. should forthwith proceed to such place in the East Indies at such time, & by such conveyance as the co. should direct & should there serve the co. as engineer at a certain salary per month, to commence from the day of his embarkation at Southampton. The condition was in the terms of the recited agreement, but mentioned no place of embarkation. The co. paid for the passage of P. to India, on board a vessel about to leave Southampton; but the bond not having been executed in sufficient time to enable him to go by that vessel, he was directed by the co. to go by way of Marseilles, & so meet the vessel. He embarked at Dover but never reached Marseilles & in a short time returned to this country:—*Held*: the condition of the bond was not restrained by the recital, & consequently the surety was liable, notwithstanding the principal did not embark at Southampton.—*EVANS v. EARLE (1851), 10 Exch. 1; 2 Q. L. R. 1222; 23 L. J. Ex. 265; 2 W. R. 476; 156 E. R. 330.*

**401. Appointment as treasurer for year—Condition as to future elections—Change in law—Office made tenable during pleasure.]**—5 & 6 Will. 4, c. 76, s. 58, required that the council of a borough should annually elect the treasurer of the borough. While that Act was in force, M. was elected treasurer of the borough of B. for “the year ending Nov. 9, 1812, if it should so long please the said council, but not otherwise.” He gave bond with sureties for the due discharge of the duties of his office. The bond recited the election, & was conditioned for the due accounting by M. for all such moneys, etc. “as I, the said M., shall or may recover, or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office in consequence of the said election, or under any annual or other future election of the said council, to the said office.” After the bond had been given, 6 & 7 Vict. c. 89, was passed. Sect. 6 of that Act repealed sect. 58 of the previous statute, & directed that, instead of the treasurer being annually elected, he should “hold his office during the pleasure of the council for the time being.” M. was re-elected in Nov. 1843, after the passing of this latter statute; no fresh bond was taken:—*Held*: under the original bond, the sureties continued liable; the election in Nov. 1843, was “a

future election" within the true intent & meaning of the bond; that M. did continue in the office of treasurer within the true intent & meaning of the said bond.—*OSWALD v. BERWICK-UPON-TWEED CORPN.* (1856), 5 H. L. Cas. 856; 25 L. J. Q. B. 383; 10 E. R. 1139; *sub nom.* DOBIE *v. BERWICK-ON-TWEED CORPN.*, *RENTON v. SAME*, *OSWALD v. SAME*, 27 L. T. O. S. 311; 20 J. P. 531; 2 Jur. N. S. 743; 4 W. R. 738, H. L.; *affg.* S. C. *sub nom.* *BERWICK CORPN. v. OSWALD* (1851), 3 E. & B. 653, Ex. Ch.; (1853), 1 E. & B. 295.

*Annotations*.—*Distd.* *Pybus v. Gibb* (1856), 6 E. & B. 902; *Badger v. Finch* (1857), 29 L. T. O. S. 88. *Consd.* *Dartmouth Corpn. v. Sully* (1857), 7 E. & B. 97. *Distd.* *Cambridge Corpn. v. Dennis* (1858), E. B. & E. 660. *Refd.* *N. W. Ry. v. Whinray* (1854), 10 Exch. 77; *Kitsen v. Julian* (1855), 4 E. & B. 851. *Mentd.* *Spence v. Healey* (1853), 8 Exch. 668; *Hughes v. Lumley* (1854), 4 E. & B. 358; *Vansittart v. Taylor* (1855), 4 E. & B. 910; *Baily v. De Crespiigny* (1869), L. R. 11, 4 Q. B. 180; *Collins v. Collins* (1884), 9 App. Cas. 205.

## SECT. 2.—ADMISSIBILITY OF EXTRINSIC EVIDENCE.

### SUB-SECT. 1.—IN GENERAL.

*See, generally*, DEEDS, Vol. XVII., pp. 302 *et seq.*

**To prove consideration.**—*See, note*, Mercantile Law Amendment Act, 1856 (c. 97), s. 3; & *see* Part III., Sect. 3, sub-sect. 4, B. (b), *ante*.

**402. General rule—Where ambiguity—Admissible.**—Declaration in *assumpsit*, stating that deft. promised, in consideration that plffs., at his request, would give up to him a certain guarantee of £10,000 on behalf of L., then held by plffs. Averment, that plffs. gave up the guarantee, but deft. did not perform his promise. Plea, that the guarantee was a promise to answer for the debt of another, & that there was no agreement, etc., in writing, wherein any sufficient consideration was stated according to Stat. Frauds, s. 4. The supposed guarantee was contained in the following written memorandum signed by deft.:—"Messrs. H." (plffs.). "In consideration of your being in advance to L. in the sum of £10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. B."—*Held*: (1) the guarantee did not necessarily imply a past advance; (2) plffs., on a trial, might have offered evidence to show that future advances had been contemplated; (3) the paper on which the guarantee was written appeared by the declaration & plea to have been given up by plffs. to deft. & this alone was consideration for a promise; & on the trial of an issue of fact raising the question whether or not the above guarantee had been delivered up the guarantee might be given in evidence though unstamped.—*BROOKS v. HAIGH* (1840), 10 Ad. & El. 323; 4 Per. & Dav. 288; 113 E. R. 119, Ex. Ch.; *affg.* S. C. *sub nom.* *HAIGH v. BROOKS* (1839), 10

Ad. & El. 309; 3 Per. & Dav. 452; 9 L. J. Q. B. 194.

*Annotations*.—*As to* (1) *Consd.* *Bell v. Welch* (1830), 9 C. B. 154. *As to* (2) *Fold.* *Goldshede v. Swan* (1847), 1 Exch. 154. *Expld.* *Way v. Hearn* (1862), 13 C. B. N. S. 292. *Refd.* *Chapman v. Sutton* (1846), 2 C. B. 634; *Edwards v. Jevons* (1849), 8 C. B. 436; *Bainbridge v. Wade* (1850), 16 Q. B. 89; *Broom v. Hatchelor* (1856), 1 H. & N. 255. *As to* (3) *Refd.* *Allnut v. Ashenden* (1843), 5 Man. & G. 392; *Curlew v. Clark* (1849), 3 Exch. 375; *Steele v. Hoe* (1849), 14 Q. B. 431; *Colbourn v. Dawson* (1851), 10 C. B. 765. *As to* (4) *Refd.* *R. v. Watts* (1854), 18 J. P. 87. *Generally*, *Refd.* *Meinertzhagen v. Davis* (1844), 1 Coll. 335; *Money v. Jordau* (1852), 2 De G. M. & G. 318. *Hall v. Conder* (1857), 2 C. B. N. S. 22. *Mentd.* *Kearns v. Durrell* (1818), 6 C. B. 596; *Southall v. Riggs*, *Forman v. Wright* (1851), 11 C. B. 481; *Mather v. Malsstone* (1856), 27 L. T. O. S. 261; *Cheale v. Kenward* (1858), 3 De G. & J. 27; *Hart v. Miles* (1858), 4 C. B. N. S. 371; *Westlake v. Adams* (1858), 5 C. B. N. S. 248.

### 403. — Where no ambiguity—Inadmissible.]

—*LONDON ASSURANCE CO. v. BOLD*, No. 100, *post*.

**404. Position of parties—Capacity in which document received—Principal or agent.**—*BATEMAN v. PHILLIPS*, No. 298, *ante*.

### 405. — Co-obligors of bond—Who is surety.]

—Parol evidence may be given to show, as between the two co-obligors in a bond, that one of them was only a surety for the other. A. & B. join in a bond to secure money, borrowed by B. for the use of a third person; as between A. & B. A. is only a surety.—*BOLTON v. COOKE* (1825), 3 L. J. O. S. Ch. 87.

### 406. — Capacity in which money received —

**Joint receipt by surety & partner.**—The condition of a bond given by deft. to plff., after reciting that A. had been appointed agent for plff., which employment he had accepted, & undertaken to perform the trusts thereof, was declared to be that, if A. should, during his continuance in such employment, faithfully demean & conduct himself, & when required, account for & pay to plff. all moneys which he had received or should thereafter receive for plff.'s use, the bond should be void. Declaration on the bond set out the condition, & averred that, while A. remained in the employment of plff., as agent aforesaid, A. received for the use of plff. moneys, amounting, etc., but did not, when required, account, etc. Plea; that A. did not, while he remained in the service of plff. as such agent as in the declaration mentioned, receive for the use of plff. the sums mentioned.—*Held*: plff. did not support the issue by proof that A. & B., as partners, were employed by plff. as agents, & in that character had jointly received money for plff.'s use, it appearing that A. had never been employed by plff., or received money for him solely; & no difference would be made by proof that deft. knew that A. was to be employed only as partner with B.

The intention of the parties to the instrument is to be the criterion, but that is in general to be

which guarantee signed.]

—*UL-AMMAN BEGAM v. AHMAD WALI KHAN* (1903), 1 L. R. 25 All. 337. — *IND.*

p. —. —.]—*GRAHAME v. GRAHAME* (1887), 19 L. R. Ir. 219.—*IR.*

q. **To prove reservation of rights—Against surety.**—On the maturity & non-payment of a mtge., the grantee of the equity of redemption, who had covenanted with the mtgor. to pay the mtge. moneys, executed a new mtge. to the holder, through several mesne assignments, of the original mtge., the new mtge. extending the time for payment of the principal & reducing the rate of interest, the mtgor. refusing to discharge the original mtge., & orally reserving his rights against the

security on other real property for the payment of moneys, to which plff. agreed; & plff. averred that, in consideration that he would allow the assignment to be put on record, deft. promised that the arrangement made with N. for the payment of the balance should be duly carried out, otherwise defts. would pay plff. £135, that being the sum to be secured. The guarantee, when produced, showed that defts. had not agreed absolutely to secure plff., as alleged, but to pay the £135 if N. did not do so.—*Held*: oral evidence of an agreement to the effect declared upon was inadmissible.—*IRVINE v. NICHOLSON* (1861), 20 U. C. R. 461.—*CAN.*

c. **Position of parties—Capacity**

## PART IV. SECT. 2, SUB-SECT. 1.

**402i. General rule—Where ambiguity—Admissible.**—Deft. by writing agreed to become responsible for the debt contracted by J. to W., but the writing did not state to whom he was to become responsible.—*Held*: parol evidence of the surrounding circumstances was admissible to explain the ambiguity.—*WATEROUS ENGINE WORKS CO. v. JONES* (1890), 7 Man. L. R. 73.—*CAN.*

**403i. — Where no ambiguity—Inadmissible.**—Plff. sued on a guarantee, alleging that it was proposed to him by deft. N., that if he would allow a certain assignment made to him of a leasehold property to be put on record, he, N., would give him

**Sect. 2.—Admissibility of extrinsic evidence: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1.]**

ascertained from the words of the instrument. We may indeed look at the circumstances which occurred at the time, in order to understand what the parties were about, but when, as here, a bond has an express meaning in the words which it contains, we are not to admit any evidence to diminish or enlarge its meaning (COLERIDGE, J.).—LONDON ASSURANCE CO. v. BOLD (1844), 6 Q. B. 514; 14 L. J. Q. B. 50; 4 L. T. O. S. 112; 8 Jur. 1118; 115 E. R. 192.

*Annotations:—*Consd. Mills v. Alderbury Union Grdns. (1819), 3 Exch. 590. *Refd.* Montefiore v. Lloyd (1863), 15 C. B. N. S. 203.

**407. — Capacity in which guarantee signed—Principal or agent.]—**By arts. of agreement under seal between A. & co., & Y. & co., Y. & co. agreed to do certain work for which A. & co. were to make certain payments, & the agreement contained this clause, "It is further understood between the parties to this contract that S. guarantees payment to Y. & co., of all moneys due to them under this contract." The attestation clause was "signed & delivered by Y. & co. in the presence of 'C. T.' & S., acting under a power of attorney, signed as follows:—"P.P.A. A. & co., J.S." Y. & co., sued S. as guarantor, & evidence was given at the trial of statements by S. at the time of execution, that he intended to sign on his own behalf as well as on that of A. & co. A verdict was found for plffs. S. moved for a new trial on the ground that he had not signed the guarantee: *Held*: evidence that S. intended to sign in his own right as well as on behalf of A. & co., did not contradict the document, & was admissible, & that S. must be taken to have signed as a contracting party.—YOUNG v. SCHULER (1883), 11 Q. B. D. 651; 49 L. T. 546, C. A.

**408. To identify debt guaranteed—More than one debt in existence.]—**A promise in writing to pay a debt, to be transferred from promisor's account to that of a third party, his agent:—*Held*: valid, as a guarantee, & parol evidence admitted to identify the debt.

There appear to have been two debts, & the dispute is as to which of them the promise applies. That can be proved by parol, for though by Stat. Frauds, the contract must be in writing, the ambiguity is latent & raised by parol evidence, & therefore may be removed by parol evidence (BRAMWELL, B.). BRUNTON v. DULLENS (1859), 1 F. & F. 450.

**409. To supply consideration.]—**SHORTREDE v. CHEEK, No. 712, *post*.

**410. — Mercantile Law Amendment Act, 1856 (c. 97), s. 3.]—**(1) Since above sect. though parol evidence may supply the consideration for a guarantee, it cannot be admitted to explain the promise.

Above sect. does not make a promise good which was not good before (BYLES, J.).

Above sect. intended to exclude parol testimony as to the terms of the promise itself (COCKBURN, C.J.).

(2) In a letter written by deft. to plff., relating to a proposed mtge., the following words are not a sufficient guarantee within Stat. Frauds, s. 4—"I will take any responsibility myself respecting it, should there be any."

The letter, if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest secured by any kind of mtge. on any land, with any title. That would be an unreasonable construction & is not its true meaning. It evidently refers to previous conversations in which these particulars were supplied. The whole promise, therefore, is not in writing, as the statute [of Frauds] requires that it should be. [The contract] cannot be made out without reference to previous conversations. A consideration expressed in writing formerly discharged two offices, it sustained the promise & might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further & explain the promise (WILLIAMS, J.).—HOLMES v. MITCHELL (1859), 7 C. B. N. S. 361; 28 L. J. C. P. 301; 6 Jur. N. S. 73; 141 E. R. 856.

*Annotations:—*As to (1) *Refd.* Sheers v. Thimbleby (1897), 76 L. T. 709. As to (2) *Refd.* North Staffordshire Ry. v. Peck (1860), E. B. & L. 986.

**411. To explain promise—Inadmissible.]—**HOLMES v. MITCHELL, No. 410, *ante*.

**412. To defeat guarantee—By contemporary, oral contract—Varying surety's liability.]—**Plffs. sued defts on a promissory note made by deft. co. & indorsed at the request of plffs. by deft. D. who was president of deft. co. The note was given in part payment of goods supplied by plffs. to deft. co. Deft. co. did not appear at the trial, but deft. D. appeared & set up an oral agreement made by him with plffs., contemporaneous with the promissory note, that he was not to be called upon to pay if the goods supplied to deft. co. should be unequal to sample. The goods were retained by deft. co., but D. proved that they were unequal to sample:—*Held*: the oral agreement relied upon by D. not being an agreement suspending the coming into force of the contract contained in the promissory note, but being an agreement in defeasance of that contract, evidence in support of it was inadmissible, & D. was liable on the promissory note.—HITCHINGS & COULT-HURST CO. v. NORTHERN LEATHER CO. OF AMERICA & DOUSHKISS, [1914] 3 K. B. 907; 83 L. J. K. B. 1819; 111 L. T. 1078; 30 T. L. R. 688; 20 Com. Cas. 25.

**SUB-SECT. 2.—TO PROVE FUTURE CONSIDERATION.**

*See* Sect. 3, sub-sect. 2, *post*.

assignor to him of that mtge., who had covenanted that the mtge. moneys should be paid:—*Held*: parol evidence of the reservation of rights against the surety was admissible.—TRUSTS CORP. OF ONTARIO v. HOOD (1896), 27 O. R. 135; 23 A. R. 589.—CAN.

*r. To rectify guarantee—Admissible.]—*STYVESTER v. PORTER (1896), 11 Man. L. R. 98.—CAN.

*s. To vary terms—Inadmissible.]—*The letters of F. & the general manager of the bank, if they con-

stituted an agreement which controlled the terms of the bond, as the guarantors contended, were not admissible in evidence, because they would vary the terms of the bond.—MATHER v. BANK OF ORRAWA (1919), 46 O. L. R. 499; 51 D. L. R. 353; 17 O. W. N. 249.—CAN.

*t. — — —.]—*COLONIAL BANK OF NEW ZEALAND v. LEWIS & MOFFETT (1887), 5 N. Z. L. R. 465 (S. C.).—N.Z.

*To show collusion —*

*principal debtor & creditor.]—*Where a person is sued upon a bond given by him to pay such a sum as the obligee should obtain judgment for in another action, he, the obligor, may give evidence of the facts on which such other action was brought, for the purpose of proving that there was no substantial cause of action, & that the parties collusively & fraudulently allowed judgment to be entered up.—HUTCHISON v. HOOKER (1883), 2 N. Z. L. R. 134 (S. C.).—N.Z.

## SECT. 3.—WHETHER CONSIDERATION PAST OR FUTURE.

## SUB-SECT. 1.—IN GENERAL.

413. *Future consideration presumed*—*Ut res magis valeat quam pereat.*—S. & another, the deacons of a Baptist Congregation, being receivers of its general funds, & managers of its finances, bound themselves, by writing, to E., then resigning the office of minister of the church, to repay him, with half-yearly interest, £700, which he had advanced for the building of a chapel. Besides the general revenue above-mentioned, there were funds vested in trustees, which were usually applied to the maintenance of the minister for the time being, & were likewise applicable to the relief of the poor. After the undertaking to E., a new minister was appointed; & he agreed with the congregation that he would be responsible to S., who was still deacon, & to any future deacon or deacons, for the continued repayment of E.'s debt; & he also consented that periodical payments of it should be made out of the trust funds. S. afterwards resigned; & the new minister gave him a written undertaking as follows: "In consideration of your having resigned the office of deacon & your connection with the Baptist church" at, etc., "I hereby agree to hold myself responsible to you for the payment of the sum of £150, due to the Rev. E. by the Baptist church," etc., " & also the interest for the same, at the rate " etc., " being the residue of the sum of £700, principal & interest, remaining unpaid, for which you became responsible," etc. "By an instrument," etc.:—*Held*: the written instrument given by the minister showed a valid contract; for that the words might import either a past or a concurrent consideration on S.'s part, & that construction was to be preferred which made the instrument good.—*STEELE v. HOE* (1849), 14 Q. B. 431; 19 L. J. Q. B. 89; 14 L. T. O. S. 327; 14 Jur. 147; 117 E. R. 168.

*Annotations*:—*Reid*. Colbourn v. Dawson (1851), 10 C. B. 785. *Mentid*. *Re* McHenry, McDermott v. Boyd, [1891] 2 Ch. 428.

414. ————]—*BAINBRIDGE v. WADE*, No. 425, *post*.

415. "Having agreed" to stay action.]—Declaration, in *assumpsit*, stated that T. had commenced an action against M. for £165; & that, in consideration of T.'s "agreeing to stay the said action," debt. promised to pay T. the £165 within six months next after the decease of A. The promise, as proved, was, to pay, as above, in consideration of T.'s "having agreed" to stay the action:—*Held*: no variance; & a valid consideration was proved.—*TANNER v. MOORE* (1846), 9 Q. B. 1; 15 L. J. Q. B. 391; 7 L. T. O. S. 202; 11 Jur. 11; 115 E. R. 1176.

*Annotation*:—*Reid*. Goldshede v. Swan (1847), 1 Exch. 154.

416. "Having released" debt.]—In an action of *assumpsit* on a guarantee, plff., in support of an averment in the declaration, that he had executed a certain indenture, gave in evidence the following document, signed by debt.: "In

consideration of your having by indenture agreed to accept payment of the debt owing to you by W., by the following instalments; that is to say, 10s. in the pound, on Aug. 18, next, etc., I promise to guarantee the payment of the instalments." There was evidence that, when W.'s creditors received the guarantee, they signed the deed at the same time:—*Held*: the true construction of the guarantee was, "that, if at some future time plff. shall have released the debt, debt. will guarantee the same to him": & therefore, that it did not prove the averment in the declaration.

The guarantee was as follows:—"In consideration of your having, by indenture bearing date Feb. 18, 1847, agreed to accept payment of the debt owing to you by W., amounting to the sum of £650 by the following instalments: that is to say £325, part thereof, being at the rate of 10s. in the pound on Aug. 18, 1847, & £325, the residue of the said debt, on Feb. 18, 1848, & of your having, by the same indenture, released the said W. from such debt, I do hereby guarantee to you the payment of such debt or sum of £650 at the times & in manner aforesaid. Dated Feb. 18, 1847." This guarantee was signed by debt. at an antecedent period but being delivered to his attorney to be handed over to plff. we think that it must be considered as an admission made by debt. on the day on which it was so handed over & is the same as if it had been written & spoken by debt. at that time. What then is the true construction of the guarantee? The ct. may treat those words ["having released"] as meaning that if at some future time plff. shall have released the debt, debt. will guarantee the same to him. If this be so, the declaration will be supported, but the admission will not prove the averment that, in fact, such a release was executed. We think this is the true construction of this guarantee (*ALDERSON, B.*).—*KING v. COLE* (1818), 2 Exch. 628; 17 L. J. Ex. 283; 154 E. R. 642.

*Annotation*:—*Reid*. *Steele v. Hoe* (1849), 14 Q. B. 431.

417. Money "advanced or to be advanced" — *Future advances negatived.*]—*BEIL v. WELCH*, No. 101, *ante*.

418. "Balance that may be due."]—*BROOM v. BATCHELOR*, No. 103, *ante*.

419. Liabilities "incurred."]—*CHALMERS v. VICTORS*, No. 105, *ante*.

420. Onus of proof—On plaintiff.]—A declaration in *assumpsit* averred that in consideration that plff. would supply goods to W. B., debt. promised to pay for them & then averred a supply of goods & non-payment. The guarantee was as follows:—"Messrs. H.—All goods purchased of your firm by W. B. of L. I hereby agree to pay for when due"—*Held*: it was incumbent on plff. to prove that it was given for future supplies.—*HARVEY v. PRITCHARD* (1845), 1 New Pract. Cas. 179; 4 L. T. O. S. 338.

421. ————]—A promissory note given by principal & surety for a definite sum, & payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note:

pending between the parties"—dated Sept. 29. The declaration in an action on this guarantee stated that, in consideration that plff., at debt.'s request, would leave certain differences between plff. & S. & Co., to the award of, etc., the debt. promised to pay him any sum that might be awarded to him. A bond of submission was signed by S. & Co. on Oct. 3:—*Held*: the evidence showing that the arbn. was not conclusively agreed upon when the guarantee was signed, that the guarantee sustained the consideration

## PART IV. SECT. 3, SUB-SECT. 1.

b. *Future consideration presumed*]—Plff. brought his action on the following guarantee:—"Sir,—J. informs me that you have a doubt respecting the validity of a mtge. from him to you for your claim for the sails & rigging. I am willing to become responsible to you that a good & valid mtge. shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default of your not receiving it, I will be respon-

sible for the payment of your debt in twelve months":—*Held*: it did not import a past consideration, & it was an actual guarantee, & not a mere proposal requiring acceptance to render it binding.—*JENKINS v. RUTAN* (1852), 8 U. C. R. 625.—*CAN.*

c. *Past consideration—Arbitration—now pending*]—"I do hereby promise to guarantee the payment of any sum to S. that the arbitrators chosen by himself & S. & Co., & a fifth person to be chosen by them, may award to S., in the arbn. now

**Sect. 3.—Whether consideration past or future: Sub-sects. 1 & 2. Sects. 4 & 5: Sub-sect. 1.]**

& if the payee asserts, as against the surety, that the object of the note was to secure the payment of the balance of an account current between the principal & the payee, the burden of proof lies on the payee.—*Re BOYS, EDEES v. BOYS, Ex p. HOP PLANTERS CO.* (1870), L. R. 10 Eq. 467; 39 L. J. Ch. 655.

*Annotation:—Consd. Allen v Royal Bank of Canada* (1925), 41 T. L. R. 625.

*Compare No. 416, ante.*

**SUB-SECT. 2.—EXTRINSIC EVIDENCE TO EXPLAIN.**

**422. To show present or future consideration—“Having advanced.”]**—*GOLDSHED v. SWAN*, No. 100, *ante*.

**423. —“Giving credit.”]**—*EDWARDS v. JEVONS*, No. 88, *ante*.

**424. —“Having resigned.”]**—*STERLE v. HOE*, No. 413, *ante*.

**425. —Sums due.]**—Declaration in *assumpsit* alleged: that L. had requested pltf. to sell & deliver to him goods in the way of pltf.'s business; & pltf. had, at L.'s request, consented to do so, provided deft. would guarantee the payment, of which deft., before the making of the promise after mentioned, had notice: that afterwards, & before L. was indebted to pltf. for any goods, & when no goods delivered by pltf. to L. were unpaid for, & no money was due from L. to pltf. on any account whatever, deft., by writing addressed to pltf., promised in the words following: “I hereby guarantee the payment of any sum or sums of money due to you from” L., “the amount not to exceed at any time the sum of £100”: that afterwards pltf., confiding, etc., supplied goods to L. for reasonable prices amounting to £100, & thereby allowed L. to become indebted to him in £100; that L. had not paid; breach, that deft. had not paid. On demurrer to the declaration:—*Held*: (1) the circumstances stated in the declaration might be looked at to explain the meaning of the writing. (2) The writing, so explained, showed a good consideration for deft.'s promise, namely, the future advances by pltf. to L., so as to satisfy sect. 4 of Stat. Frauds. (3) This consideration appeared by the writing itself, independently of the other circumstances stated.

You may explain the meaning of the words used by any legal means. Of such legal means one is, to look at the situation of the parties. Till you have done that, it is a fallacy to say that the language is ambiguous, that which ends in certainty is not ambiguous. Now one ambiguity, when the instrument alone is looked at is the time to which the writer refers. He often puts himself in such a position as to anticipate the time, & thus uses a word which ordinarily denotes present time, to denote the future. In order to know what he means, you may look at the context of the

instrument, & at the surrounding circumstances (*COLERIDGE, J.*).—*BAINBRIDGE v. WADE* (1850), 16 Q. B. 89; 20 L. J. Q. B. 7; 16 L. T. O. S. 170; 15 Jur. 572; 117 E. R. 808.

*Annotation:—Generally, Rejd. Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154.

**426. —“For iron received.”]**—A. & co. write to B., “We are doing business with C., & we require a guarantee to the amount of £200, & we refer us to you for one.” B. replies, “In reply to yours, I beg to say that I have no objection to become security for C., & subjoin the following memorandum to that effect.” The subjoined memorandum was—“I hereby engage to guarantee to A. & co. the sum of £200, for iron received from them for C., as annexed”:—*Held*: a good consideration to support an *assumpsit*. *Semble*: if necessary, evidence was admissible to explain the meaning of the words “for iron received.”—*COLBOURN v. DAWSON* (1851), 10 C. B. 765; 20 L. J. C. P. 154; 17 L. T. O. S. 125; 15 Jur. 680; 138 E. R. 302.

**427. —“Goods supplied.”]**—A guarantee in the following form, “Gentlemen,—As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account,” is not on its face a guarantee in respect of a past supply, but is to be read as for goods to be supplied.

*Semble*: if it were ambiguous, or primarily imported a past consideration, parol evidence would be admissible to show that the parties intended it to refer to a future supply.

Therefore to a declaration that in consideration the pltf. would sell & deliver from time to time goods to D. on credit, deft. guaranteed & promised pltf. to be responsible for the payment of the price, & averring a delivery & non-payment by D. or deft., a plea merely setting out the guarantee in the above terms, was held bad on demurrer.

I think that in construing mercantile instruments you must look at, & are entitled to have given in evidence all the surrounding circumstances, so as to know what the parties meant (*POLLOCK, C.B.*).—*HOAD v. GRACE* (1861), 7 H. & N. 494; 31 L. J. Ex. 98; 5 L. T. 359; 8 Jur. N. S. 43; 10 W. R. 85; 158 E. R. 567.

*Annotation:—Rejd. Chalmers v. Victors* (1868), 13 L. T. 451.

**SECT. 4.—CONSTRUCTION OF PARTICULAR WORDS.**

*Sec, generally, DEEDS, Vol. XVII., pp. 261 et seq.*

**428. “Ad standum juri in hac parte”]**—In guarantee for execution debt.]—If a person become surety for the appearance of pltf. in Chancery, “*ad standum juri in hac parte*, & that he shall prosecute with effect” it imports that the surety shall “pay the condemnation, if pltf. does

as alleged, & the words “now pending” did not necessarily imply a past consideration.—*SHAW v. CAUGHNELL* (1853), 10 U. C. R. 117.—*CAN.*

**PART IV. SECT. 4.**

**d. “Used” & “delivered.”]**—I hereby guarantee the payment of three stone pitchforks “used” by M., “delivered” by us §87 10s.:—*Held*: the words “used” & “delivered” in the guarantee were applicable to the pitchforks to be delivered as well as those already delivered, & oral evidence was admissible to explain the surrounding

circumstances, in order to arrive at the meaning in which these ambiguous expressions were used.—*SMITH v. PARNMAN* (1883), 4 N. S. W. L. R. 274.—*AUS.*

**e. “Upon request to him or them made.”]**—The condition was, that a treasurer, his exors. or administrators, at the expiration of his office, upon request to him or them made, should give a just account of all moneys received, & should pay & deliver over all balances due:—*Held*: the words “upon request to him or them made” applied both to the giving an account

& to the paying over.—*BRUCE COUNTY CORPN. v. TROWAR* (1863), 22 U. C. R. 321.—*CAN.*

**1. Request to “push forward” work.]**—Pltf. agreed with M. to repair a boiler in the latter's sawmill. During the progress of the work he received the following letter from the deft.: “As M.'s sawmill is about to come into my hands right away, & as I am to assume the expense of repairs to the boiler, be good enough to push forward the work to be done by you on the boiler as fast as possible; everything at present is at a standstill waiting on

not pay it, nor prosecute with effect."—*WOLICH v. MASSY* (1005), *Cr. Jac.* 67; 79 *E. R.* 57.

*Annotation*.—*Mentd. Cobbett v. Hudson* (1849), 13 *Q. B.* 497.

429. "Credit" to be given—Fair & reasonable credit.]—Guarantee, "if you give A. credit, we will be responsible that his payments shall be regularly made":—*Held*: the word credit meant a fair & reasonable credit, according to the manner in which A. & the persons guaranteed should deal, & did not confine the guarantee to dealings according to the strict customary credit of the trade.—*SIMPSON v. MANLEY* (1831), 2 *Cr. & J.* 12; 2 *Tyr.* 86; 1 *L. J. Ex.* 3; 149 *E. R.* 5.

*Annotation*.—*Refd. Nicholson v. Paget* (1832), 3 *Tyr.* 164.

430. "Account" guaranteed—Existing account.]—The words of a guarantee were, "I hereby guarantee J.'s account with you for wines & spirits to the amount of £100. (Signed) E. A., Apr. 14, 1838. To Messrs. A." J., who was an innkeeper, had an account with Messrs. A. at that time to the amount of £83. They continued to supply him till Nov. 1840, & the whole transactions between the parties had been to the amount of £814, of which £611 were paid, & plffs. now sued deft. on his guarantee for £100:—*Held*: the guarantee applied only to an account existing at the time it was given & was not a continuing security for an account to be running on, because the plain meaning of the word "account" is an account then existing.—*ALLNUTT v. ASHENDEN*

(1843), 5 *Man. & G.* 392; 6 *Scott, N. R.* 127; 12 *L. J. C. P.* 124; 7 *Jur.* 113; 134 *E. R.* 616.  
*Annotations*.—*Fold. Broom v. Batchelor* (1856), 1 *H. & N.* 255. *Refd. Wood v. Priestner* (1867), 15 *W. R.* 912.

431. "Duly" arrested by sheriff—Where consideration release from custody.]—*BUTCHER v. STEUART*, No. 225, *ante*.

432. "Renewing" bill of exchange—Whether construed technically.]—*BARBER v. MACKRELL*, No. 480, *post*.

433. "Works"—"Done & to be done."—*PIASTIC DECORATION & PAPIER-MÂCHÉ CO., LTD. v. MASSEY-MAINWARING* (1895), 11 *T. L. R.* 205.

434. "And"—When equivalent to "or"—Default on which liability conditioned—In payment of premiums "and" interest.]—*FABER v. LATHOM (EARL)*, No. 607, *post*.

## SECT. 5.—CONTINUING GUARANTEES.

### SUB-SECT. 1.—IN GENERAL.

435. Construction against guarantee as continuing—Unless intention clear.]—*NICHOLSON v. PAGET*, No. 377, *ante*.

436. Construction of one guarantee as continuing—No guide to interpretation of another.]—*COLES v. PACK*, No. 653, *post*.

you. Please push on work & oblige yours truly, R." Plff., without communicating with deft., went on with the work. Deft.'s contemplated purchase was not carried out:—*Held*: he had not rendered himself liable by his letter for the price of the work done.—*WHITELAW v. TAYLOR* (1880), 45 *U. C. R.* 446.—*CAN.*

g. *Guarantee that principal debtor*—"Honest."—A. wrote to B. asking whether B. would be responsible for X's account with A. B. replied that X was honest, & that he had backed him before:—*Held*: a good guarantee by B.—*LAIRD v. ADAMS* (1908), 1 *Sask. L. R.* 352; 7 *W. L. R.* 881.—*CAN.*

h. "Agreement good & guarantee it."—A. guarantee by deft., real-estate agents, to plffs. who were purchasing through defts. the vendor's rights under an agreement for the sale of land, was given by a telegram containing the words, "agreement good & guarantee it."—*Held*: the guarantee did not guarantee the payments, but it merely guaranteed that the agreement was a *bond fide* one & that the property & parties were good.—*SCHIEL v. MCCALLUM & VANNATTER*, [1918] 2 *W. W. R.* 735; 42 *D. L. R.* 563; 57 *S. C. R.* 15.—*CAN.*

k. "After default" of principal debtor.]—An insurance co. guaranteed payment to a depositor of the deposit receipt of a bank "after default" in payment by the bank. The bank stopped payment & failed to pay the deposit receipt at due date. It was afterwards reconstructed in an action against the insurance co. at the instance of the depositor:—*Held*: the bank was in default, & pursuer was entitled to a decree for the amount of his deposit-receipt.—*YOUNG v. ASSETS & INVESTMENT INSURANCE CO. (TRUSTEE)* (1893), 21 *R. (Ct. of Sess.)* 222.—*SCOT.*

### PART IV. SECT. 5, SUB-SECT. 1.

l. *Guarantee of purchase of goods*—Of specified amount.]—Deft. wrote to plff.:—"The bearer, H., wishes to deal with you for produce, & he asked me to speak for him. I can highly recommend him, & in fact I will stand

good for him to the amount of £50"—*Held*: a continuing guarantee.—*SEE v. FARREY* (1889), 10 *N. S. W. L. R.* 72; 5 *N. S. W. N.* 195.—*AUS.*

m. — — —.]—"I hereby hold myself accountable to you for any goods F. may purchase of you to the amount of £250":—*Held*: a continuing guarantee.—*ROSS v. BURTON* (1848), 4 *U. C. R.* 357.—*CAN.*

n. *Guarantee of payment of mortgage interest*.]—A deed guaranteed the payment of interest by a mtgor. the mtge. together with the benefit of the guarantee were transferred to plff. In an action to recover the interest:—*Held*: the guarantee was a continuing guarantee so long as the original debt remained unpaid, whether the original covenants survived or not, whether they had parted with the benefit or not, & notwithstanding the death of the mtgor.—*MORRIS v. LOXTON* (1912), 13 *S. L. N. S. W.* 145.—*AUS.*

o. *Liability limited to specific amount*—Lesser sum actually advanced than represented.]—S. by letter informed R. & K. that his son was a partner in a firm, & that he had advanced him £3,000 as his share of the capital thereof. The firm, having failed, made an assignment in which S. was preferred to the amount of £3,565, represented as made up of loans & advances to the firm. The actual capital advanced to the son appeared to be only £1,000:—*Held*: S. was bound to R. & K. by his representation, & the statement of S. operated as a continuing guarantee to them.—*RAINEY v. DICKSON* (1860), 8 *Gr. 150*.—*CAN.*

p. — — — *Meaning of words "continue in force"*.]—Where plffs. had gone security to a bank for an advance to be made to a third party, taking as security under a mtge. for "three years, or so long as credit should be continued in force," certain properties. The mtgor. becoming insolvent the trustee claimed that the mtge. was ineffectual, & that it only contained an interest for three years, beyond which the credit had gone:—*Held*: the words "continue in force" must be held to mean so long as plffs. are liable on their guarantee.—*HARVEY*

*v. HUNT (TRUSTEE)* (1892), 7 *Nfld. L. R.* 680.—*NFLD.*

q. *Liability not limited to specific amount*—Single transaction contemplated.]—"The bearer, A., my brother-in-law, who is on his way to N.Y., wants to purchase some goods in your line. I have recommended him to your house, hoping you will do the best you can for him, & any accommodation he may require, I will feel obliged by your giving: he will give his bill, & I will guarantee the payment."—*Held*: not a continuing guarantee.—*GATHE v. O'AN* (1860), 4 *L. T.* 182.—*IR.*

r. — — —.]—A letter of guarantee to a bank of overdrafts to be allowed on the principal debtor's account:—*Held*: to constitute a continuing guarantee.—*CALDONIAN BANKING CO. v. KENNEDY'S TRUSTEES* (1870), 8 *Macph. (Ct. of Sess.)*, 862; 42 *Sc. Jur.* 520.—*SCOT.*

s. — — —.]—"Do you supply wholesale tobaccoists' fancy goods? If so, be pleased to quote prices, with samples. They are for M., a son of the writer, & his trade will be guaranteed by M. & Co."—*Held*: to be a continuing guarantee.—*WITCH v. MURRAY & CO.* (1864), 2 *Macph. (Ct. of Sess.)* 1098; 36 *Sc. Jur.* 537.—*SCOT.*

t. *Construction against guarantee as continuing*.]—Plffs. required security before filling an order & deft. wrote to them on Mar. 25: "I recommended M. to you & if he should fail in his promise to you for anything in your way, I consider myself jointly liable for the amount of £200, payable in six months, to your firm." The machinery was shipped to M., the last shipment being made on May 6, & M. gave his note payable in six months from that day, six months' credit being plffs.' usual course of dealing:—*Held*: taking the guarantee in connection with the surrounding circumstances it must be referred to the specific order which M. had given; & deft.'s liability arose immediately on M.'s default at the expiration of the six months' credit.—*BOYLE v. BRADLEY* (1876), 26 *C. P.* 373.—*CAN.*

u. *Guarantee of bank cashier's honesty*.]—Upon the appointment of a

**Sect. 5.—Continuing guaranties: Sub-sects. 1, 2 & 3. Part V. Sects. 1 & 2: Sub-sect. 1, A.]**

**437. Extent of liability—Presumption where amount limited.]—**ELLIS v. EMMANUEL, No. 627, *post*.

*See, further, Part V., Sect. 4,*

**SUB-SECT. 2.—WHETHER PROSPECTIVE, RETROSPECTIVE, OR BOTH.**

*See Part V., Sect. 4, sub-sect. 1, A., B., post.*

**SUB-SECT. 3.—CONSTRUCTION OF PARTICULAR GUARANTEES.**

*See Part V., Sect. 4, post.*

## Part V.—Liability of the Surety.

### SECT. 1.—IN GENERAL.

**438. Liability in equity.]—**A surety is not chargeable in equity further than he is at law.—RATCLIFFE v. GRAVES (1683), 1 Vern. 196; 2 Cas. in Ch. 152; 23 E. R. 409.

*Annotations:—*Mentd. Thruxton v. A.-G. (1685), 1 Vern. 310; Bilson v. Saunders (1727), Bunb. 240.

**439. —.]—**A surety not bound in law, shall not be bound in equity.—SIMPSON v. FIELD (1679), 2 Cas. in Ch. 22; 22 E. R. 827, L. C.

*Annotation:—*Reid. Wright v. Russell (1774), 3 Wils. 530.

**440. —.]** SAMUELL v. HOWARTH, No. 1329, *post*.

**441. —.]—**In an action on a banking guarantee to take effect at once; plea for a defence on equitable grounds that it had been given on a misrepresentation by pltf. as to the state of the principal's banking account, & on an undertaking to return it if a partnership between the principal & deft. did not take effect:—*Held*: (1) the latter part alone would not be any defence, & therefore, if it alone were proved, pltf. should have leave to enter a verdict; (2) to sustain the former part, it must be shown not only that there was a misrepresentation, but that deft. relied on it, & gave the guarantee on the faith of it; (3) questions as to complaints by deft. of the alleged misrepresentation were not collateral.

I doubt whether, in this case there would be any difference between law & equity. In the case of a surety the only difference between law & equity is, that an equity may arise where the position of the surety is established & that a ct. of equity will protect that equity. But I have yet to learn that there is any difference between law & equity as to the terms or effect of a written instrument (WILLIAMS, J.).—M'KEWAN v. THORNTON (1861), 2 F. & F. 591, N. P.

**442. —.]—**COOPER v. EVANS, No. 557, *post*.

**443. How far liability contingent.]—**(1) Undertaking in writing to guarantee the debt of another sufficient, within the Stat. Frauds, without stating any consideration as between the creditor & the surety.

(2) Under a guarantee the debt is contingent only: therefore a debt accrued by default after the bkpy. of the surety, cannot be proved under the Commission.

A claim cannot be sustained for the price of goods as to which the credit had not expired, being under the word "guarantee" a contingent demand; therefore no debt arising until default

made (LORD ELDON, C.).—*Ex p.* GARDOM (1808), 15 Ves. 286; 33 E. R. 762, L. C.

*Annotations:—*As to (1) *Reid.* Boehm v. Campbell (1819), 8 Taunt. 679; Jenkins v. Reynolds (1821), 6 Moore, C. P. 86; Moiley v. Boothby (1825), 3 Bing. 107. *Generally, Mentd.* Brettell v. Williams (1849), 4 Exch. 623.

**444. —.]—**(1) Colonel of a regiment having taken a bond of indemnity from his agents, with another as surety, in respect of all charges, etc., to which he may become liable by their default; the agents having afterwards become bkpt.; & govt. having given notice to the representatives of the Colonel (deceased) of a demand upon the Colonel's estate by virtue of an unliquidated account; a bill by the representatives of the Colonel against the representatives of the surety, to pay the balance due to govt., & also to set aside a sufficient sum out of their testator's estate, to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet*, dismissed with costs.

The ct. is not administering D.'s [the surety's] estate. It is not called upon to distribute the residue while it is uncertain whether a claim may not be made on the exor. in consequence of this bond. The exor. is not seeking its protection against an eventual legal liability. But a person who is as yet no creditor, & who may never become one, is claiming to force out of the hands of the exor. the utmost extent of what can ever become due. I cannot make such a decree without laying it down as a rule, that, whenever a person bound in an obligation of this sort dies, a ct. of equity will compel his exor. to bring into ct. the whole amount of the penalty of the bond. I can find no trace of the exercise of any such jurisdiction & must dismiss the bill (GRANT, M.R.).

(2) A surety may come here to compel the principal to relieve him of his liability by paying off the debt (GRANT, M.R.).—ANTROBUS v. DAVIDSON (1817), 3 Mer. 569; 36 E. R. 219.

*Annotations:—*As to (1) *Reid.* Wolmershausen v. Gullick, [1893] 2 Ch. 514. *Generally, Mentd.* Hughes-Hallett v. Indian Mammoth Gold Mines Co. (1882), 22 Ch. D. 561.

**445. —.]—**A guarantee is a contract to indemnify upon a contingency.—SAMPSON v. BURTON (1820), 2 Brod. & Bing. 89; 4 Moore, C. P. 515; 129 E. R. 891.

*Annotations:—*Reid. Abbott v. Hicks (1839), 7 Scott. 715. *Mentd.* Gibson v. Bell (1835), 1 Bing. N. C. 743; Young v. Bank of Bengal (1836), 1 Moo. P. C. C. 150.

**446. —.]—**A covenant by a surety for payment of a debt at a future day is not a contingent

cashier to a bank in 1903, he, his father & the bank entered into an agreement whereby the father deposited with the bank security, the bank agreed to employ the son, & the son agreed to perform the usual duties. The father's deposit was to remain as security for the son's faithful discharge of his duties & against any loss. In 1910 the son became insolvent, the bank being large creditors. The exors. of the father, who died in 1908, sued

the bank in 1913 to recover the securities which were deposited under the agreement of 1903:—*Held*: the agreement in 1903 did not constitute a continuing guarantee within Indian Contract Act, s. 129, revoked under sect. 131 by the father's death.—SEN v. BANK OF BENGAL (1919), L. R. 47 Ind. App. 164.—IND.

b. *Guarantee of bank overdraft.]—*A letter of guarantee to a bank of over-

drafts to be allowed on the principal debtor's current account:—*Held*: to constitute a continuing guarantee.—CALEDONIAN BANKING CO. v. KENNEDY'S TRUSTEES (1870), 8 Macph. (Ct. of Sess.) 862; 42 Sc. Jur. 520.—SCOT.

### PART V. SECT. 1.

a. *General rule.]—*Sureties are not liable for any greater sum than the principal debtor.—A.-G. FOR ONTARIO



at an actually existing debt, & must be provided or before simple contract creditors are paid.

There seems to me no doubt whatever as to the legal effect & construction of the covenant. It is a joint & several covenant, but for the purposes of the present discussion I must treat it as the several covenant of this testator, the covenant being the creditor who claims. It appears from the instrument which contains the covenant that testator joined as a covenantor as surety on behalf of L.; that, however, appears from the language of the instrument to be immaterial. Pltff. in this case is a simple contract creditor suing on behalf of himself & all the other creditors for administration of the estate. The estate is insolvent. It has been argued that this covenant in respect of £1,000 which will be payable in 1858 is only to be construed, for the purpose of administering the assets, as creating a contingent debt. I have not been able to follow the argument that, the covenant being one in the way of suretyship, a surety is not called upon to pay at all if the principal debtor should pay, & that this makes the debt contingent. It would be a very imperfect suretyship if it did not absolutely bind the surety to pay the debt of his principal, & I have never heard that, because the principal debtor may pay, the surety is to be discharged (STUART, V.-C.).—ATKINSON v. GREY (1853), 1 Sm. & G. 577; 23 L. T. O. S. 181; 18 Jur. 282; 65 E. R. 253.

447. —[.]—In July, 1850, A. & B. gave C. a guarantee (continuing) for £200 for goods to be supplied to D. with a stipulation that the security should subsist "until C. received a notice in writing to the contrary." Goods were supplied to D. upon the faith of this guarantee, & a balance exceeding £200 was due in respect thereof. In June 1853, B. became bkpt. & duly obtained his certificate:—*Held*: B's liability upon this guarantee was not a "contingent liability" within 12 & 13 Vict. c. 106, s. 178, & his certificate was no bar to a claim in respect of goods supplied to D. after the bkpcy. of B.—BOYD v. ROBINS & LANGLANDS (1859), 5 C. B. N. S. 597; 28 L. J. C. P. 73; 5 Jur. N. S. 915; 7 W. R. 78; 111 E. R. 240, Ex. Ch.

*Annotations*:—*Consd.* White v. Corbett (1859), 1 E. & E. 692; Betteley v. Stansby (1862), 12 C. B. N. S. 477. *Refd.* General Discount Co. v. Stokes (1864), 17 C. B. N. S. 765. *Mentd.* Parker v. Ince (1859), 32 L. T. O. S. 279.

448. Surety may become primarily liable.—On account stated.]—Pltff. lent money to A. upon B's promise to become surety for its repayment: & after the money was advanced, A. & B. signed & delivered to pltff. the following memorandum: "We jointly & severally owe you £60:"—*Held*: evidence for the jury of an account stated by A. & B. jointly.—BUCK v. HURST & BAILEY (1866), L. R. 1 C. P. 297; 12 Jur. N. S. 701.

For account stated, *see, generally*, CONTRACT, Vol. XII., pp. 164, 571.

449. Disposition by surety of property.—To evade liability.—*Void*.]—A tradesman mortgaged the freehold house in which he carried on his trade, being his only real estate, to secure an existing debt of £1,100 for which he was liable as surety, which exceeded the value of the mtged. property. His other property was of very trifling amount. He was at the time liable as surety on a promissory note for £2,000, & afterwards the other makers having become insolvent, he was called upon for payment, & became bkpt.:

—*Held*: the mtge. was void as against the assignees of the bkpcy., as being an assignment made to defeat or delay creditors.

A surety is no more justified in placing the whole of his property out of the reach of liability to pay the debt, than if he were the principal debtor (TURNER, L.J.).—GOODRICK v. TAYLOR (1864), 2 De G. J. & Sm. 135; 3 New Rep. 678; 10 L. T. 113; 10 Jur. N. S. 414; 12 W. R. 632; 3 E. R. 326, L.J.J.

*Annotations*:—*Mentd.* Young v. Fletcher (1865), 3 H. & C. 732; *Re Nurse*, *Ex p.* Foxley (1868), 17 L. T. 623; Allen v. Bonnett (1870), 21 L. T. 578.

50. —[.]—A guarantee given to a bank to cover any balance that might be due by his son, not exceeding £1,000, for four or five years subsequently, when there was a balance of about £1,500 due to the bank, the father executed a voluntary settlement of a leasehold house, which virtually comprised all his property. The son having made a composition with his creditors, the bank claimed to be paid the amount of the guarantee:—*Held*: the liability under the guarantee must be regarded as a substantial one; an intention to hinder or delay creditors must be inferred; & the settlement was invalid.—*Re RIDLER*, RIDLER v. RIDLER (1882), 22 Ch. D. 71; 52 L. J. Ch. 313; 48 L. T. 96; 47 J. P. 279; 31 W. R. 93, C. A.

*Annotations*:—*Mentd.* *Re* Lulham, Brinton v. Lulham (1881), 53 L. J. Ch. 928; Green v. Paterson (1886), 32 Ch. D. 95; Harris v. Tubb (1889), 42 Ch. D. 79.

**Avoidance of guarantee.**—*See* Part IX., Sect. 2, *post*.

## SECT. 2.—WHEN LIABILITY ARISES.

### SUB-SECT. 1.—DEFAULT OF PRINCIPAL DEBTOR.

#### A. In General.

##### 451. General rule—Liability arises on default.]

The claim made against the estate of P. [deft.], is in respect of his being one of the makers of a promissory note; & his estate can be liable only on the assumption that there was a mistake in the form of the note, & that, in signing as surety, he meant to be severally liable, if the E.'s [principal debtors] did not pay. Now there is nothing to satisfy me, that, if the intention of the parties had been drawn to the circumstance, the creditor would not have been satisfied with the security derived from P.'s becoming jointly liable with the E.'s. But if any argument in favour of presuming a mistake were to arise out of the circumstance that P. is joined as surety, how is the supposed mistake to be rectified? It is said, it may be rectified by making the note joint & several. The effect of making it joint & several would be, that it would not have been necessary for the creditor to sue the E.'s in the first instance, & that he might have proceeded against P. alone, without even joining the E.'s in the action. If P. signed merely as surety, & if effect is to be given to the contract of suretyship, he would not be liable except on the default of the principal debtors. If, therefore, the instrument is to be altered on the ground of its not having carried the intention of the parties into effect, I cannot satisfy myself that their intention would be carried into effect by making

v. RAILWAY PASSENGERS ASSURANCE CO. (1918), 43 O. L. R. 108; 43 D. L. R. 344.—CAN.

d. —[.]—The liability of a

surety is strictly limited according to the terms of the obligation undertaken.—VAN OOSTERZEE v. MCRAE (1828), 1 Men. 305.—S. AF.

## PART V. SECT. 2, SUB-SECT. 1.—A.

451 i. General rule—Liability arises on default.]—RAYMOND v. COOPER (1858), 8 C. P. 388.—CAN.



**Sect. 2.—When liability arises: Sub-sect. 1, A. & B.]**

it joint & several (LORD ELDON, C.).—**RAWSTONE v. PARR** (1827), 3 Russ. 539; 38 E. R. 678, L. C.

**Annotations:—Folld. Jones v. Beach** (1852), 2 De G. M. & G. 886. **Consd. Other v. Iveson** (1855), 3 Eq. Rep. 562. **Refd. Richardson v. Horton** (1843), 12 L. J. Ch. 333.

**452. ———.]—**He [the surety] is liable to pay only in default of his principal, *non constat* that he will be called upon to pay anything, or how often, or what sum (HOLROYD, J.).—**BROWNE v. LEE** (1827), 6 B. & C. 689; 9 Dow. & Ry. K. B. 700; 5 L. J. O. S. K. B. 276; 108 E. R. 604.

**Annotations:—Refd. Clements v. Langley** (1833), 5 B. & Ad. 372; *Re Colnaghi, Ex p. Marks* (1838), 3 Mont. & A. 521; *Pago v. Thomas* (1840), 6 M. & W. 733; *Kemp v. Finden* (1844), 12 M. & W. 421; *Amott v. Holden* (1852), 18 Q. B. 593; *Batard v. Hawes* (1853), 2 E. & B. 287. **Mentd. Aston v. Gwinnell** (1829), 3 Y. & J. 136.

**453. ———.]—**A. covenants to pay annuity on default of B. A. becomes bkpt. before any default. The annuitant cannot prove against A.'s estate, he not having contracted a debt until the default made either under 6 Geo. 4, c. 16, ss. 54 or 56.

No question in this case can arise on the construction of 6 Geo. 4, c. 16, s. 54, that sect. in no way applying. Here the bkpt. is not an annuity debtor, but a party merely undertaking that in certain events he will be liable. It is contended that it comes within sect. 56. I am of a contrary opinion. The words of that sect. are: "if any bkpt. shall before the issuing of any commission have contracted any debt payable upon a contingency," etc. The first step therefore is to ascertain whether any debt is actually contracted at the time of the bkpy. In order to make out that the bkpt. had contracted any debt, you must show that something was owing, that there was a *debitum in presenti* though *solvendum in futuro*. The present is said to be such a debt payable on default of B. This is not a joint & separate engagement of both to pay the annuity, but only an additional contract to indemnify in case of the grantor's default; & the grantee had no power whatever to come against the surety till after his principal had made default. This, then, is a mere engagement to become liable in the event of default, till which no liability exists (ERSKINE, C.J.).—*Re WYATT & THOMPSON, Ex p. THOMPSON* (1832), 2 Deac. & Ch. 126; Mont. & B. 219; 2 L. J. Bcy. 5, Ct. of R.

**Annotations:—Consd. Re Fox, Ex p. Marshall** (1831), 3 Deac. & Ch. 120. **Folld. Re Colnaghi, Ex p. Marks** (1838), 3 Deac. 133. **Expld. Re Willis** (1819), 4 Exch. 530. **Consd. Amott v. Holden** (1852), 18 Q. B. 593. **Refd. Re Sudell, Ex p. Simpson** (1834), 3 Deac. & Ch. 792; *Thompson v. Thompson* (1835), 2 Bing. N. C. 165; *Re Whitmore* (1813), 3 De G. & Sm. 563.

**454. ———.]—**(1) A., in consideration of B.'s supplying C. with goods guarantees to B. the payment of the price. B. having supplied C. with goods, & C. having neglected to pay the price, A., in consideration of B.'s extending to C. a period of two years & upwards for the liquidation of his debt, agrees to reserve to B. all right & claim which B. may now have against him, A., by virtue of the security previously entered into on C.'s behalf, & to be bound by it, if, at the expiration of such period B.'s demand shall not have been fully discharged:—*Held: A.'s liability attached upon default made by C. after the expiration of two years & a few days; B.'s right of action*

then accrued, & Stat. Limitations then began to run.

(2) A. guarantees to B. the debt of C. upon condition that no application shall be made to A. on B.'s part, for the amount guaranteed, or any portion thereof, but on the failure of B.'s utmost efforts & legal proceedings to obtain the same from C. C. remains in England two years, then goes abroad insolvent, not having paid the debt to B. No proceedings are taken against him until four years after the guarantee given, when process is issued, & continued on the roll, C. remaining abroad until more than six years after the guarantee given. The guarantee is discharged by the laches of B.—*HOLL v. HADLEY* (1835), 2 Ad. & El. 758; 4 Nev. & M. K. B. 515; 4 L. J. K. B. 126; 111 E. R. 292.

**455. ———.]—**A. grants an annuity to C., & B. jointly & severally covenants with A., as his surety, to pay the annuity, provided that if default should be made in payment of the annuity by A., C. would give notice in writing of so much of the annuity as might be in arrear, twenty-one days previous to the adoption of any measures against B. to enforce the payment of the arrears. B. becomes bkpt., before any default is made by A. in the payment of the annuity:—*Held: C. could not prove for the value of the annuity, under 6 Geo. 4, c. 16, s. 54.*

The proviso must be coupled with the covenant, & the bkpt. cannot be considered liable until default of the grantor, & notice given of such default (SIR JOHN (ROSS).—*Re COLNAGHI, Ex p. MARKS* (1838), 3 Deac. 133; 3 Mont. & A. 521, Ct. of R.

**Annotation:—Consd. Amott v. Holden** (1852), 18 Q. B. 593.

**456. ———.]—**Declaration in the common form on an annuity bond, dated June 9, 1828. Pleas, Stat. Limitations, & the bkpy. of deft. after the making of the bond & the accruing of the causes of action in the declaration mentioned, & before the commencement of the action. Replication joining issue on the latter plea, & as to the former, that the causes of action did accrue to pltf. within twenty years next before the commencement of the action, setting out the bond & condition, & assigning as a breach of the condition, the non-payment of £50 for two years & a half arrears of the annuity. The bond was a joint & several bond of deft. & M. & was conditioned after reciting that M. had agreed with pltf. for the sale of an annuity of £20 to be paid to pltf., his exors., etc., during the joint & several lives of pltf. & his wife, for the sum of £150, & that deft. at the request of M. had assented to join in & execute the bond for securing the due & regular payment of the annuity & the receipt by M. of the sum of £150 for the due payment by M. or deft., their or either of their heirs, etc., of the annuity, by two equal half-yearly payments on Dec. 9 & June 9 in every year, during the joint & several lives of pltf. & his wife, & a proportionate part of the half-yearly payment of such annuity in the event of the death of the survivor between the half-yearly days of payment. On the trial, it was proved that deft. had become bkpt. in 1830, that deft. had, down to 1818, paid the half-yearly instalments of the annuity, but on no occasion, until after the days of payment stated in the condition; so that there had been breaches

\*. ———. During term for which sureties were liable.]—It must be shown that the default sued for took place during the term for which the sureties were liable under the covenant.

—**McMARTIN v. GRAHAM** (1846), 2 U. C. R. 365.—**CAN.**

f. ———.]—A letter of guarantee held not to cover transactions prior to its delivery.—**DYKES v.**

**WATSON** (1825), 4 Sh. (Ct. of Sess.) 69.—**SCOT.**

g. Doubt as to principal debtor's obligation.]—Observed that decree ought not to pass against a cautioner

of the bond before deft.'s bkpcy., & it appeared also, more than twenty years before the commencement of the action; & that arrears were then due in respect of breaches committed since 1848:—*Held*: (1) a new cause of action arose with each successive breach of the condition, & by proof at the trial of breaches committed within twenty years, pltf. was entitled to the verdict upon the issue raised by the plea of Stat. Limitations; (2) deft.'s liability under the above form of bond & condition was that of a surety for M., the grantor of the annuity, & who was alone to be considered as the principal debtor; pltf., therefore, could not have proved under the bkpcy. of deft. in respect of previous breaches & a forfeiture of the bond; & the bkpcy. & certificate of deft. were no defence to the action.

(3) Certain debts payable upon a contingency are specifically provided for in the sections preceding the general enactment in Bankrupt Law Consolidation Act (c. 106), s. 177, & among those are annuities, in respect of which, upon the bkpcy. of the grantor, proof must be made in the required form before resort can be had to the surety whose liability is deferred; & as no provision is made for proof on the bkpcy. of the surety, the grantor being solvent it may be presumed, both from the silence of the legislature & the nature of the liability, that no power for such proof was intended to be given. Although this might be true where the surety contracted expressly to pay on default of the grantor, deft. contended that the form of the present bond created a simultaneous instead of a successive liability. This ground cannot be maintained. The bond shows that the annuity had been already granted. The bond is an instrument beyond the grant. The two are jointly bound, but the one is described as grantor, the other as surety. If the grantor pays, the surety is free; if he makes default, the surety is liable (ERLE, J.). —*AMOTT v. HOLDEN* (1852), 18 Q. B. 593; 22 L. J. Q. B. 11; 19 L. T. O. S. 253; 17 Jur. 318; 118 E. R. 224.

*Annotations*:—As to (1) *Refd.* Forsyth v. Bristowe (1853), 8 Exch. 347. As to (2) *Apprvd.* White v. Corbett (1859), 1 E. & E. 692. *Refd.* Warburg v. Tucker (1855), 5 E. & B. 381. *Generally, Refd.* Wythes v. Labouchere (1859), 3 De G. & J. 593.

**457. Death of surety before default—Liability of estate of surety—When solvent.**—*ANTHOBUS v. DAVIDSON*, No. 441, *ante*.

**458. ——— When insolvent.**—*ATKINSON v. GREY*, No. 446, *ante*.

**459. Default occasioned by creditor's bankruptcy.**—A bank granted a letter of credit to a co. on terms that the co. should ship tea & forward bills of lading, invoices, & policy of insurance on the tea to the bank, & should also draw on B. & Co. bills to be accepted by B. & Co. to an amount sufficient to cover the amount authorised by the letter of credit. B. & Co. guaranteed the performance by the co. of these terms, holding themselves responsible for the same. The co. drew on the bank, & the bank accepted the bills, but owing to the failure of the bank after the dates when the bills were drawn & before they became due, the co. shipped no tea, & did not perform any of

the terms agreed on. All the bills were eventually paid:—*Held*: the failure of the bank was no reason why the co. should not have performed its part of the contract, & B. & Co. were not relieved from their guarantee.—*Re BARBER & Co., Ex p. AGRA BANK* (1870), L. R. 9 Eq. 725; 39 L. J. Bcy. 39.

**Right of surety—To call on debtor to pay.**—*See* Part VII., *post*.

### B. What Constitutes Default.

**460. Under replevin bond—Withdrawal from sheriff's jurisdiction.**—*MULSO v. SHERE* (1718), Fortes. Rep. 330; 92 E. R. 876.

*Annotation*:—*Refd.* Combes v. Colo (1736), Lee temp. Hard. 352.

**461. Not renewal of bill of exchange—Without authority of surety.**—Where, in an action on a guarantee, by which deft. undertook, in consideration of pltf.'s giving S. a current credit for silk, on the event of his failure, to make good any loss pltf.s. might sustain, not exceeding £100, & it appeared that pltf.s. had renewed bills of exchange accepted by S., without giving any notice to deft., & without his authority or assent:—*Held*: (1) it was unnecessary to give him such notice; (2) the mere renewal of the bills could not be considered as a failure. —*CARR v. BROWNE* (1826), 12 Moore, C. P. 62; 5 L. J. O. S. C. P. 12.

**462. Under fidelity guarantee—Payment to account of former year—By collector.**—(i., as surety for A., who was appointed a collector for the year 1828, executed a bond, with a condition that A. should "well & truly pay or cause to be paid unto the Receiver-General of the taxes, etc., all such sum & sums of money as should come to the hands of A. as such collector, upon the days & at the times by 43 Geo. 3, c. 99, & 3 Geo. 4, c. 88, appointed for the payment thereof, & according to the true intent & meaning of the Acts":—*Held*: (1) payment by A. of moneys collected by him to the account of former years was a breach of the condition of the bond; (2) seizure & sale of lands & goods of A., of the existence of which the comrs. had notice or knowledge, was, under 43 Geo. 3, c. 99, s. 9, a condition precedent to their right to put the bond in suit against the surety; (3) seizure & sale of lands & goods of A. of the existence of which the comrs. had no notice or knowledge, was not a condition precedent to their right to put the bond in suit against the surety.—*GWYNNE v. BURNELL* (1840), 6 Bing. N. C. 453; 7 Cl. & Fin. 572; 1 Scott, N. R. 711; West, 342; 133 E. R. 175, 11. L.; *revsq.* (1835), 2 Bing. N. C. 7, Ex. Ch.; *sub nom.* COLLINS v. GWYNNE (1833), 9 Bing. 544.

*Annotations*:—*Generally, Mentd.* Negelen v. Mitchell (1811), 7 M. & W. 612; Galloway v. Jackson (1812), 3 Scott, N. R. 753; Atkinson v. Davies (1843), 11 M. & W. 236; Do Wolf v. Bevan (1841), 14 L. J. Ex. 121; Gordon v. Ellis (1844), 8 Jur. 670; Pim v. Grazebrook (1845), 2 C. B. 429; Aston v. Perkes (1846), 7 L. T. O. S. 186; Gregory v. Brunswick (1846), 3 C. B. 481; R. v. Dairlington School (1846), 6 Q. B. 682; Couling v. Cox (1848), 6 C. B. 703; Kepp v. Wiggitt (1848), 6 C. B. 280; Morris v. Chadwick (1849), 13 L. T. O. S. 208; Rutland v. Bagshaw (1850), 14 Q. B. 869; Herwick (corp'n. v. Oswald (1852), 1 E. & B. 295; Sturgis v. Daroll (1860), 2 L. T. 808; Montreal Street Ry. v. Normandin, [1917] A. C. 170.

*sales agent—Non-accounting for money generally.*—The condition of a bond was "that if M. should make correct returns to F. of all moneys arising out of the sale of any articles, & of all other moneys M. might at any time during the continuance of the agency collect for F., at the time & in the manner mentioned in the instructions of F., & agreed to by M., then," etc.:—*Held*: the words in italics did not refer only

when the question was still in dependence whether any obligation attached to the principal.—*ROSS v. GRIGG* (1834), 12 Sh. (Ct. of Sess.) 427.—*SCOT*.

### PART V. SECT. 2, SUB-SECT. 1.—B.

**h. Guarantee of bank overdraft.**—In a written guarantee given to a banking co. to secure the amount of the principal debtor's overdrawn account with the co. together with

future advances & interest by the co. to him, a clause was inserted making the guarantor's liability dependent upon the making default by the principal debtor:—*Held*: the fact of the account being always overdrawn did not constitute default by the principal.—*UNION BANK OF AUSTRALIA, LTD. v. BARRY* (1897), 23 V. L. R. 505.—*AUS.*

**k. Under fidelity guarantee—For**

*Sect. 2.—When liability arises: Sub-sect. 1, B. & C.; sub-sect. 2, A. (a).]*

**463. — Non-payment by collector—Duties collected without authority.]—KEPP v. WIGGETT, No. 711, *post*.**

**464. — Erroneous balance sheet—By bank clerk.]—**In an action upon a bond, the condition of which was, for the honest & faithful service of a banker's clerk, three breaches were assigned, viz., general misconduct, irregular & unbusinesslike conduct, & not faithfully accounting. An arbitrator to whom the cause was referred found specially that, on a certain day, the clerk made an erroneous balance-sheet, failing to exhibit, as it should have done, a surplus of £100, but that there was no proof that such sum came to the hands of the clerk; & also that, on another occasion, the clerk having received from a customer £213, entered it in the books of the bank as £113, exhibiting on that day's balance sheet a false & unaccounted for surplus of £100: *Held*: these facts did not show conclusively that the condition of the bond had been broken, so as to call upon the court to interfere with the inference drawn by the arbitrator.—*JERISON v. HOWKINS* (1841), 2 Man. & G. 306; 2 Scott, N. R. 605; 133 E. R. 787.

**465. — Loss of money in transit—Scope of employment of bank clerk.]—**Deft. entered into a bond, as surety, for the due & faithful performance by C. of his duty as clerk to a provincial bank. C. being sent by the manager of the bank, at the request of a customer, to his residence, about eleven miles distant from the bank, for the purpose of receiving a large sum of money to be placed to his account, on his way back lost it: *Held*: (1) the money was received by C. in the course of his employment, as clerk to the bank; (2) deft. was liable as surety, notwithstanding the finding of the jury, that it was not the custom for bankers in that part of the country to send for their customers' money in the manner adopted.—*MILVILLE v. DOINDRE* (1848), 6 C. B. 450; 18 L. J. C. P. 7; 12 L. T. O. S. 127; 12 Jur. 922; 136 E. R. 1324.

**466. — Robbery with violence.]—**The treasurer of a benefit building society, 6 & 7 Will. 4, c. 32, & 10 Geo. 4, c. 50, having covenanted with the society's trustees that he will faithfully discharge the duties of treasurer, duly obey the directions of the trustees in relation to such duties, & punctually account to the trustees for all & every sum & sums of money, bills, notes, securities, goods & chattels which he, in his office of treasurer, shall receive on the society's account, & being bound by the rules of the society, to pay over in a given time the same moneys which he shall receive, does not violate such obligation if, after receiving moneys, & before he had an opportunity of paying them over, he is robbed of them by irresistible violence & without fault of his own; such obligation being that only of a bailee. So held in an action by trustees of such society against sureties of a treasurer, complaining that he had not paid the moneys, to which the sureties pleaded such robbery, committed upon their principal, in

excuse of his non-payment.—*WALKER v. BRITISH GUARANTEE ASSOCN.* (1852), 18 Q. B. 277; 21 L. J. Q. B. 257; 19 L. T. O. S. 87; 16 J. P. 582; 16 Jur. 885; 118 E. R. 104.

*Under administration bond.]—See EXECUTORS, Vol. XXIII., pp. 226, 227, Nos. 2733-2744.*

**467. Guarantee of mortgage debt—Price on completed sale of premises—What is completion of sale.]—**In consideration that pltf. would advance £1,200 to a third person upon mtge. of certain leasehold premises, defts. promised, that, if, after any sale of the premises duly made under the power of sale to be contained in the mortgage deed, the purchase-money should not be sufficient to satisfy the principal sum & all interest, costs, charges, & expenses which might be then due in respect of the mtge., they would immediately thereafter make good & pay to pltf. such deficiency, whether the same should be occasioned by any defect in the title to the premises otherwise howsoever. The premises having been put up to auction under the power of sale, were knocked down to W. for £650, & W. paid a deposit of £100 & signed the usual contract. He afterwards declined to complete the purchase, on the ground of the vendor's inability to produce certain receipts for ground rent, & pltf. brought an action against him to recover damages for his alleged breach of contract, which action was still pending: *Held*: a concurrent action against defts. upon their guarantee was premature, the word "sale" in that instrument meaning a sale completed, so that the deficiency which was to be made good by defts. could be ascertained.—*MOOR v. ROBERTS* (1858), 3 C. B. N. S. 830; 140 E. R. 970.

*See, generally, SALE OF LAND.*

**468. Guarantee of completion of contract—Completion prevented by creditor.]—**Where applts., having guaranteed the due performance of a contract made with a municipal corpn. for the execution of works on its land, agreed on the contractor's default with resp. to complete the execution of the works on the terms of the original contract, & in effect delegated the supervision of the contract & all incidental arrangements to the corpn., & the corpn., according to the findings of the jury, improperly prevented resp. from proceeding with the stipulated expedition & wrongfully seized the works & extruded the resp.: *Held*: applts., having by their conduct constituted the corpn. their agents & the delay being attributable to their acts, could not justify the seizure & re-entry; & resp. was entitled to treat the contract as at an end & sue on *quantum meruit*.—*LODDER v. SLOWEY*, [1904] A. C. 442; 73 L. J. P. C. 82; 91 L. T. 211; 53 W. R. 131; 20 T. L. R. 597, P. C.

*Annotation:—Reid. Mort's Dock & Engineering Co. v. Wade* (1905), 22 T. L. R. 61.

**469. Payment of debentures—Postponement by company.]—FINLAY v. MEXICAN INVESTMENT CORPN., No. 790, *post*.**

*C. Under Joint and Several Contract with Surety.*

**470. Default of principal debtor sufficient.]—RAWSTONE v. PARR, No. 451, *ante*.**

*m. Failure to invest sum—According to covenant in ante-nuptial contract.]—WILSON v. WISEART* (1844), 7 Durl. (Ct. of Sess.) 125.—*SCOT*.

**PART V. SECT. 2, SUB-SECT. 1.—C.**

**4701. Default of principal debtor sufficient.]—RASTALL v. A.-G. (1871), 18 Gr. 138; 17 Gr. 1.—CAN.**

to such moneys as were to be derived from the proceeds of sales effected by M., & upon default for other moneys than those arising from such sales collected by him the sureties were liable to F.—*FLEURY v. MOORE* (1873), 34 U. C. R. 319.—*CAN.*

**1. Under bail bond—Failure to satisfy judgment.]—A., surety to a**

bail bond by H., who bound himself "to stand to, abide & perform the judgment of the ct." on a claim for debt, "or to render himself to the prison of the ct.": *Held*: liable for the amount of the bond, H. not having satisfied the judgment on the claim & having about a fortnight thereafter left the Colony.—*OGILVIE v. NORTON* (1845), 2 Men. 79.—*S. AF.*

471. —.]—*Re WYATT & THOMPSON, Ex p. THOMPSON*, No. 453, *ante*.

472. —.]—*AMOTT v. HOLDEN*, No. 456, *ante*.

## SUB-SECT. 2.—FULFILMENT OF CONDITIONS PRECEDENT.

### A. Demand.

#### (a) On Principal.

*See, generally, ACTIONS*, Vol. I., pp. 52 *et seq.*, Nos. 422 *et seq.*

473. *Necessity for demand*—*Excepted by contract*.—A proviso in a lease for years, whereby the rent is payable on a day certain, at the mansion-house of lessor, that if the rent shall be unpaid for forty days after the day whereon it is reserved, although not demanded, the lease shall be void, does not make the lease voidable by the lessee by reason of his having overstayed the forty days allowed for payment; & in debt by lessor on bond given by lessee & deft. in a penal sum, conditioned for payment of rent at the day & place mentioned in lease, pltf. may assign for breach, non-payment of rent at the day & place, without showing a demand of the rent.—*REDE v. FAIR* (1817), 6 M. & S. 121; 105 E. R. 1188.

*Annotations*.—*Mentd.* *Arnsby v. Woodward* (1827), 6 B. & C. 519; *Ripplinghall v. Lloyd* (1833), 5 B. & Ad. 742; *Bowser v. Colby* (1841), 1 Haro, 109; *Jones v. Carter* (1846), 15 M. & W. 718; *Grey v. Finar* (1854), 4 H. L. Cas. 565; *Toleman v. Portbury* (1871), 40 L. J. Q. B. 125; *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*, [1919] A. C. 1.

474. —.]—It is not necessary, in a declaration against a person on his undertaking to be answerable for or to pay the debt of another, to state an agreement, note, or memorandum, or the terms of any such, or the parties thereto, or that it was in writing or signed by deft.: nor is it necessary to do so in the replication to a plea, averring that no agreement or note or memorandum stating the consideration in writing, signed by deft., was stated or shown. Such a plea held bad on special demurrer. It is not matter of objection to such a declaration, that the consideration for such collateral undertaking as set out is inadequate; for it is not necessary to state a full & adequate consideration to maintain *assumpsit* on the promise & undertaking. A good & valuable consideration in law is all that is necessary to state for that purpose. Therefore, if the undertaking were to be answerable for & to repay money advanced & to be advanced, to a limited amount to the third person, it cannot be objected that the money already advanced was an insufficient consideration to ground the undertaking. It is not necessary in such a declaration to aver a request made to the party himself, in the first instance, to pay the debt before the guarantee is resorted to: at least an averment, that he had neglected & refused to repay the money, is sufficient for the purpose of maintaining

the action against the guarantee.—*LILLEY v. HEWITT* (1822), 11 Price, 494; 147 E. R. 513.

*Annotation*.—*Mentd.* *Wakeman v. Sutton* (1834), 2 Ad. & El. 78.

475. — *Where contract silent*.—In an action on a guarantee to pay, in case the principal should not, it is not necessary to set out the contingency that the principal should not pay, that being an implied exception in law, from the nature of a guarantee. Nor, in such an action, is it necessary to prove a demand of payment from the principal, unless the making of such a demand were a part of the contract.—*MAGOR v. WILKS* (1827), 5 L. J. O. S. K. B. 308.

476. — *Stipulated for by contract*—*Death of principal before demand made*—*Effect on surety's liability*.—A debtor promised to repay to pltf. an advance within three months of the receipt by him of a written notice requiring payment, & deft. agreed to guarantee the repayment of the advance as per the above agreement. The principal debtor died leaving no estate, & neither probate nor letters of administration were taken out. No written notice requiring payment was ever given. In an action against deft. to recover the amount of the advance:—*Held*: as no notice had been given requiring payment, the condition upon which the money became payable was not fulfilled, & deft. as surety was not liable.—*RICKABY v. LEWIS* (1905), 22 T. L. R. 130; 50 Sol. Jo. 113.

477. — *On bills or promissory notes*.—Where a party guarantees the payment of a promissory note, if it be not duly honoured & paid by the maker according to its tenor & effect, he is liable on his guarantee, if the note be not paid by the maker when due, without any presentment to him for that purpose. An action on such guarantee need not aver a presentment of the note by the maker when due, or a request to him to pay it; & if such request be averred, a plea which traverses the request is bad in substance.—*WALTON v. MASCALL* (1814), 13 M. & W. 452; 2 Dow. & L. 410; 14 L. J. Ex. 51; 1 L. T. O. S. 158; 153 E. R. 188.

*Annotations*.—*Refd.* *Barber v. Mackrell* (1892), 67 L. T. 108; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833; *Joachinson v. Swiss Bank Corp.*, [1921] 3 K. B. 110.

478. — *Omission to provide for demand*—*Relief*.—In an action on a promissory note, deft. pleaded as an equitable plea, that he made the note jointly with E. for the accommodation of E. & as his surety only to secure payment of a loan of £200 then made by pltf. to E., that at the time when the note was made, pltf. having notice of the premises, agreed, in consideration of deft. making such note as surety, that pltf. would call in & demand payment of the note from E. within three years; that this agreement should be indorsed in writing on the note at the time of making it, which, by mistake, was not done; that pltf. omitted to demand payment of the note from E. within three years, whereby he lost the means

## PART V. SECT. 2, SUB-SECT. 2.—A. (a).

474 i. *Necessity for demand*.—Money which had been collected by the treasurer of a corp. & fraudulently charged as paid by him, was not demanded by the parties entitled thereto.—*Held*: the liability of the treasurer was between the municipality & himself, he having received the money as their officer, & his responsibility was not altered by the fact of non-parties entitled to the money.—*ESSEX CORPN. v. PARK* (1861), 11 C. P. 473.—*CAN.*

474 ii. —.]—*R. v. HAMMOND* (1867), 1 Han. 33.—*CAN.*

474 iii. —.]—It is a condition precedent to the liability of the sureties in a bond conditioned for the delivery up by the principal on demand of all moneys received & not paid out by him, that a personal demand of payment should be made on him.—*PORT ELGIN PUBLIC SCHOOL BOARD v. EBY* (1894), 26 O. R. 75.—*CAN.*

474 iv. —.]—*SHELDON & ACKHOPE v. MILLIGAN* (1907), 14 S. L. T. 703. *SCOT.*

474 v. —.]—*JOHANNKE-BURG COUNCIL v. STEWART*, [1909] S. C. (H. L.) 53.—*SCOT.*

474 vi. —.]—*ROGERSON, N. O. v. MEYER & BERNING* (1837), 2 Men. 38.

### —S. AF.

474 vii. —.]—A creditor is not obliged before suing a surety to excuse the principal debtor if the latter has removed from the jurisdiction of the ct. without leaving any assets behind him.—*WOLFSON v. CROWE* (1904), T. S. 682.—*S. AF.*

n. *Proof of demand to principal*.—Before defts. became sureties for A., notice had been given to him to send lumber specifying the quantity & quality thereof. After the guarantee he was also distinctly notified to send in the lumber previously specified:—*Held*: sufficient to bind the sureties, without specifying the particular kind

*Sect. 2.—When liability arises: Sub-sect. 2, A. (a) & (b), & B.]*

of obtaining payment from E., who had since become insolvent. On demurrer to this plea: —*Held*: the plea was good, on the ground that the condition in consideration of which debt. had become surety had not been performed by plff. —*LAWRENCE v. WALMSLEY* (1862), 12 C. B. N. S. 709, 811; 31 L. J. C. P. 143; 5 L. T. 798; 10 W. R. 344; 142 E. R. 1356, 1361.

**479. — Parties to bill & surety distinguished.]**—A debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. Plff. at the same time, as a surety deposited with the creditor certificates of stock in a joint stock co. as collateral security for the debt. The bill was never presented for payment, nor was notice given to plff. of its non-payment: —*Held*: the creditor had not discharged plff. from his suretyship by his omission to fill up the drawer's name & to give notice of the non-payment of the bill to plff.

It is said that it was his [the creditor's] duty to present the bills for payment & to give notice to the surety of their non-payment. That depends on the custom of merchants. It was decided years ago that there is a difference in this respect between those who are sureties for the payment of a bill & those who are parties to the bill (*LINDLEY, L.J.*).—*CARTER v. WHITE* (1883), 25 Ch. D. 606; 51 L. J. Ch. 138; 50 L. T. 670; 32 W. R. 602, C. A.

*Annotations:—Refd. Barber v. Mackrell* (1892), 68 L. T. 29. *Mentd. Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 541; *Chamberlain v. Young*, [1893] 2 Q. B. 206.

**480. — — — —]**—F. was the drawer of two bills accepted by the S. Co. for £1,048 10s. 5d. & £162 6s. 6d., due respectively on Dec. 28, 1866, & Jan. 1, 1867. In Dec. 1866, F. applied for a renewal by means of bills to be accepted by himself alone, & stated M. would guarantee payment. The holder of the bills wrote to M. on Dec. 22, 1866: "We have received a request from F. to renew the bills for £1,048 10s. 5d. & £162 6s. 6d., due respectively on the 28th inst. & the 4th prox. He tells us that you are quite willing to guarantee their payment, & as it is proposed that we draw on him solely in exchange for the above, we must ask your confirmation of the assurance before we can consistently meet his wishes." In reply M. wrote: "I hereby guarantee the payment by F. of two bills you intend to renew for him, one for £1,018 10s. 5d., & the other for £162 6s. 6d., due respectively on the 28th inst. & the 4th prox." The holders, by way of renewal, drew on F. two bills, one for £1,025 6s. 11d., the other for £485 10s., dated Dec. 22, 1866, & payable three months after date, & mentioned this in a letter sent to M.:—*Held*: on the true construction of the letters, the bills were not to be renewed in the strict sense of the word, but M. guaranteed the payment of the aggregate amount of the old bills.

Bills were to be accepted by F., & M. is asked to guarantee their payment. He guaranteed the aggregate amount of the two bills. It does not appear that any demand was made on F., when the bills became due, but it was decided long ago, in

the case of *Wright v. Simpson*, No. 498, *post*, that a surety may be sued in the first instance (*LINDLEY, L.J.*).—*BARBER v. MACKRELL* (1892), 68 L. T. 29; 41 W. R. 341; 36 Sol. Jo. 696; 2 R. 72, C. A.

(b) On Surety.

**481. Promise to pay on demand—Demand necessary.]**—Lease by plff. to T. for years of a messuage & farm, at a yearly rent, payable quarterly, & T. covenants to pay the rent at the days & in the manner therein mentioned, & also to pay interest in case the rent should be behind three quarters; & debt. covenants that T. shall at all times during the term, well & truly pay to plff. the rent at the respective days, & also interest, & shall duly observe all the covenants, & that in case T. should neglect to pay the rent for forty days debt. shall pay on demand:—*Held*: debt. was not chargeable until after forty days & demand made, & plff. having generally declared, assigning for breach rent arrear, & it appearing upon oyer that the lease contained the qualification above stated, the breach was ill assigned, & there being general damages upon the whole declaration, which contained other breaches which were well assigned, judgment nevertheless must be arrested *causa qua supra*.—*SICKLEMORE v. THISTLETON* (1817), 6 M. & S. 9; 105 E. R. 1146.

*Annotations:—Consd. Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833. *Refd. Re Colnaghi, Ex p. Marks* (1838), 3 Mont. & A. 521, *Jowett v. Spencer* (1816), 15 M. & W. 602. *Mentd. Hoggett v. Exley* (1840), 6 Bing. N. C. 207; *Macintosh v. Midland Counties Ry.* (1815), 14 M. & W. 548.

**482. — — — —]**—A surety joined in a covenant to repay the principal of a mtgce. debt "on demand," & interest thereon in the meantime from the date of the mtgce.;—*Held*: until demand was made no cause of action accrued against the surety within Stat. Limitations so as to bar the mtgce.'s action against him on the covenant. *Re Brown's Estate, BROWN v. BROWN*, [1893] 2 Ch. 300; 62 L. J. Ch. 695; 69 L. T. 12; 41 W. R. 410; 37 Sol. Jo. 351; 3 R. 163.

*Annotations:—Consd. Edwards v. Walters*, [1896] 2 Ch. 157. *Apld. Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.

**483. — — — —]**—In 1801 plffs. agreed to grant a co. a fixed loan of £3,600 & to allow an overdraft of £2,500 on the co. depositing debentures for £6,100 & procuring a guarantee from two of its directors. The debentures were deposited, & the directors gave a guarantee which was expressed as being given to protect plffs. from loss on the realisation of the debentures, agreeing to pay to plffs. on demand all sums owing by the co., the amount ultimately recoverable under the guarantee not to exceed £6,100 with interest "from the time of default of payment by the co. or from the time of your demanding payment thereof from us." In 1898 S., one of the guarantors, became insane, & plffs. had notice of this in 1899. The co. continued to bank with plffs. until 1907, when plffs. amalgamated with another bank under the name of the United Counties Bank, Ltd., selling to the new bank all its debts & the benefit of all securities & guarantees. The £6,100 debentures remained registered in the name of plffs. The new bank continued to use the books of the old bank, a note being made therein

of lumber in the second notice.—*MORRIS v. BENJAMIN & PHIPPEN* (1841), 8 U. C. R. 594.—*CAN.*

**PART V. SECT. 2, SUB-SECT. 2. — A. (b).**

**481 i. Promise to pay on demand—**

*Demand necessary.]*—Under a covenant "that in case of default by a purchaser in payment of money which should 'become due or owing under articles of agreement' A. would forthwith on demand, pay any sum in default," a demand for payment is necessary before action.—*GENERAL*

*FINANCIAL CORPN. OF CANADA v. LE JEUNE*, [1918] 1 W. W. R. 372; 11 Sask. L. R. 38; 39 D. L. R. 33.—*CAN.*

**481 ii. — — — —]**—*LONDON & MIDLAND BANK v. FORRETT* (1899), 2 F. (Ct. of Sess.) 179.—*SCOT.*

to the effect, "United Counties Bank, Ltd., as from Feb. 13, 1907." The co.'s accounts were transferred in those books to the name of the new bank, & the co. paid interest on the loan account by cheques drawn on the current account in favour of the new bank. In 1912 plffs. demanded payment from the co. of the amounts owing & commenced an action to enforce the debentures, in which they realised a certain sum; & in 1915 they commenced an action on the guarantee against deft. as the committee of S. for the amounts accrued due on the loan account & current account less the amount realised on the debentures. On appeal by deft.: *Held*: (1) the loan account & the current account could not be treated as one, & subsequent payments into the current account could not be taken as satisfying the loan account; (2) plffs.' claim was not barred by Stat. Limitations, as no cause of action arose against the surety until demand had been made by plffs., & no demand was made till 1912; (3) the transactions arising out of the amalgamation of plffs. with the new bank & the dealings with the accounts, even if these could be said to amount to a novation, did not discharge the surety; (4) deft. was liable for the amount accrued due on the loan account.

(5) Deft. also contended that the claim was barred by Stat. Limitations. The judge held that this defence failed because the claim had been kept alive by the payment of interest by the principal debtor, the co. I cannot agree with this reason, which is contrary to Mercantile Law Amendment Act, 1856 (c. 97) (PICKFORD, L.J.).

(6) There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing & ascertained debt to another creditor stands on a different footing (PICKFORD, L.J.).—BRADFORD OLD BANK v. SUTCLIFFE, [1918] 2 K. B. 833; 88 L. J. K. B. 85; 119 L. T. 727; 34 T. L. R. 619; 62 Sol. Jo. 753; 24 Com. Cas. 27, C. A.

**484. — Joint & several negotiable instruments.**—The rule that, where a man agrees to pay a debt not his own, demand is necessary to create a right of action against him, does not apply to the case of a joint & several promissory note, in which one of the makers is known to join only as surety for the other.—*Re MAYOR, Ex p. WHITWORTH* (1811), 2 Mont. D. & De. G. 158, C. of B.

**485. Principal debtor acceptor of bill of exchange—Bankruptcy before bill due—Whether demand dispensed with.**—WARRINGTON v. PURBOR, No. 359, ante.

**486. Notice that debt due—How far a request for payment.**—BATSON v. SPEARMAN, No. 663,

### B. Notice of Default.

**487. Whether notice to surety essential—Notice stipulated for—Fidelity guarantee.**—Where deft. gave a bond undertaking that if his son,

apprenticed to plff., embezzled any of plff.'s property, he would pay the same to plff. within three months after demand, upon due proof thereof:—*Held*: the proof preceded payment, & plff. was not entitled to sue until three months after proof & notice to deft.—*COKAIN v. GOODLAGE* (1610), 1 Bulst. 40; 80 E. R. 711.

**488. — — — — —**—Under a bond, conditioned that if M. shall duly account for all moneys, etc., received by him in plff.'s service as a clerk, & also that if M. shall embezzle plff.'s property, & shall, within three days after proof thereof, repay plff. the damage sustained by such misbehaviour or misdoing, or, in default thereof, if deft. shall, after notice given, make a full recompense to plff., then the bond to be void. Plff. in order to render deft., the surety, liable for M.'s not accounting, must give deft. notice thereof, as by the construction of the condition the notice must be given for M.'s not accounting, as well as for his embezzling. *PHILLIPS v. FORDYCE* (1779), 2 Chit. 670.

**489. — Notice not stipulated for—Notice from independent source.**—*PEEL v. TATLOCK*, No. 1687, post.

**490. — — — — —**—*NARES v. ROWLES*, No. 583, post.

**491. — — Non-payment of bill of exchange—Debtors insolvent.**—(1) Upon a guarantee given of the price of goods to be paid by a bill, due notice of the non-payment must be given both to the drawer & guarantor, unless both drawer & acceptor are bkpts. when the bill becomes due. (2) Upon a contract to guarantee a bill for a given sum, the guarantor would not be liable to that extent on a bill given for a larger sum.—*PHILLIPS v. ASTLING* (1809), 2 Taunt. 206; 127 E. R. 1056.

*Annotations: — as to (1) Distd. Murray v. King* (1821), 5 B. & Ald. 165; *Holbrow v. Wilkins* (1822), 1 B. & C. 10. *Expld. Van Wart v. Woolley* (1824), 3 B. & C. 439; *Hitchcock v. Humphrey* (1813), 5 Man. & G. 559.

**492. — — — — —**—Plffs. sold goods to C., & P. & took their acceptance for the amount, half of which was guaranteed by deft. Before the bill became due, C. & P. became insolvent, of which deft. was then informed, & also that plffs. looked to him for the sum which he had guaranteed:—*Held*: it was unnecessary for plffs. to present the bill when due, or give deft. notice of the non-payment of it.—*HOLBROW v. WILKINS* (1822), 1 B. & C. 10; 2 Dow. & Ry. K. B. 59; 1 L. J. O. S. K. B. 11; 107 E. R. 5.

*Annotations: — Consd. Van Wart v. Woolley* (1821), 3 B. & C. 439. *Refd. Hitchcock v. Humphrey* (1813), 5 Scott, N. R. 540.

**493. — — — — — Sureties party to bill.**—The condition of a bond, after reciting that deft. & S. had delivered & indorsed to plff. a bill of exchange, drawn by S. & accepted by B., was that deft. & S. or either of them, their heirs, etc., should pay or cause to be paid to plff., his exors., etc., the sum secured by the bill within one month after it should become due & payable, in case it should

(1867), 1 Han. 33.—**CAN.**

**b. — — — — —**—*HARBOUR COMRS. OF MONTREAL v. GUARANTEE CO. OF NORTH AMERICA* (1893), 22 S. C. R. 512.—**CAN.**

**c. — — — — —**—*NIAGARA DISTRICT FRUIT GROWERS' STOCK CO. v. WALKER* (1896), 26 S. C. R. 629.—**CAN.**

**d. — — — — —**—*F. & J. were sureties on a bond given to B. assocn. by C. for the faithful discharge of his duties as an agent. Among such duties were the remittance of all*

### PART V. SECT. 2, SUB-SECT. 2.—B.

**a. Whether notice to surety essential—Notice stipulated for.**—*MECHANICS' WHALE FISHING CO. v. WHITNEY* (1846), 3 Kerr, 11.—**CAN.**

**p. — — — — —**—*ROYAL CANADIAN BANK v. EUROPEAN ASSURANCE SOCIETY* (1870), 29 U. C. R. 579.—**CAN.**

**q. — — — — —**—*CLYDEBANK & DISTRICT WATER TRUSTEES v. FIDELITY & DEPOSIT CO. OF MARYLAND*, [1915] S. C. 362.—**SCOT.**

**r. — — — — —**—*WILLEMS v. SCHENDELER* (1835), 2 Men. 20.—**S. AF.**

**s. — — — — — Notice not stipulated for.**—The surety to an administration bond is not relieved of his obligation by the omission of the next of kin entitled under the administration to inform the surety that they have not been paid, where there has been no request for information by the surety & no collusion with the administrator.—*MULHOLLAND v. SMITH* (1891), 20 V. L. R. 403.—**AUS.**

**t. — — — — —**—*R. v. BONTEN* (1843), 6 O. S. 551.—**CAN.**

**v. HAMMOND**

**Sect. 2.—When liability arises: Sub-sect. 2, B.**

not be then paid by the acceptor to pltf., his exors., etc., according to the tenor of the bill, together with interest from the time the bill became due:—*Held*: to an action on this bond, it was not a good plea that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to deft. & S., or either of them.

There is a main distinction between those cases [*Warrington v. Furbor*, No. 359, *ante*; *Phillips v. Astling*, No. 491, *ante*] & the present; for in both of them the guarantees were given by persons not interested as parties to the original instrument. But here the bond is given by S. & deft., who were both parties to the bill. I conclude that the parties meant to engage to pay the bill at all events, as sureties for the acceptor, in case he did not pay it (*ABBOTT, C.J.*).—*MURRAY v. KING* (1821), 5 B. & Ald. 165; 106 E. R. 1153.

*Annotation*.—*Distd. Holborow v. Wilkins* (1822), 2 Dow. & Ry. K. B. 50.

*Compare* No. 359, *ante*.

**Bill not indorsed nor accepted.]—**

*See* **BILLS OF EXCHANGE**, Vol. VI., p. 254, Nos. 1041, 1042.

**494. ——— Notice of renewal.]—***CARR v. BROWNE*, No. 461, *ante*.

**495. ———.]—**Deft. having guaranteed the payment of goods to be supplied by pltf. to A. up to July 1, gave on Apr. 9, the following additional guarantee: "In consideration of your extending the credit already given to A., & agreeing to draw upon him at three months from the 1st of the following month, for all goods purchased up to the 20th of the preceding month; I hereby guarantee the payment of any sum that shall be due & owing to you upon his account for goods supplied":—*Held*: (1) a continuing guarantee; (2) substantially a guarantee for the payment of the price of the goods sold to A., & not of the amount of the bill drawn upon him.

(3) Where a person not party to a bill, guarantees the payment by the acceptor, he is not entitled to require proof of presentment or of notice of dishonour. A plea to such a declaration, that the bill was not presented, & a plea, that deft. had no notice of non-payment:—*Held*: to contain no answer to the action; & deft. having obtained a verdict upon issues joined upon these traverses, pltf. had judgment *non obstante veredicto*.—*HITCHCOCK v. HUMFREY* (1843), 5 Man. & G. 550; 6 Scott, N. R. 540; 12 L. J. C. P. 235; 11 L. T. O. S. 109; 7 Jur. 423; 134 E. R. 683.

*Annotations*.—*As to* (3) *Apld. Carter v. White* (1883), 25 Ch. D. 666. *Refd. Lim v. Grazebrook* (1845), 2 C. B. 429.

**496. ———.]—***CARTER v. WHITE*, No. 479 *ante*.

**— When surety indorses bill.]—***See* **BILLS OF EXCHANGE**, Vol. VI., p. 201, Nos. 1935 1936.

*See, also*, **BILLS OF EXCHANGE**, Vol. VI., pp. 200 *et seq.*, Nos. 1933 *et seq.*

**497. Time for giving notice—On ascertainment**

of moneys or securities collected for or on account of B. C. remitted moneys by his own personal cheques, instead of as directed:—*Held*: it was the duty of B. to have notified the sureties of C.'s derelictions of duty; & having to do so, B. could not recover against the sureties for the default of C.—*CONFEDERATION LIFE ASSCOIN. v. BROWN* (1903), 35 N. S. R. 94; *reversd*. 34 S. C. R. 338.—*CAN.*

entitled to notice of the principal debtor's default unless there is a contract express or implied that such notice shall be given.—*MASSEY-HARRIS v. BAPTISTE* (1915), 32 W. L. R. 435; 9 W. W. R. 149; 24 D. L. R. 753; 9 Alta. L. R. 71.—*CAN.*

**1. ———.]—***SOUTH AFRICAN BANK v. FORDRE* (1886), 4 S. C. 287.

**of default.]—**Where, in a guarantee policy, there is a condition to the effect that the insurer is to give notice within six days of any liability being incurred, or the policy to be void:—*Held*: this means, notice of any criminal misconduct whereby it is clear that a liability has been incurred; & pltf., on receipt of evidence that the party against whose criminal misconduct the policy had been granted had been guilty of embezzlement, was not bound to give notice thereof until he had ascertained that a liability had actually been incurred.—*WARD v. LAW PROPERTY ASSURANCE CO.* (1850), 27 L. T. O. S. 155; 4 W. R. 605.

**C. Prior Proceedings Against Principal Debtor.**

**498. General rule—Not necessary.]—**(1) A surety may be sued in the first instance, but if the creditor sues the principal first & gives time, the surety is discharged.

As to the case of principal & surety, in general cases I never understood that as between the obligee & the surety, there was an obligation of active diligence against the principal. The surety is a guarantee; & it is his business to see whether the principal pays, & not that of the creditor (*LORD ELDON, C.J.*).

(2) Surety depositing the money & indemnifying against expense, etc., may compel the creditor to go against the principal & even to prove under a commission of bkpcy. for the benefit of the surety.—*WRIGHT v. SIMPSON* (1802), 6 Ves. 714; 31 E. R. 1272, L. C.

*Annotations*.—*As to* (1) *Refd. The Vreede* (1811), 1 Dods. 1; *Re Lacy, Ex p. De Souza* (1853), 1 Bankr. & Ins. R. 30; *Newton v. Chorlton* (1853), 2 Drew. 333; *Jackson v. Digby* (1854), 2 W. R. 540; *Strong v. Foster* (1855), 4 W. R. 151; *Madden v. M'Mullen* (1860), 4 L. T. 180; *Balley v. Edwards* (1861), 4 B. & S. 761; *Belfast Banking Co. v. Stanley* (1867), 15 W. R. 989; *Barber v. Mackrell* (1892), 68 L. T. 29. *As to* (2) *Consd. Newton v. Chorlton* (1853), 2 Drew. 333. *Refd. Jackson v. Digby* (1854), 2 W. R. 540; *Re M'Master* (1858), 32 L. T. O. S. 288; *Balley v. Edwards* (1861), 4 B. & S. 761; *Belfast Banking Co. v. Stanley* (1867), 15 W. R. 989. *Generally, Mentd. Pennell v. Roy* (1853), 3 De G. M. & G. 126; *Liverpool Marine Credit Co. v. Hunter* (1867), L. R. 4 Eq. 62.

**499. ———.]—***BARBER v. MACKRELI*, No. 480, *ante*.

**500. ——— In absence of contrary stipulation—Between creditor & surety.]—**To an action by the payee against one of two makers of a promissory note, deft. pleaded that he made the note jointly with E., for the accommodation of E., & as his surety only, to secure payment of a loan of £200 then made by pltf. to E., & that, at the time of the note being made & signed by deft. & E., a memorandum was by agreement between pltf., E., & deft. indorsed upon the note, & signed by E., in the following words: "Memorandum: This note is to be paid off within three years from date: T. E.," & that pltf. did not compel payment of the note within the period of three years, which elapsed before the commencement of the suit. On motion for judgment *non obstante veredicto*:—*Held*: this plea afforded no defence.

The memorandum set out in the plea does not purport to be a contract by deft. with the creditor

—S. AF.

**4971. Time for giving notice—On ascertainment of default.]—***BONTHRON v. PATERSON* (1898), 25 R. (Ct. of Sess.) 391; 35 Sc. L. R. 344; 5 S. L. T. 284.—*SCOT.*

**497 II. ———.]—***BRITANNIA STEAMSHIP INSURANCE ASSCOIN., LTD. v. DUFF* (1909) S. C. 1261; 40 S. L. R. 894; 2 S. L. T. 193.—*SCOT.*



at all. It is evidently a mere agreement between the principal debtor & the surety that the former will pay off the advance within three years (BYLES, J.).

It is impossible to imagine any state of circumstance which could make this amount to a good plea. It could only be so if it could be read as disclosing an agreement on the part of pltf. that he would sue the principal debtor in the event of the note remaining unpaid at the expiration of the three years. It is impossible to say that it does amount to such an agreement & therefore it affords no answer (WILLIAMS, J.).—*LAWRENCE v. WALMSLEY* (1802), 12 O. B. N. S. 799, 811; 31 L. J. O. P. 143; 5 L. T. 798; 10 W. R. 314; 142 E. R. 1350, 1361.

—[PALMER v. SHERIDAN-

BICKERS (1910), *Times*, July 20.

**502. ——— Though principal a public official.]—**Action against a surety on a bond given by a collector of assessed taxes, & deft. as his surety. On demurrer:—*Held*: it was no defence to plead that the comrs. & Receiver-General had not complied with certain directory parts of the statutes relating to assessed taxes which lay down methods for obtaining payment from collectors.

In order to take advantage of the proviso in 43 Geo. 3, c. 99, s. 13, that no bond shall be put in a suit against a surety for a collector for any deficiency "other than shall remain unsatisfied after sale of lands, etc., of such collector," the plea must aver that there were lands, etc., of the collector which might have been seized & sold to supply the deficiency.—*WILKS v. HEELEY* (1832), 1 Cr. & M. 249; 3 Tyr. 91; 2 L. J. Ex. 51; 119 E. R. 393.

**503. ——— ———.]—**GWYNNE v. BURNELL, No. 402, *ante*.

**504. Proceedings stipulated for by contract—Effect of laches by surety.]—**Deft. drew bills as surety for the acceptor H., & it was provided by a deed, to which pltf., the holder of the bills, as well as deft., was a party, that he should not sue deft. on the bills till H.'s effects should have been sold, & the proceeds applied in discharge of the bills. H.'s effects were seized & sold under a commission of bkpcy., the trustee to whom they had been conveyed by the deed in question having, with the knowledge & assent of deft., omitted to take possession of them in time:—*Held*: pltf. was not barred from suing deft. on the bills. *LANCASTER v. HARRISON* (1830), 6 Bing. 726; 4 Moo. & P. 561; 8 L. J. O. S. O. P. 288; 130 E. R. 1460.

**505. ——— Effect of laches by creditor—Time extended by surety.]—**HOLL v. HADLEY, No. 454, *ante*.

**506. ——— Omission to enforce useless security.]—**A guarantee given by deft. was to be void if pltf. should omit to avail himself to the utmost of any security he held of R., & if any thing should prevent deft. from retaining the proceeds of an execution levied on the property of R.:—*Held*: the guarantee was not avoided by pltf.'s omitting to put in suit a bill of exchange drawn by R., & accepted by an insolvent still in prison, or by deft.'s being deprived of a part of the proceeds of his execution against R., such part being the value of the goods of another person wrongfully taken under that execution.—*MUSKET v. ROGERS* (1839), 5 Bing. N. C. 728; 8 Scott, 51; 8 L. J. O. P. 354; 132 E. R. 1281.

**507. ——— Omission to prosecute for felony—Fidelity guarantee.]—**F., who was about to employ M. in a situation of trust & confidence, effected a policy with a guarantee co. to secure

himself against fraud by embezzlement of money by M. The policy, which was for £1,000, declared that "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this policy," the co. undertook to reimburse any pecuniary loss sustained by the employer from "the fraud or dishonesty of the employed, as should amount to embezzlement of money, as should be discovered within three months of the death, dismissal, or retirement of the employed." The employer was to give notice of the claim, & proofs were to be given such as the directors for the time being might require. Then followed this proviso: "Provided that the employer shall if, & when, required by the co. but at the expense of the co., if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty in consequence of which a claim shall have been made under this policy, & shall, at the co.'s expense, give all information & assistance to enable the co. to sue for & obtain reimbursement, by the employed, or by his estate, of any moneys which the co. shall have become liable to pay." F. claimed under this policy a sum of money alleged to have been lost by M.'s embezzlement. The directors pleaded that they had required F. to prosecute M., but that F. had not done so. Demurrer, because it did not appear that there was any obligation on F. to prosecute M., or that the non-performance of any such obligation was a condition precedent to F.'s right to recover:—*Held*: the proviso did constitute a condition precedent, & furnished a defence to the action.—*LONDON GUARANTEE CO. v. FEARNLEY* (1880), 5 App. Cas. 911; 43 L. T. 390; 45 J. P. 4; 28 W. R. 893, 11 L.

*Annotations:—*Consd. *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415. *Mentl. Kidner v. Stimpson* (1918), 34 T. L. R. 434; *Dawsons v. Bonnin* (1922), 91 L. J. P. C. 210.

**508. Compensation to be provided by third party—Available to creditor—Enforcement by surety.]**Pltf. was guarantor to the owner of an American ship for a merchant who freighted her to Bordeaux. She was detained there by an embargo & dismissed by the freighter. The French govt. having declared themselves bound to indemnify all neutral owners for the effects of the embargo, & pltf. an English subject not being able to take advantage of that order, deft. must endeavour to get an indemnity in France, before he can sue pltf.—*COTTIN v. BLANE* (1795), 2 Anst. 541; 145 E. R. 962.

*Annotation:—*Refd. *Jackson v. Digby* (1854), 2 W. R. 510.

**509. ——— ———.]**WRIGHT v. SIMPSON, No. 498, *ante*.

**510. Concurrent proceedings against principal & surety.]—**A surety has no equity to restrain an action against him by the creditor on the ground that the creditor has instituted proceedings in equity under which he may obtain relief against the principal, in the absence of circumstances to prevent the surety from recovering over against his principal.—*JACKSON v. DIGBY* (1854), 2 W. R. 540.

**511. Where surety bound as principal—Magna Carta, 1297 (c. 8).]**—At the common law, if a man were surety for another's debt, he was chargeable if the debtor failed in payment; but the above Act orders that the pledge shall not be distrained, if the principal debtor be sufficient to pay. This grew troublesome to the creditor, & therefore it fell in use that the pledge should be bound as principal, & so by common law he is chargeable, notwithstanding the sufficiency of the principal. Nevertheless it is now usual in Chancery to help



## GUARANTEE AND INDEMNITY.

### *Sect. 2.—When liability arises: Sub-sect. 2, C. & D. (a).]*

this surety against whatsoever default of the principal, if so be he will offer the principal debt & damages.—*ANON.* (prior to 1602), Cary, 12; 21 E. R. 7.

512. ———.]—The above act does not extend, nor was ever taken to extend to sureties in a bond or recognisance, if they may be so called, being bound themselves equally with the principal; as sureties to perform covenants & agreements are in like manner, but to pledges & manucaptors only, who by express words are not responsible unless their principals become insolvent, & so are conditional debtors only (*per CUR.*).—*A.-G. v. RESBY* (1661), Hard. 377; 145 E. R. 506.

*Annotations:—Apld. A.-G. v. Atkinson* (1827), 1 Y. & J. 207. *Refd. R. v. Marsh* (1824), 13 Price, 826.

513. ———.]—*A.-G. v. ATKINSON* (1827), 1 Y. & J. 207; 148 E. R. 617.

### *D. Execution of the Contract by Other Parties.*

#### *(a) Joinder of Co-Sureties.*

514. **Purported Joinder in replevin bond - No joinder in fact.**—It is no plea in debt on a replevin bond that the bond purported to be entered into by two sureties, but is executed only by deft.—*AUSTEN v. HOWARD* (1816), 7 Taunt. 28; 2 Marsh. 352; 129 E. R. 11.

*Annotation:—Apld. Peppin v. Cooper* (1819), 2 B. & Ald. 431.

515. **Joinder a term of contract—No liability unless co-surety joins—Waiver.**—When a person signs a promissory note on a representation that others are to join, & one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the jury are satisfied that such person, knowing the facts, & being aware of his rights, had consented to waive his objection.—*LEAF v. GIBBS* (1830), 4 C. & P. 466, N. P.

*Annotations:—Folld. Evans v. Bremridge* (1855), 2 K. & J. 174. *Refd. Gardner v. Walsh* (1815), 3 C. L. R. 1235; *Beckett v. Addyman* (1882), 9 Q. B. D. 783.

516. ———.]—(1) R. together with J. as a surety, agreed to give a bond to bankers to secure advances made by them to R. & Co., & R. & Co. agreed to give a bond to J. to indemnify him. Bonds were accordingly prepared, but the joint & several bond by R. & J. to the bankers, was never executed by R., but R. & Co. executed the bond of indemnity to J.:—*Held*: J. was not liable to the bankers upon the bond, as it had not been executed by R.

The surety had not that which he contemplated, that which was a portion, & a material portion, of the contract at the time when he entered into this obligation (*LORD LANGDALE, M.R.*).

(2) J. & R. gave a promissory note to a banking firm of which R. was a member, as a security against a bill which that firm advanced for D.

& Co. in which firm R. was also a member & which latter bill was to be renewed. R. retired from the banking firm, who soon after accepted & paid another bill drawn by D. & Co.:—*Held*: this last bill was to be considered as a renewal of the former bill, notwithstanding R. had retired from the banking firm, & J. was liable upon his promissory note.—*BONSER v. COX* (1841), 4 Beav. 379; 10 L. J. Ch. 395; 5 Jur. 104; 49 E. R. 385, L. C.; *subsequent proceedings* (1844), 6 Beav. 110, L. C.

*Annotations:—As to (1) Distd. Cooper v. Evans* (1867), 1 L. R. 4 Eq. 45. *Consd. Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755. *Refd. Beckett v. Addyman* (1882), 9 Q. B. D. 783; *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1889), 62 L. T. 541. *Generally, Mentd. Archer v. Hudson* (1846), 7 L. T. O. S. 105.

517. ———.]—One of two intended co-sureties executed a deed of covenant for the repayment of moneys advanced to the principal debtor, on the understanding that the moneys would not be advanced until the deed was executed by the other surety. The deed was never executed by the other surety, & no notice of his failure to execute it was given by the creditor to the executing surety, until after the principal debtor had made default & become insolvent:—*Held*: the executing surety was entitled to be discharged in equity from every part of the debt, & to have the deed delivered up to be cancelled.

When once it appears that the instrument is not such as it was intended to be, this ct. holds that the legal effect of the instrument is to be got rid of as against the surety. This ct. then, will look at the original agreement between the parties to see if it appears that they all intended the obligation should be joint & several between the co-sureties. It was the duty of the co. to inform plff. that the deed was not executed by his co-surety as originally proposed, & to ascertain his view with respect to his altered position (*PAGE-WOOD, V.-C.*).—*EVANS v. BREMRIDGE* (1855), 2 K. & J. 174; 25 L. J. Ch. 102; 26 L. T. O. S. 161; 2 Jur. N. S. 134; 4 W. R. 161; 69 E. R. 741; *on appeal* (1856), 8 De G. M. & G. 100, 1 L. JJ.

*Annotations:—Distd. Cooper v. Evans* (1867), 1 L. R. 4 Eq. 45. *Refd. Cumberlege v. Lawson* (1857), 26 L. J. C. P. 120; *Spaight v. Cowne, Edwards v. Spaight* (1863), 1 Hem. & M. 359; *Beckett v. Addyman* (1882), 9 Q. B. D. 783; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *National Provincial Bank of England v. Brackenbury* (1906), 22 T. L. R. 797. *Mentd. Waterlow v. Bacon* (1866), 35 L. J. Ch. 613; *Luke v. South Kensington Hotel Co.* (1879), 27 W. R. 514; *Royal Albert Hall Corp'n. v. Winchelsea* (1891), 7 T. L. R. 362.

518. ———.]—Where a surety executes a document in the belief, derived from its form, that it will be executed by all the sureties named therein as persons who are to sign, he will be released from his obligation if all the others do not sign.—*HANSARD v. LETHBRIDGE* (1892), 8 T. L. R. 346, C. A.

*Annotation:—Folld. National Provincial Bank of England v. Brackenbury* (1906), 22 T. L. R. 797.

### **PART V. SECT. 2, SUB-SECT. 2.—D. (a).**

516i. **Joinder a term of contract—No liability unless co-surety joins.**—Declaration on a covenant by deft. as surety for B. Plea, that deft. executed on the understanding & representation that Y. K. & E. should also execute, & that he should be responsible with them, & not solely; & that it was represented to him by B. & by K., that immediately after deft.'s execution, the other three would execute. They never did execute, & before any breach & with all due diligence, he gave notice to plffs.,

of the premises; & he claimed to have been released by such non-execution:—*Held*: the defence was admissible, as showing in substance that deft. executed the deed conditionally only.—*HEYON CORPN. v. ARMSTRONG* (1868), 27 U. C. R. 533.—*CAN.*

516 II. ———.]—One who signs a guarantee under a promise by the creditor that it will be also signed by another guarantor will not be liable upon it, if such other guarantor does not sign.—*SCANDINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND* (1913), 24 W. L. R. 587; 4 W. W. R. 944; 11 D. L. R. 243;

23 Man. L. R. 480.—*CAN.*

516 III. ———.]—*FITZGERALD v. M'COWAN*, [1898] 2 I. R. 1.—*IR.*

516 IV. ———.]—One of the cautioners not having subscribed a bond, the others are not liable for the advances made under it.—*PATERSON v. BONAR* (1844), 6 Dunl. (Ct. of Sess.) 987; 16 Sc. Jur. 439.—*SCOT.*

516 v. ———.]—*SCOTTISH PROVINCIAL ASSURANCE CO. v. PRINLOE* (1858), 20 Dunl. (Ct. of Sess.) 463; 30 Sc. Jur. 236.—*SCOT.*

516 VI. ———.]—*FLEMING v. SIMPSON* (1860), 2 L. T. 60.—*SCOT.*

## PART V.—LIABILITY OF THE SURETY.

**519.** — — —.]—**ELLESMERE BREWERY CO. v. COOPER**, No. 1081, *post*.

**520.** — — —.]—One surety to an administration bond executed the same on being assured that the other person named in it as co-surety would execute it. The latter refused to do so. The name of another surety was inserted in the bond, & this person executed it. The first surety did not assent to the alteration:—*Held*: the bond was void & must be cancelled.—*In the Goods of COWARDIN* (1901), 86 L. T. 261; 18 T. L. R. 220; 46 Sol. Jo. 163.

**521.** — — —.]—**WEST RIDING UNION BANKING CO., LTD. v. ELMORE** (1905), *Times*, Feb. 21, C. A.

**522.** — — —.]—A guarantee to a bank for an overdraft was, on its face, intended to be a joint & several guarantee by four guarantors. Three out of the four signed the guarantee, but the fourth did not sign, though willing to do so, & then died:—*Held*: the three who signed were not liable to the bank on the guarantee.—**NATIONAL PROVINCIAL BANK OF ENGLAND v. BRACKENBURY** (1906), 22 T. L. R. 797.

**523. Joinder not a term of contract Liability of surety.**—To a declaration stating that T. was the lessee of certain tolls, & that S. & defts. agreed to join with T. in a bond conditioned for payment of the rent under the lease & alleging as a breach that deft. refused to join T. in the bond, deft. pleaded that at the time of tendering the bond to him, S. had not executed the same, nor was he present [on that occasion] ready to execute it jointly with deft. & that S. died before the commencement of the suit, & that before his death the bond was not tendered to deft. for execution, nor was he requested to execute it:—*Held*: the pleas were bad.

The agreement must receive the same interpretation as it would have borne at the time when it was signed. It is a contract by each of the intended sureties to join in the bond with T., the principal, i.e. to execute the bond in the character of surety. It is not a contract that they shall execute it in the presence of each other, or that if one die, the other shall be at liberty to refuse to execute it (**LORD ABINGER, C.B.**).

What deft. undertook was to join with T. in the bond. The only condition precedent was the execution of the bond by T. He has executed it, but deft. refuses to do so. I think he has no right so to refuse; it is no part of the agreement that he shall join with the other surety in the execution (**ALDERSON, B.**).—**HORNE v. RAMSDALE** (1842), 9 M. & W. 329; 11 L. J. Ex. 100; 152 E. R. 140.

**524.** — — —.]—By an indenture expressed to be made between G. of the first part, deft. & two others, as sureties of G. of the second part, & plffs. of the third part, G., deft., & the two other sureties, jointly & severally covenanted to repay plffs. moneys advanced by them to G. Deft. having been sued for a breach of his covenant, pleaded that he executed the indenture in the faith that P., one of the sureties, should join therein & execute the same; & that P. never did join therein or execute the same:—*Held*: a bad plea.

Deft. does not say that he never did seal or deliver, nor that he delivered the deed as an escrow on condition that P. should execute, nor that he was betrayed into sealing & delivering on the

faith that he was not to be bound unless P. executed; & I can find nothing on the face of the plea to lead to the conclusion that there was any such stipulation. All deft. says is, that he executed the deed on the faith that P. should execute it. That is clearly not sufficient. If deft. delivered the deed as an escrow on condition that he was not to be bound unless P. executed, he should have so pleaded (**CRESWELL, J.**).—**CUMBERLEGE v. LAWSON** (1857), 1 C. B. N. S. 709; 26 L. J. C. P. 120; 28 L. T. O. S. 271; 5 W. R. 237; 140 E. R. 292.

**525.** — — —.]—By indenture of mtge. between the mtgor. deft. & two others, as sureties, & the mtgee., after reciting that the mtgor. was possessed of certain hereditaments, & of a policy of insurance on his life, & that the mtge. had agreed to lend him £1000 to be secured as therein provided, & that upon treaty for the loan, it was agreed that the repayment thereof should be further secured by the sureties joining in the deed; the mtgor. mortgaged the hereditaments & the policy of insurance, & all moneys assured or to become payable under it, as security for the debt. There were covenants by the mtgor. & the two other sureties to pay the interest, etc., & to pay the premiums on the policy & any sums necessary for effecting another if it should become void. There was a power of sale by the mtgee. of the hereditaments & the policy. Deft. covenanted that if the mtgee. should be made to execute the power of sale, or if the proceeds should not be sufficient, he would pay the deficiency to the amount of £300. To an action on this covenant it was pleaded that no policy was effected & that R. one of the sureties, had not executed the deed:—*Held*: (1) it was a condition precedent that a policy should have been effected; (2) in the absence of express provision it was not a condition precedent that the other surety had signed. **COYNE v. ELPHECK** (1874), 22 W. R. 511.

**525.** — — —.] **LAWRENCE v. HARRIS** (1902), *Times*, Mar. 10.

**527. Evidence.** In an action against a surety on an equitable plea founded on the non-execution of the security by a co-surety:—*Held*: there must be evidence of an agreement by plff. with deft. that such co-surety should execute or that deft. executed on the faith of the other's doing so, & where the proposal of another surety came from plffs., & was not at the time made a condition by deft. the defence failed.—**TRAILL v. GIBBONS** (1861), 2 F. & F. 358, N. P.

**528.** — — —.] Plffs. agreed to discount acceptances of G. provided that G. obtained the following security; first, a policy or guarantee by which the underwriters agreed that if G. failed to meet the acceptances the underwriters would pay the amount, the liability of the underwriters respectively being limited to certain specified amounts; secondly, a policy from defts. by which defts. guaranteed the solvency of the underwriters of the first policy. The first policy was obtained for a total amount of £3,750 & purported to be underwritten by five names, each for £750, but, in fact, the name of one underwriter was signed without his authority, & he, therefore, never became liable upon the policy. The second policy contained a recital that certain underwriters had signed the first policy & that their names & signatures or those of their attorneys

**523 i. Joinder not a term of contract—Liability of surety.**—**SIDNEY ROAD CO. v. HOLMES & DAVIS** (1858), 16 U. C. R. 265.—**CAN.**

**523 ii.** — — —.]—**HENDERSON v. VERMILYEA** (1868), 27 U. C. R. 544.—**CAN.**

*Sect. 2.—When liability arises: Sub-sect. 2, D. (a)*

were known to defts. G. went into liquidation & failed to meet their acceptances & the four underwriters who were liable on the first policy became insolvent. In an action against defts. on the second policy:—*Held*: (1) in the absence of evidence of an express agreement to that effect, the fact that one underwriter to the first policy never became liable to plffs. did not charge the remaining four from their liability upon that policy; (2) evidence was not admissible to show that it was a condition precedent to defts.' liability upon the second policy that the fifth underwriter should be liable to plffs. on the first policy inasmuch as the recital in the second policy that the underwriters had signed the first policy was inconsistent with oral evidence that defts. were not to be liable unless the fifth underwriter had subscribed the first policy.—*ANGLO-CALIFORNIAN BANK v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE Co.* (1904), 20 T. L. R. 665; 10 Com. Cas. 1.

529. —“Express engagement & understanding”—*Sufficiency*.—(1) Five directors of a co. gave their joint & several bond to a bank to secure repayment with interest of a loan made by the bank to the co. By an agreement made between five persons interested in the co. of the first part, & the five directors of the second part, after reciting the bond, it was agreed that, in pursuance of an agreement made upon the treaty for the loan by the bank, the liability of the several persons, parties thereto of the second part, under the bond, should be borne & discharged by the ten several persons parties thereto respectively in equal shares & proportions, & that each of the several persons parties thereto, would indemnify the other nine against all actions, etc., in respect of the loan by the bank or in respect of the bond. The co. was ordered to be wound up, & the bank recovered judgment against the obligees of bond for the whole amount of principal & interest due thereunder. One of the guarantors had become insolvent. On a bill by two of the guarantors, who had under the judgment paid more than their proportion of the sum secured by the bond against the other eight guarantors to enforce a ratable contribution from them in respect of the principal, interest, & costs recovered under the bond:—*Held*: all the solvent guarantors were liable to contribute ratably in respect of the whole amount recovered under the bond, & the extra liability arising from the insolvency of one of the guarantors was not to fall upon defts. to the action at law.

(2) The bank made a further advance to the co. upon the personal security of three of the directors. Five of the guarantors for the amount secured by the bond signed an agreement that they would join the three directors in guaranteeing repayment to the bank of the further advance in equal proportions with the three directors. One of the five who signed this agreement stated by his affidavit that his signature, if he did sign, was obtained “on the express engagement & understanding” that the agreement should be signed by all the guarantors for the sum secured by the bond:—*Held*: the words “express understanding” were utterly unmeaning, & the ct. would never pay any attention to a statement that something was done on an express engagement, unless the engagement was spoken to in a manner which was admissible in evidence.

If it had been intended that a certain number of

individuals should concur, & that if any of them did not concur, the others were not to be bound, so were only to be bound in a special & particular manner & to a particular extent, there was nothing whatever to prevent that being expressed upon the face of the document & the document could not, to my apprehension, if that had been the real agreement, have assumed the particular form which this document has assumed, because it is headed as an act done at a certain meeting, not of all the guarantors, but of the guarantors of the £10,000. That is not the ordinary way in which you would head a document which is not intended to be the act of those who are present at the meeting. Why refer to the meeting at all, if it was meant that persons not at the meeting should be bound (LORD SELBORNE, C.). —*DALLAS v. WALLS* (1873), 29 L. T. 599, L. C. & J. J.

530. Right to recover from creditor.—If payment made.]—A., as surety to a firm, signed a joint & several bill of exchange, on the faith that B. would join as co-surety. B. never signed it, but A. was afterwards compelled to pay it, by proceedings at law at the suit of an indorsee. One of the firm died, & the others became bkpt.:—*Held*: the firm were not entitled to avail themselves of the bill, & were liable to repay the amount & the costs of the proceedings both at law & equity.—*RICE v. GORDON* (1848), 11 Beav. 265; 50 E. R. 818.

*Annotation*:—*Reid. Evans v. Bremridge* (1855), 2 K. & J. 174.

(b) *Execution of Composition Deed by Creditors.*

531. Delivery of deed as escrow—Failure of some to execute.]—Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors:—*Held*: this was to be considered a delivery of the deed as an escrow, & all the creditors not having executed it, the surety was not bound.—*JOHNSON v. BAKER* (1821), 4 B. & Ald. 440; 106 E. R. 908.

*Annotations*:—*Mentd. Spicer v. Burgess* (1834), 3 L. J. Ex. 285; *Bowker v. Burdekin* (1843), 11 M. & W. 128; *London Freehold & Leasehold Property Co. v. Saffield* (1897), 66 L. J. Ch. 790.

532. Execution not in terms agreed on.]—A declaration stated, that A. being indebted to plffs. in £7,093, & being unable to pay the amount, requested plffs. to accept a composition of 10s. in the pound on their debt, & to give time for the payment thereof, to which plffs. agreed upon having the same guaranteed to them; & that thereupon deft. addressed a guarantee to plffs., to the following effect; “At the request of A. & in consideration of your agreeing to take 10s. in the pound for your claim on them, amounting to £7,093, & giving them five years to pay off £3,546, being one-half of the debt, or at the rate of 10s. in the pound for the whole, with interest on £3,546, at the rate of £5 per cent. *per annum*, payable half-yearly, £3,546 to be paid by the instalments & in the manner mentioned or to be mentioned in your agreement with A., I hereby guarantee to the extent of £500, the payment by A. of £3,546, with interest, as mentioned, in the agreement”; that plffs. & A. subsequently

## PART V.—LIABILITY OF THE SURETY.

entered into a written agreement, by which plffs. agreed to accept of A. the composition of 10s. in the pound, to be paid by stipulated instalments, on several specified days, extending over a space of five years, in consideration of having the payment of the instalments guaranteed by the persons named in the schedule, & in which deflt.'s name appeared as guaranteeing to the extent of £500. The agreement then contained a proviso, rendering the agreement void, & enabling plffs. to recover the whole of the original debt, in case A. should make default in payment of any instalments on the stipulated days, or should commit any act of bkpcy. on which a fiat should issue. The declaration then averred, that one instalment became due, that default was made in payment thereof by A., that plffs. applied to deflt., but that he had not guaranteed the instalment, & that the same remained unpaid:—*Held*: bad on general demurrer, on the ground that, upon the true construction of the guarantee, the consideration of deflt.'s promise was that there should be an agreement between plffs. & A., & the agreement entered into by them did not comply with the terms of the guarantee.—*CLARKE v. GREEN* (1849), 3 Exch. 619; 13 L. T. O. S. 98; 151 E. R. 992.

**533. Execution by plaintiff creditor—Subsequent repudiation—and bankruptcy proceedings against principal debtor.**—By a composition deed entered into by W. with his creditors, it was agreed that they should accept a composition of 10s. in the pound, to be secured by the joint promissory notes of W. & deflt. his father, such promissory notes to be delivered to certain trustees for the creditors, & that a deed containing a release, & all the usual covenants, should be prepared & executed by the creditors, & that such deed should be a deed within Bkpcy. Act, 1861 (c. 131), s. 192. Deflt. was induced to become surety for the payment of the composition by an arrangement made at the meeting of creditors that the goods & effects of the debtor should be realised for the benefit of deflt. In pursuance of these resolutions a deed was executed or assented to by a majority of the debtor's creditor's, but not by plff., although he had originally promised to give his assent. Deflt., in pursuance of the arrangement, delivered the promissory notes to the trustees, & the property & effects were realised for the benefit of deflt. The trustees tendered to plff. the promissory notes for the composition of his debt. Plff. refused to receive them, & denied the validity of the deed of composition, & brought an action against his debtor for the amount of his debt, to which the debtor pleaded the deed of composition. Plff. replied, that the assent of the creditors had been obtained by fraudulent misrepresentations. That action was referred to arbn., & the debtor being unable to establish the deed, the arbitrator awarded in favour of plff. The debtor was then adjudged a bkpt. After the award, the promissory notes made in favour of plff. still remaining in the hands of the trustees, plff. demanded them, & not succeeding in obtaining them, he brought the present action, there being counts for the recovery of the amounts of the notes, & a count in detinue to recover the notes themselves:—*Held*: such action could not under the circumstances be maintained.—*LATTER v. WHITE* (1871),

L. R. 6 Q. B. 474; 40 L. J. Q. B. 162; 25 L. T. 158; 19 W. R. 1149, Ex. Ch.; *affd.* (1872), L. R. 5 H. L. 578, H. L.

**534. Subsequent annulment of deed.**—A debtor having filed a petition under Bkpcy. Act, 1883 (c. 52), resolutions were passed accepting a composition of 20s. in the pound extending over fifteen months, payment of which was secured by a mtge. given by plff. to deflt. as trustee. Default having been made in payment of the instalments, the debtor was adjudicated bkpt. on the application of creditors under Bkpcy. Act, 1883 (c. 52), s. 18 (11), & by the same order the composition was expressly annulled:—*Held*: plff.'s suretyship for the composition was thereby discharged, & the mtge. deed must be set aside so far as it made plff. liable as a surety.—*WALTON v. COOK* (1888), 40 Ch. D. 325; 58 L. J. Ch. 180; 60 L. T. 91; 37 W. R. 189.

### *E. Performance of Consideration.*

#### (a) Supply of Goods.

**535. Supply to larger quantity—Than that agreed.**—To an action against deflt. on his bond for £250, deft. set out on over the condition of the bond, which recited that R. had agreed to become tenant to plffs. of a public-house; that it was stipulated that he should take from them the ale, wine, etc., to be consumed there; that he should become bound with a surety to pay for the same to the amount of £50 before he should have a fresh supply, as long as he should continue tenant of plffs.; that when he should cease to be their tenant, the surety should be liable to plffs. in such sum, not exceeding £50, as R. might then owe plffs. for ale, etc. The condition then stated, that if R. should pay plffs. for all ale received from them to an amount not exceeding £50 before he should have a fresh supply, & when he should become indebted to them in that sum, & if he should pay them for all sums which he should owe them for ale, etc., not exceeding £50, when he should cease to be tenant, the obligation was to be void. Plffs. permitted R. to become indebted to them in a larger amount than £50:—*Held*: deft. was not discharged by reason of plffs. having supplied R. with ale to an amount exceeding £50 upon credit, but that, in any event, on default of the principal, deft. was liable to the extent of £50.—*SELLER v. JONES* (1846), 16 M. & W. 112; 18 L. J. Ex. 20; 8 L. T. O. S. 165; 153 E. R. 1121.

**536. Cessation of supply—Before amount agreed on reached.**—In an action upon a guarantee in this form: "In consideration of your supplying B. with goods as he may order them from time to time, to the extent of £300, I guarantee the payment of the same at two months from the date of the invoices":—*Held*: the refusal of plff. to supply B. with further goods at a time when less than £300 was due to him for goods was no answer to an action upon the guarantee for the sum due at that time.—*LLOYD v. BLACKBURN* (1851), 17 L. T. O. S. 105.

**537. Future supply—Past & future debts guaranteed.**—*WESTHEAD v. SPROSON*, No. 20, ante.

**538. — For business at specified place—Business done at other place.**—Dft.'s daughter

### PART V. SECT. 2, SUB-SECT. 2.—*E. (a).*

**g. Goods not sold to surety as covenanted.**—T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission

to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods, & permitted others to be seized in execution & removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guarantee. In an action by the

*Sect. 2.—When liability arises: Sub-sect. 2, E. (a),*

was about to marry B. & deft. agreed to set B. up in business as a draper. He advanced money for the purchase of a shop at L., & gave plffs. a guarantee of £50 for goods to be supplied to B., who was described in the guarantee as being of an address in L. B. gave up the business at L. & began a similar one at F., but after a short time he failed. In an action on the guarantee in respect of goods supplied by plffs. to B. at F.:—*Held*: the intention of the parties was that the guarantee should only be in respect of goods supplied at L., & the action failed. *SPENCER, TURNER & BOLDERO v. LOTZ* (1916), 32 T. L. R. 373.

As to what constitutes consideration, *see* Part II., Sect. 4, sub-sect. 3, *ante*.

*(b) Advance of Money.*

*Compare* Part II., Sect. 4, *ante*.

**539. Advance of stock To value of amount promised.]—***L. v. p. LEYCESTER* (1810), cited 5 Dow. & Ry. K. B. at p. 114.

*Annotation:—Refd.* *White v. Wright* (1821), 5 Dow. & Ry. K. B. 110.

**540. What constitutes advance Delivery by & redelivery to creditor of bills—Previously held as security.]** *GLYN v. HERTEL*, No. 33, *ante*.

**541. — Promise by partner — Advance by firm.]—***Assumpsit* that in consideration that plff. would advance a sum of money to A. deft. promised that provision should be made for repaying plff. At the trial, it appeared that deft. had given to plff. the guarantee stated in the declaration & that the latter was a partner with two other persons in a banking house, & that the firm had advanced the money, & charged A. in account with the same: *Held*: the averment in the declaration, that plff. had advanced the money, was not supported by the proof, there being no evidence to show that the money had been advanced to plff. by the firm, & by him to A. *GARRETT v. HANDLEY* (1821), 3 B. & C. 462; 1 C. & P. 483; 5 Dow. & Ry. K. B. 319; 3 L. J. O. S. K. B. 47; 107 E. R. 805.

*Annotations:—Consd.* *Alexander v. Barker* (1831), 2 Cr. & J. 133. *Refd.* *Aguelo v. Forbes* (1861), 11 Moo. P. C. C. 160; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 151. *Mentd.* *Higgins v. Senior* (1811), 11 L. J. Ex. 199; *Brett v. Beckwith* (1856), 5 W. R. 112.

**542. — “In the usual way.”]** A. guaranteed the payment of moneys advanced by plffs. to B. “in the usual way.” A. had been in the habit of advancing to B. upon the faith of his credit, but before he paid the bills in question, he required some security, & B. paid in some bills in consequence:—*Held*: this was not an advance “in the usual way.”—*BECKETT v. POTTS* (1814), 2 L. T. O. S. 309.

**543. — For specified time — Permission to overdraw by cheque.]—**Certain title-deeds which had been handed by plff. to his brother, B., to enable the latter to borrow £600 from H. for seven days, were deposited by B. with a bank, with a memorandum purporting to be signed by plff., & stating that the deposit was made in consideration of the bank lending B. £1,000 for seven days. The bank made him no loan for seven days, but, during the seven days next after

the deposit, they allowed him to draw by cheques to an amount exceeding £900. Upon a bill filed by plff. against the bank for the delivery up of the deeds, on the grounds that the memorandum of deposit was a forgery, & that the bank had not lent B. £1,000 for seven days:—*Held*: the question of forgery was one for a jury only but assuming that the memorandum to be genuine, the bank had no right to retain the deeds, inasmuch as they had not fulfilled the condition on which the deposit was made. —*BURTON v. GRAY* (1873), 8 Ch. App. 932; 43 L. J. Ch. 229, 1 L. J.J.

**544. Agreement for specified amount Advance to greater amount.]—***HALL v. GROSE* (1814), cited in *Chitty on Commercial Law*, Vol. III. at p. 323.

**545. — — — Bond by deft. as surety for W. & W., with a condition, reciting that obligees were bankers, & W. & W. paper manufacturers, & had overdrawn their account with obligees £4,822, & in order to enable them to carry on their business, had applied to obligees to allow them for a time to overdraw such further sums as they should require, so as that the same, together with the £4,822, should not exceed in the whole at any one time £5,000, which obligees had agreed to do, & the condition was for the payment by W. & W., & deft., or any of them, of the sum £4,822, & also such further sums as obligees should or might thereafter advance to W. & W. in the course of their business not exceeding in the whole £5,000: *Held*: not to be avoided by the obligees having allowed W. & W. to overdraw to an amount, together with the £4,822, exceeding £5,000, & therefore, deft.’s plea to that effect was ill pleaded: for the restrictive words in the recital were not to be construed as conditional, that if obligees exceeded the amount the bond should be void.**

I adopt to their full extent the positions on which the counsel rests his argument in support of this plea, that a surety ought not to be bound beyond the scope of his engagement, & that this is to be sought out from the whole context taken together, & that the decisions . . . . . agree that the condition shall be taken with reference to the recital, & may be explained & restrained by it (LORD ELLENBOROUGH, C.J.). *PARKER v. WISE* (1817), 6 M. & S. 239; 105 E. R. 1232.

*Annotations:—Foll.* *Gordon v. Rae* (1858), 8 E. & B. 1065. *Apid.* *Laurie v. Scholefield* (1869), L. R. 1 C. P. 622.

**546. — — —]**—Deft. executed a bond for £2,000 to a banking co., the condition whereof recited that C. kept an account with the co. It was declared that, if C. or deft., or either of them, should on demand pay to the co. all sums, not exceeding in the whole £1,000, which should from time to time be due to the co. by C., with interest, the bond should be void. The co. sued deft. on the bond, alleging, as a breach, that on June 30, 1856, there was due from C., as the balance of his account, £296 12s. 11d., which had not been paid by C. or deft., though duly demanded, & a further sum for interest. Equitable plea: That the bond was executed by deft. solely as surety for C., & so accepted by the co.: & that, by reason of various verbal & written communications between deft. & the co., before & at the time of execution, the liability of deft., & the advances

creditor to recover the amount of the guarantee.—*Held*: the condition of the guarantee had not been complied with by the creditor, & he could not hold the guarantor responsible.—*BROWN v. TORRANCE* (1900), 30 S. C. L. 311.—CAN.

**PART V. SECT. 2, SUB-SECT. 2.— E. (b).**

**h. Failure to make further advances as covenanted.]—**One who signs a guarantee, expressed to be given in consideration of the creditor making further advances, will not be liable

upon it, if the creditor refuses to make further advances.—*SCANDINAVIAN AMERICAN NATIONAL BANK v. MINNEAPOLIS v. KNEELAND* (1913), 24 W. L. R. 587; 4 W. W. R. 944; 11 D. L. R. 243; 23 Man. L. R. 480.—CAN.

to C., which were to be secured, were limited to £950; & deft. was to be informed if the account, with interest, should reach £1,000 & not be reduced within a month; & deft. became surety on such terms only: but the co., on each of several occasions, made advances beyond £950; & on each of several occasions the account against C. exceeded £1,000 & was not reduced within a month, & deft. was not informed; whereby deft. became absolutely released from liability & entitled to equitable relief. The co. took issue on the plea, & also replied over; & deft. took issue on the replication. On a special case, giving the ct. power to draw inferences of fact, it was stated that, previously to the execution of the bond, deft. objected, by letter, to becoming liable for interest upon an advance of £1,000, & requested to know whether the £1,000 was to include interest. In answer, the co. informed deft. that the bond was for £1,000 with interest, but that there was little chance of its exceeding that sum for any length of time, as the co. if it should be over the amount, including interest, at the half-yearly balance, would require it to be reduced to £1,000 or would limit the amount to £950, which would leave a margin for interest. Afterwards, the co. executed a memorandum, to the effect that C.'s advance should be limited to £950, & deft. be informed if the account, with interest, should reach £1,000, & not be reduced in a month. At this time the advance exceeded £950. Deft. then executed the bond. Afterwards, the limit of £950, was on many occasions exceeded. Also, on three occasions, the amount of £1,000 interest included, was slightly exceeded, & not reduced within a month, & deft. was not informed of it. Also, at one half-yearly balance, the amount was £1,004 10s. 1d., but was reduced by £12 in two days after:—*Held*: the effect of the agreement was, not that deft. should be discharged from liability upon the limit being exceeded, but that £950 should be considered as substituted for £1,000 in the condition.—*GORDON v. RAE* (1858), 8 E. & B. 1065; 27 L. J. Q. B. 185; 31 L. T. O. S. 55; 4 Jur. N. S. 530; 120 E. R. 396. *Annotation*:—*Refd.* Price v. Kirkham (1864), 3 H. & C. 437.

547. — Advance to lesser amount— Knowledge of surety.] *BILWATER v. DURRAND*, [1880] W. N. 27, G. A.

(c) *Forbearance to Sue.*

*Compare* Part II., Sect. 4, sub-sect. 3, C., *ante*.

548. By creditors — All creditors must forbear.] — Deft. was arrested on an affidavit, which stated that by a memorandum in writing, bearing date Aug. 11, & signed by deft., he undertook to be answerable to the creditors of certain persons using the style & firm of W. & J., for the amount of the debts of such creditors, on the creditors' undertaking not to issue a commission of bkpt., or sue out process, against W. & J., on or before Aug. 16 then next; that plffs. were creditors of W. & J.; & that the latter were indebted to the former, in the sum of £1,000; & that plffs. had not, nor, as the deponent was informed & believed, had any of the other creditors caused a commission of bkpt., or any process, to be sued out against W. & J. before Aug. 16:—*Held*: insufficient, on the ground that an undertaking by all the creditors not to sue out a commission or process, was a condition precedent, & ought to have been alleged in the affidavit.

An undertaking to forbear to sue out process against deft.'s sons, on or before a given day is

sufficient to raise a consideration for his promise & although plffs. have stated that they forbore to issue a commission or sue out process against the sons, yet it is not alleged that all the creditors undertook not to sue out a commission or sue within the stipulated time which is a condition precedent to any liability to be incurred by deft. (*BEST, C.J.*).—*ELWORTHY v. MAUNDER* (1828), 5 Bing. 295; 2 Moo. & P. 482; 7 L. J. O. S. C. P. 30; 130 E. R. 1071.

549. Execution of release of debt.] — W., by indenture, agreed to guarantee a certain composition to all the creditors of J. who should, before a fixed day, execute a release of their debts. Pltf., who was a creditor of J., did not execute by the time named, but insisted that this delay had taken place in consequence of an arrangement entered into between him & the agent of W., the effect of which was to bind pltf. to accept the composition, but to allow him to postpone his execution of the release:—*Held*: dismissing a bill filed by pltf. against W. for specific performance of the agreement to pay the composition, there was no evidence that the agent of W. had authority to enter into any new agreement that, if such authority had been proved, the agreement being within Stat. Frauds, s. 4, any alteration in its terms must have been evidenced by writing, & the condition in the original agreement not having been performed by pltf., the agreement never took effect so far as he was concerned, & in the absence of fraud no parol agreement could be substituted. *EMMET v. DEWHURST* (1851), 3 Mac. & G. 587; 21 L. J. Ch. 497; 15 Jur. 1115; 42 E. R. 386, L. C.

*Annotation*:—*Mentd.* Williams v. Mostyn (1863), 33 L. J. Ch. 54.

*Compare* Sub-sect. 2, D. (b), *ante*.

550. For agreed time — Forbearance for such time.] — *ROLT v. COZENS*, No. 117, *ante*.

551. Postponement of sale under execution — No power to postpone — Without consent of third party.] — *COOPER v. JOEL*, No. 1708, *post*.

F. Other Conditions.

552. Guarantee of price of goods sold to contractor — Conditional on payment to him of total contract money — Breach resulting in completion of contract by third party — To whom part contract money paid.] — A builder having contracted to perform certain works for govt., his sureties entered into a contract to guarantee to a person who supplied him with bricks, payment out of the amount of the money payable by govt. to the builder. He performed part of the work, & received some money, which the seller of the bricks allowed him to retain. He was employed to do some extra work, & ultimately broke his contract with govt. Other persons were employed to complete it; & with the consent of the sureties, the money paid to them was deducted from the amount payable under the contract, & the balance did not cover the extra work:—*Held*: the guarantee did not attach unless the whole amount was paid over by the govt., & the sellers of the bricks could not treat the money paid to those persons as paid to the contractor, & as payment had not been made to him, the guarantee was not broken.—*HEMMING v. TRENER & MALIM* (1835), 2 Cr. M. & R. 385; 1 Gale, 206; 5 Tyr. 887; 150 E. R. 166; *sub nom.* *HEMING v. MALINE*, 4 L. J. Ex. 245.

553. S. P. *HEMMING v. TRENER & MALIM* (1837), 1 Jur. 893.

554. — Conditional on work being done.] —

*Sect. 2.—When liability arises: Sub-sect. 2, F. Sect. 3: Sub-sect. 1.]*

A. being engaged, under a contract in writing, in the erection of engineer's work for B., for which iron & brass castings were required, & C. the founder from whom the castings were procured, having a claim against A. to the amount of £218 for goods already supplied, & refusing to continue the supply without obtaining payment or security for that sum, B. consented to give C. a guarantee in the following terms:—"May 22, 1861. B. agrees to pay to C., iron-founder, on A.'s account, the sum of £218, being the amount owing to her by them, together with interest, in six months from the above date, providing he has work done as security for the same." In an action by the representatives of C. against B. upon this guarantee:—*Held*: it was a condition of B.'s liability thereon, that, at the end of the six months, work should have been done by A. for him in respect of which a debt should be due from him to them; & plffs. could not recover without producing the contract between A. & B. under which the work was done.—*HILL v. NUTTALL* (1864), 17 C. B. N. S. 262; 33 L. J. C. P. 303; 144 E. R. 106.

*Sec. generally, BUILDING CONTRACTS, Vol. VII., pp. 427 et seq., Nos. 376 et seq.*

**555. Guarantee of price of real property — On sale to husband & wife—Sale to husband only.]—**Under a judicial sale of real estate in St. Lucia, L. professing to act as attorney for W. & wife, resident in France, purchased the estate on their behalf. The purchase-money was to be paid, according to the Ordinance of Jan. 22, 1833, by instalments, & D. became surety, *in solido*, for payment of the second instalment. The deed of arrangement for the purchase, & the notarial deed was executed by one of the trustees, who was resident in the colony, & by such deed it was stipulated that the sale should be confirmed & ratified by his two trustees resident in England within six months. By a deed poll, the sale to W. & his wife was confirmed & ratified by the trustees in England. Default was made in payment of the second instalment, when the trustees brought an action against D. as surety, for the amount of the second instalment. It was afterwards discovered that the power of attorney to L. was confined to W. alone, & contained no authority from his wife, when the trustees discharged the wife from the contract:—*Held*: D. was not liable as surety, as the sale professed to be to W. & wife by the three trustees, while in fact the sale was to W. only, & as such was an

ineffectual & void sale.—*DE BRETTE v. GOODMAN* (1855), 9 Moo. P. C. C. 466; 14 E. R. 375, P. C.

**556. Guarantee made voidable—On failure of execution against principal—Recovery by third party of goods levied—Effect.]—***MUSKET v. ROGERS*, No. 506, *ante*.

**557. Execution of bond by principal—Other instrument executed—By which surety constituted specialty creditor.]—**(1) A surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him & become a specialty creditor of his.

(2) The doctrine of principal & surety is the same at law & in equity.—*COOPER v. EVANS* (1867), L. R. 4 Eq. 45; 36 L. J. Ch. 431; 15 W. R. 609.

**558. Execution of insurance policy.]—***COYTE v. ELPHICK*, No. 525, *ante*.

**559. Surveyor's certificate of completion — On building contract—Construction of guarantee.]—**Resp. advanced money to applt. on a guarantee to be repaid "on the completion of six houses in accordance with a contract between myself & T." One of the terms of the contract was that the houses were to be built to the satisfaction of a surveyor, & payment was to be made upon his certificate. No such certificate had been given. In an action on the guarantee, brought by resp. against applt., the jury found that, as a matter of fact, the houses were completed:—*Held*: resp. was entitled to recover, notwithstanding the absence of the certificate.—*LEWIS v. HOARE* (1881), 44 L. T. 66; 29 W. R. 357, H. L.

**560. Condition in favour of creditor — Satisfaction as to references —Right to waive condition.]—**By an instrument in writing, in consideration of pltf.'s execution on a judgment against a third person being stayed until a certain day, deft. undertook to pay the debt & costs if not then paid by the principal debtor, & pltf., in consideration of the undertaking, agreed to stay execution until the above-named day if deft. gave to W. satisfactory references as to his ability to pay the amount, but not otherwise, & if the references were not satisfactory, then the guarantee was to be given up within a week from that date:—*Held*: even if the giving of references was a condition for the benefit of pltf., which they could renounce, it lay upon them (the references being unsatisfactory) to show that they had renounced the condition, & had elected to treat the instrument as in force; therefore a plea

#### PART V. SECT. 2, SUB-SECT. 2.—F.

**5581. Execution of insurance policy.]**

—A. guaranteed the performance by H. of his obligation under a selling & commission agency contract with deft. co. There was a provision in the contract between H. & the co. that he should insure against loss or damage by fire, by a policy in the co.'s name, all goods in his possession. The goods were destroyed by fire:—*Held*: if the insurance were effected the co. ought to have seen that it received the insurance money & credited it; if it were not effected the co. was more than passively negligent & so were responsible for any loss to the surety.—*KORCZYSKI v. COCKSHUTT PLOW CO.* (1916), 34 W. L. R. 1196; 10 Alta. L. R. 28; 30 D. L. R. 475.—*CAN.*

k. *Work to be done—To "satisfaction" of surety.]—*Where a contract of guarantee depended upon the completion of certain work to the satisfaction of the surety:—*Held*:

evidence of facts raising a presumption of reasonable satisfaction was sufficient to launch a case against deft.—*SHARP v. TURNBULL* (1879), 5 V. L. R. 103.—*AUS.*

l. *To obtain draft from principal debtor.]—*A lumberman had a lien on lumber for freight, & C. wrote saying, "I wish you would advise your agents in Q. to deliver to O. the sawn stuff on your rafts. I am to pay the river freight, & will thank you to take O.'s draft on me for river freight, which I will pay":—*Held*: this letter would not render C. liable to pay the freight until the lumberman had obtained O.'s draft for the amount thereof.—*RC COUMBE* (1877), 24 Gr. 519.—*CAN.*

m. *To provide acceptable sureties—In specified time.]—*H. tendered for the construction of a line of ry. pursuant to an advertisement for tenders, & his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender & con-

ditioned within four days, to provide two acceptable sureties, & also to execute all necessary agreements for the commencement & completion of the work by specified dates. These conditions were not performed & the contract was eventually given to other persons:—*Held*: the bond & the agreement for the construction of the work were to be contemporaneous acts, & as no such agreement was entered into H. was not liable on the bond.—*BRANTFORD, WATERLOO & LAKE ERIE RY. CO. v. HUFFMAN* (1891), 19 S. C. R. 336.—*CAN.*

n. *Failure to supply new motor.]—*Deft. gave his promissory note as surety for the payment of the debt of P. to pltf., after certain differences between P. & pltf. had been settled, by pltf. agreeing to supply a new motor to drive a tractor, over which the dispute had arisen. Pltf. did not supply a new motor & the one supplied did not do the work, so that the profits



that the references were not given & were not satisfactory, & thereupon debt. requested ptfs. to give up the undertaking, which they refused, & debt. became & was discharged from performing it, was an answer to a declaration on the undertaking.—*MORTEN v. MARSHALL* (1863), 2 H. & C. 305; 2 New Rep. 247; 33 L. J. Ex. 54; 8 L. T. 462; 9 Jur. N. S. 651; 159 E. R. 127.

See, further, *CONTRACT*, Vol. XII., p. 417, Nos. 3354–3359.

### SECT. 3.—EXTENT OF LIABILITY.

#### SUB-SECT. 1.—IN GENERAL.

**561. Liability on bond—Limited to penalty.]—***Ex p. RUSHFORTH*, No. 620, *post*.

**562. ———.]—**An annuity bond was forfeited, when the grantor was discharged under an Insolvent Act which provided that future estate should not be discharged. The penalty, being less than the subsequent arrears, was allowed as the debt, & not only in favour of the purchaser of an annuity, but also of a co-obligor as surety, who had compounded with the purchaser & obtained possession of the securities by repaying the money advanced with the arrears, then due, & being at that time less than the penalty.—*BUTCHER v. CHURCHILL* (1808), 14 Ves. 567; 33 E. R. 638.

*Annotations:—**Reid*. *Reed v. Norris* (1837), 2 My. & Cr. 361; *Bower v. Marris* (1841), Cr. & Ph. 351.

**563. ———.]—***SELLER v. JONES*, No. 535, *ante*.

**564. Liability confined to terms of agreement—Bill for specific sum guaranteed—Bill for larger sum given.]—***PHILIPS v. ASTLING*, No. 491, *ante*.

**565. ——— Alteration releases surety.]—***BLEST v. BROWN*, No. 759, *post*.

See, further, Part IX., *post*.

**566. ———.]—**A wife entitled to a reversionary interest for her separate use joined with her husband in assigning it, together with a policy of insurance belonging to him, to a banking co., in trust to receive the assigned moneys & premises, & thereout, after payment of the cost of the assignment & of keeping on foot the policy, to retain & pay such sums of money as should from time to time be due to the co., & to pay the residue to the husband & wife according to their respective interests therein. The deed contained no proviso for redemption nor power of sale:—*Held*: the wife was to be regarded as a surety, against whom the provisions of the security could not be extended beyond their express terms, & a decree for foreclosure or sale could not be maintained on appeal.—*STAMFORD, SPALDING & BOSTON BANKING CO. v. BALL* (1862), 4 De G. F. & J. 310; 41 L. J. Ch. 143; 5 L. T. 594; 8 Jur. N. S. 320; 10 W. R. 196; 45 E. R. 1203, L. C.

**567. ———.]—**On Jan. 20, 1881, P., in consideration of an advance of £2,000, mortgaged certain real estate to H., & covenanted to pay £2,000 & interest at 5 per cent. *per annum* on July 20, 1881, & to pay interest at the like rate half-yearly on the £2,000, or so much of it as should for the time

being remain owing, until the same should be fully paid. On May 9, 1882, P. executed a document in the following terms: "I, F., for the consideration therein mentioned, do hereby guarantee to the said H. repayment of the sum . . . of £2,000, & interest for the same" at 5 per cent. *per annum*. This guarantee was referred to in the correspondence relating to the execution thereof as "the guarantee of P.'s mtge." Interest was regularly paid by P. until July 20, 1891. P. died on Sept. 13, 1891, & the proceeds of his estate & the property comprised in the mtge. were sufficient to pay £600 only of the mtge. debt. Upon non-compliance by F. with a notice to pay the balance of £1,400 & interest, the mtgee. brought an action against F., & thereby sought to recover from him £1,400 & interest, as sums payable by him under his guarantee:—*Held*: (1) the liability of F. was confined to the payment of £2,000 & interest, in accordance with the terms of the mtge. deed; (2) in the absence of an agreement not to sue for a definite time, the mtgee. could at the most be presumed to have agreed not to sue for a reasonable time; such time had elapsed prior to the commencement of six years before the bringing of the action, & consequently the mtgee.'s claim against F. was barred by Stat. Limitations.—*HENTON v. PADDISON* (1893), 68 L. T. 405; 9 T. L. R. 333; 3 R. 450.

**568. Indefinite liability.]—**A. gave B. the following guarantee:—"I have given C. an order to purchase cotton, & as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts to the amount of those he may send to you for sale, on my account, & I engage that his bills on me, so transmitted, shall be regularly accepted & paid:—*Held*: under this guarantee, B. was justified in honouring C.'s draft to the amount of a bill drawn by C. on A., & represented by C. to B., as being drawn on account of A., though such bill was in fact drawn by C. on his own account.

Ptfs. are entitled to recover to the extent of the amount of the bill & the interest upon it & no further. It has been urged in opposition to their recovering even so far that it was the duty of ptfs. to ascertain as a matter of fact that the bill was drawn in respect of cotton purchased for & on account of debt., & that the terms of the guarantee expressly impose upon them that duty. The guarantee will not admit of such a construction. The law does not require impossibilities of any man, & how was it possible for ptfs. at a distance of 1,200 miles to know what was the real nature of the transaction, or to obtain any other description of the consignments or bills than that which he [C.] thought proper to give them (ABBOT, C.J.).—*OGDEN v. ASPINALL* (1826), 7 Dow. & Ry. K. B. 637.

**569. Breach of contract by principal debtor—Damages for non-performance.]—**43 Geo. 3, c. 153, s. 15, having enabled the King by Ord. in Council to license the importation of certain goods, being British or neutral property, from the enemy's country, in neutral ships, a contract made by A.

of P. which were to reduce the debt or which debt. was surety were too little to do so:—*Held*: debt. was released.—*RUMLEY v. LEIGHTON* (1916), 34 W. L. R. 717.—*CAN.*

*e. Verbal stipulation that notes be paid.]—**STANDARD BANK OF CANADA v. MCCROSSAN*, [1920] 3 W. W. R. 846.—*CAN.*

*e. Omission to forward bill of* *—**GRIEVE v. DOW* (1839), 14

*Fac. Coll.* 815.—*SCOT.*

#### PART V. SECT. 3, SUB-SECT. 1.

**566 i. Liability confined to terms of agreement.]—***GUTHRIE v. O'CONNOR* (1875), 36 U. C. R. 372.—*CAN.*

**566 ii. ———.]—**A surety cannot be charged beyond his express agreement.—*FITZGERALD v. LILLY* (1818), 1 Nfld. L. R. 84.—*NFLD.*

**566 iii. ———.]—***HARMER & Co. v.*

*GIBB*, [1911] S. C. 1341.—*SCOT.*

*q. Co-extensive with that of principal debtor.]—*The liability of a surety is co-extensive, unless there is some contrary agreement, with that of his principal.—*PANIOTY v. DWARKA MOHUN DASS* (1879), 4 C. L. R. 145.—*IND.*

*r. Surety not regarded more favourably—Than principal debtor.]—**Re O'NEILL* (1837), Sau. & Sc. 686.—*IR.*



*Secl. 3.—Extent of liability: Sub-sects. 1 & 2, A.]*

& B. British subjects (plffs.) for the purchase of brandy from a house of trade in France (an enemy) to be shipped from thence in a neutral, on account of A. & B., which contract was made in contemplation of obtaining a licence for that purpose & which licence was accordingly obtained soon after the making of such contract & before it was begun to be executed, is a legal contract, & may lawfully be guaranteed in the first instance by C. & D. other British subjects (defts.). After such licence obtained the guarantors are liable in damages for the non-shipment of the goods by the house in France on board a neutral sent there for that purpose. Though it were objected to the licence legalising such trade, that it was not made out to A. & B. by name, but only to C. & D. & other British merchants; & that neither C. & D. nor even A. & B. had any property in the goods; whereas the licence required the goods to be imported to be the property of the said persons or some of them; & until shipment the property continued in the house in France. For neither the Act of Parliament nor the King's licence required the owners of the property to be individually named; & even if the licence were to be so construed, as it only required the goods imported to be the property of "the said persons or some of them, as may be specified in their bills of lading;" & as no bills of lading were made out, which might have been made in the names of C. & D., & if so, would have conveyed to them a legal or special property in the goods; defts. C. & D. were still liable to answer in damages, upon their guarantee, as for the non-performance of a legal contract.—TIMSON v. MERAC (1807), 9 East, 35; 103 E. R. 486.

570. — — — — — Plffs. having entered into a sub-contract with B. a govt. contractor, to supply him with certain articles within the period stipulated in the govt. contract, in which, but not in the sub-contract, there were penalties & deductions for delay in delivery, deft. guaranteed plffs. the payment of the value of the articles thus to be supplied by plffs. to the govt. contractor so soon as he should have received payment from the govt. There having been delay in delivery under both contracts, but the govt. not having exacted any penalties, & having paid their contractor at the full contract price:—*Held*: the contractor was liable to pay plffs. the full contract price, under their contract with him & deft. was liable, on his guarantee, to the same amount.—OASTLER v. POUND (1863), 1 New Rep. 393; 7 L. T. 852; 11 W. R. 518.

571. — — — — — *Damage to third party.]*—

In May, 1863, a father on the occasion of the admission of his son as an underwriting member of Lloyd's, addressed to the managing committee of that body a letter, by which he held himself responsible for all his son's engagements in that capacity. Lloyd's was then a voluntary assocn., governed by certain bye-laws, under which a person once admitted a member could not be excluded from membership except in the event of his bkpey. or insolvency. The assocn. consisted of underwriting members, non-underwriting members, & subscribers. The practice of the underwriting members was to underwrite policies of marine insurance for the benefit of various owners of property, both members of the assocn. & outsiders, but the policies with outsiders could only be effected through the agency of insurance brokers who were either members of or subscribers to the assocn. The assocn. as such in-

curred no liability on the policies underwritten by its members. In 1871 the Society was incorporated by Act of Parliament, all the rights of the committee on behalf of the members being vested by the Act in the corp'n. In 1876 the father died, & notice of his death was shortly afterwards given to Lloyd's. In 1878 the son became bkpt. & thereupon ceased to be a member of Lloyd's:—*Held*: (1) a guarantee the consideration for which is given once for all cannot be determined by the guarantor, & does not cease on his death, & therefore the guarantee was not determined by the death of the father or by the notice of it, but his estate was liable in respect of engagements contracted by the son after his death; (2) the guarantee extended to all engagements contracted by the son as an underwriting member of Lloyd's, whether with members or with outsiders; (3) the committee of Lloyd's & the corp'n. of Lloyds as their successors, were trustees of the benefit of the guarantee for all the persons, whether members or outsiders, with whom the son had contracted engagements as an underwriting member, & the corp'n. could maintain an action to enforce the guarantee against the father's estate for the benefit of all those persons; on the ground, as to the outsiders, that the brokers, through whom the son's engagements with them were contracted, were trustees for their principals of the right which they themselves had to call on their own agents, Lloyd's, to enforce the guarantee for their benefit.

The question, which is a very important & substantial one, is that Lloyd's, having sustained no damage themselves, could not recover for the losses sustained by third parties by reason of the default of H. [the principal debtor] as an underwriter. That is an alarming doctrine, & a novelty, because I consider it to be an established rule of law that where a contract is made with A., for the benefit of B., A. can sue on the contract for the benefit of B., & recover all that B. could have recovered, if the contract had been made with B. himself (LUSH, L.J.).

*Qu.*: whether a guarantee for future advances, which the party guaranteed is not bound to make, is not determinable by the guarantor, & whether it does not cease on notice of his death.—LLOYD'S v. HARPER (1880), 16 Ch. D. 290; 50 L. J. Ch. 110; 43 L. T. 481; 29 W. R. 452, G. A.

*Annotations*:—As to (1) *Fold*, *Re* Grace, Balfour v. Grace, [1902] 1 Ch. 733. *Reid*, *Shepherd v. Bray*, [1906] Ch. 235. As to (3) *Consd*, *Re* Flavell, Murray v. Flavell (1883), 25 Ch. D. 89. *Generally*, *Mentid*, *Re* Cavendish Browne's Settltmt. Trusts, Horner v. Rawle (1916), 61 Sol. Jo. 27; *Barker v. Sticknoy*, [1918] 2 K. B. 356.

572. *Default by member of Lloyd's Association.]*—

S. being desirous of carrying on business as an insurance broker at Lloyd's, which by the rules of that assocn. he could only do on being admitted a subscriber & giving security to the committee of Lloyd's, deft. & another person, in Mar. 1858, addressed the following letter to the committee:—"We each of us hereby hold ourselves responsible to the extent of £750 for any debts that S. who has applied to your committee to be admitted a subscriber of your institution, to enable him to act as an insurance broker may contract, in his capacity of such broker," for two years from this date, & till notice. S. was thereupon admitted & acted as a broker on his own sole account until Jan. 1860, when he took H. into partnership, with the knowledge of his sureties. In Apr. 1860, deft. & his co-surety gave notice to the committee for the discontinuance of the guarantee; but, upon being informed that

## PART V.—LIABILITY OF THE SURETY.

S. could not be allowed to remain a member of Lloyd's without security, they, on the 17th of that month, addressed the committee as follows: "The letter we addressed to you under date of the 11th inst. notifying the putting an end to our guarantee dated Mar. 24, 1858, on behalf of S., we now hereby withdraw, & declare that such guarantee shall continue in force upon the same terms & conditions as are mentioned in such guarantee." By the rules of Lloyd's one member only of a firm is allowed to act as a broker; but he may obtain a "substitute's ticket," which enables his substitute to contract for him in the house. In Jan. 1862, S. appointed H. his substitute, & H. as such substitute entered into contracts with underwriting members of Lloyd's. All the contracts made after Apr. 1860, whether by S. or his substitute, were made in the name & on account of the partnership. Many of these contracts resulted in debts due to members of Lloyd's from the partnership:—*Held*: the guarantee was to be construed with reference to the circumstances existing in Apr. 1860; it included all transactions by S. in his capacity of broker, after Apr. 1860, whether by himself personally or by H. as his substitute, & whether for his own sole benefit or for the benefit of the firm, & deft. was liable under the guarantee for these partnership debts.—*LEATHLEY v. SPYER* (1870), 1 L. R. 5 Q. P. 595; 39 L. J. Q. P. 299; 22 L. T. 821.

**Liability for guaranteed calls on shares.**—Transfer to escape liability.] See COMPANIES, Vol. IX., p. 393, No. 2486.

**Liability for guaranteed interest on debentures.** See Nos. 609, 610, *post*.

### SUB-SECT. 2.—RECEIPTS BY PRINCIPAL AS TREASURER, COLLECTOR, RECEIVER, ETC.

#### A. In General.

**573. What constitutes receipt of money Delivery to bank clerk.**—At customer's residence.] —*MELVILLE v. DOIDGE*, No. 465, *ante*.

**574.** — Credit allowed by treasurer of poor law union.—Trading in personal capacity with overseers.]—Deft. as surety, became bound to the guardians of a poor law union, by bond conditioned that the treasurer of the union should discharge the duties of his office "by receiving all moneys tendered to be paid to the board of guardians, etc., by paying out of the moneys in his hands of the guardians all orders on him drawn on their behalf," & that he should pay over to the guardians all balances, moneys, etc., due to the union. The treasurer, who was a corn factor, had extensive dealings in corn, &

open accounts in trade with the overseers of several of the townships, who were farmers. No money was received from these townships, but it was the practice of the treasurer to debit the overseers in his trade account with the amount of the poor rate ordered by the guardians to be paid, & then to debit himself with the amount as paid to him as treasurer. His accounts were audited half-yearly, & the credits in corn were allowed by the auditors as payments in money. At the last audit, the auditors found that £239 1s. 10d. was due from him to the guardians:—*Held*: the surety was liable, inasmuch as between the treasurer & the overseers money had in effect passed.—*PATTISON v. BELFORD UNION GUARDIANS* (1856), 1 H. & N. 523; 28 L. T. O. S. 294; 156 E. R. 1309; *sub nom.* BELFORD UNION GUARDIANS *v.* PATTISON, 26 L. J. Ex. 115; 21 J. P. 181; 3 Jur. N. S. 116; 5 W. R. 121, Ex. Ch.

**575. Receipts to which liability extends—Fines on renewal of leases.**—By receiver of rents.]—Under a bond of indemnity given by A. that B. who was appointed general agent of C. the receiver of his rents, & the manager of his estates, should pay over to C. all rents which he should receive, as also the increase & improvements thereof, upon any new contracts or renewals of leases, A. is answerable for all fines received by B. on renewing the leases, which were not paid over by him. *IRISH SOCIETY v. NEEDHAM* (1780), 1 Term Rep. 482; 99 E. R. 1209.

**576.** Money borrowed by overseer Applied to parochial purposes No authority to borrow as overseer.] An overseer has not, by virtue of his office, any authority to borrow money. In an action against a surety on a bond conditioned for the overseer's faithfully accounting for all sums received by him by virtue of his office, the surety is not liable for a sum lent to the overseer, & applied by him to parochial purposes. —*LEIGH v. TAYLOR* (1827), 7 B. & C. 491; 108 E. R. 806.

*Annotation*:—*Refd.* Kirby *v.* Baulster (1831), 5 B. & Ad. 1069.

**577.** — Sums not accounted for Part of amount only paid over Collector of taxes.]—If in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, & that he did not duly demand & enforce payment of the taxes, it is not necessary, on the part of plff., to prove exactly what money he received; for if it be proved that he was to collect a certain sum, & that he paid over a smaller sum, & did not take proper steps to exonerate himself from the residue, plff. will be entitled to recover. *LOVELAND v. KNIGHT* (1828), 3 C. & P. 106; 1 Man. & Ry. K. B. 597.

### PART V. SECT. 3, SUB-SECT. 2.—A.

**a. Receipts to which liability extends—Sums not accounted for.]**—*R. v. PATTON, R. v. McCULLOUGH, R. v. MORAN* (1850), 7 U. C. R. 83.—**CAN.**

**c. Default of receiver.]**—*Re NUGENT'S ESTATE*, [1897] 1 L. R. 464.—**IR.**

**a. Money received before guarantee given.]**—*WALLACE'S FACTOR v. McKINNOCK* (1898), 25 R. (Ct. of Sess.) 642.—**SCOT.**

**b. Money received since specified date.]**—Plffs. declared on a bond, conditioned that W., their treasurer, should pay over all moneys received since Jan. 1, 1866, avowing that on that day he had in his hands a large sum, & received further sums up

to Apr. 6, 1868, when he was dismissed; & that he accounted for all moneys received before that day, but not for a large sum received since. Plea, alleging payment of all moneys since that day; & issue thereon. An arbitrator found that W. admitted \$3,031 to be due by him on Jan. 1; that he had accounted for all moneys received since; & that of all moneys received up to his dismissal, including the \$3,031, the balance was \$1,806.—*Held*: as the breach was only in respect of moneys received since Jan. 1, 1866, plffs. upon this finding could recover nothing.—*ITAWDON CORPN. v. WARD* (1868), 27 U. C. R. 609.—**CAN.**

**c. Whether receipt of school moneys.]**—Where a township treasurer

was by his bond, dated Oct. 6, 1874, bound to duly account for all moneys coming into his hands & applicable to the general uses of the municipality:

—*Held*: the operation of this bond was not extended to school moneys by R. S. O. 1877 (c. 180), s. 213, & R. S. O. 1877 (c. 204), s. 221. *TOWNSHIP OF OAKLAND v. PROPER* (1882), 1 O. R. 330. **CAN.**

**d. Moneys received by officer Against rules of society.]**—Sureties for the due performance by the secretary of a building society of the duties of his office & for the due accounting by him for all moneys of the society are not liable for the misappropriation by the secretary of the funds of the society which, under the rules of the society, ought not to have been paid

**Sect. 3.—Extent of liability: Sub-sect. 2, A. & B.; sub-sects. 3 & 4, A.]**

**578. — Money received before guarantee given.—Collector of rates.]**—The condition of a bond, given to comrs. of sewers by a collector of rates, was, that the collector should at all times render a faithful account to the comrs. for the time being of all such sums of money as had already been collected or received, or which thereafter should be collected or received by him, by virtue of any rates for & on account of such comrs., & should pay to the comrs. for the time being all moneys already received, or which should thereafter be received by him:—*Held*: the collector was bound to account for, & pay to the comrs. for the time being, sums of money collected & received by him, by virtue of a rate made by comrs. acting under a commission, which expired before the execution of the bond. —*SAUNDERS v. TAYLOR* (1829), 9 B. & C. 35; 100 E. R. 14.

**579. — Default of receiver — Money received before security given.]**—A receiver is liable to account as such for all moneys coming to his hands in that capacity at any time, whether before or after the date of the perfecting of his security. A surety who has undertaken to account for what the receiver "should receive & become liable to pay as such receiver" is liable to account for all such moneys as above mentioned. The principle that the appointment of a receiver is merely conditional until his security is perfected, applies only to cases where the question is as to his title as against third parties. It has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received & expended by him as receiver. —*SMART v. FLOOD & Co.* (1883), 49 L. T. 467.

**580. — To account.]**—In ascertaining the liability of sureties under a receiver's recognisance, the ct. proceeds on the principle that the surety is liable, to the extent of the amount of the penalty, for all sums of money which the receiver himself was properly liable to pay into ct. or account for: consequently, where a receiver of rents " & profits" of real estate had insured some of the farm buildings in his own name, & received & misapplied the insurance money, had received, & not accounted for, dividends on Consols in ct. representing proceeds of sale of real estate, had received under an order of the ct., money representing personal estate, to be spent in repairs, which he had misappropriated:—*Held*: the sureties had been properly charged in respect of these three items.—*Re GRAHAM, (GRAHAM v. NOAKES, [1895] 1 Ch. 66; 64 L. J. Ch. 98; 71 L. T. 623; 43 W. R. 103; 39 Sol. Jo. 58; 13 R. 81.*

*See, generally, RECEIVERS.*

**581. — Committee of lunatic—Balance due on accounts & costs.]**—The sureties in a com-

mittee's recognisance, the condition of which was that the committee should obey the orders of the Lord Chancellor with respect to the lunatic's estate, held liable on the default of the committee, not only for the balance reported due from him on his accounts, but also for the costs of proceedings subsequently taken against him for the purpose of enforcing payment of such balance, although the sureties had no notice of the default of their principal until after those proceedings had been taken.—*Re LOCKEY* (1845), 1 Ph. 509; 14 L. J. Ch. 164; 4 L. T. O. S. 390, 409; 41 E. R. 726, L. C.

**582. — Receipts after death of lunatic.]**—The liability of a surety for the committee of a lunatic ceases on the death of the lunatic, & the surety is responsible for the committee only to the extent of his receipts in that character, but not for any sums received by him after the death of the lunatic which it was no part of his duty to receive. The final accounts must consequently be limited to the date of the death of the lunatic.—*Re WALKER, [1907] 2 Ch. 120; 70 L. J. Ch. 580; 96 L. T. 864; 51 Sol. Jo. 482, C. A.*

*See, generally, LUNATICS.*

**B. Rates or Taxes Invalidly Imposed or Collected.**

**583. Effect on liability—Duties actually collected.—Unauthorised collection.]**—A bond with a condition, reciting that the principal obligor, with his sureties, became bound as collector of certain duties assessed under 43 Geo. 3, c. 122, to the comrs. acting for the district under that statute, for the due collection & payment of those duties to the Receiver-General, could not, it seems, be enforced if the statute referred to did not authorise the collection of those duties, though in fact the collector had received sums from the subjects as & for such duties. Such bond may be put in force against one of the sureties, though he were not apprised of the default of the principal collector in not paying over duties collected by him, nor called upon for an indemnity by the comrs., till after the dismissal from office of such collector.

By the condition of the bond it is recited that one of the obligors applied to the comrs. to be appointed to collect the duties, under a certain Act which is described in the condition. Unless he could legally be appointed collector under such Act, & could receive duties under it, the bond cannot be enforced (*LE BLANC, J.*) —*NARES v. ROWLES* (1811), 14 East, 510; 104 E. R. 697.

*Annotations:—Reid, Webb v. James* (1840), H. & W. 89; *Durham Corp'n. v. Fowler* (1889), 22 Q. B. D. 394.

**584. — Defective mode of collection.]**—*KEPP v. WIGGETT, No. 711, post.*

**585. — Invalid rate.]**—Mere laches of the obligor, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties.

to him.—*SPERRY v. DRANSFIELD* (1884), 2 N. Z. L. R. 319 (S. C.).—*N.Z.*

**g. Neglect of clerk—To deliver roll to collector.]**—*TODD v. PERRY* (1861), 20 U. C. R. 649.—*CAN.*

**1. Office of treasurer annual office—No proof of defalcations—During first year of office.]**—J. was appointed treasurer for the county on Mar. 15, 1882, giving a bond in the sum of \$4,000, with sureties, for the performance of the duties of his office. He continued to hold the office until Mar. 15, 1888. Having failed to account for & pay over moneys received by him as such treasurer, after the first

year for which he was appointed to the office, an action was brought on the bond:—*Held*: the office of treasurer, being an annual office, the bond made by J. & the other defts., as his sureties, did not extend beyond the first year he held that office, & as there was nothing to show that there was any defalcation during that year, there must be judgment for defts.—*A.-G. v. HEMKON* (1869), 7 N. S. R. 485.—*CAN.*

**g. Treasurer acting contrary to bye-laws of company—By order of directors.]**—*SPRING HILL MINING Co. v. SHARP* (1876), 3 Pug. 603.—*CAN.*

**h. Bond covering default committed**

**—In first year of appointment.]**—*A.-G. v. CAMERON* (1908), 43 N. S. R. 49.—*CAN.*

**1. Failure to account pursuant to statute.]**—*It. v. O'CALLAGHAN* (1838), 1 I. Eq. R. 439; Jo. & Car. 154.—*IR.*

**PART V. SECT. 3, SUB-SECT. 2.—B.**

**k. Effect on liability—Duties actually collected—Collector's oath of office not taken.]**—The fact that a collector of taxes received the money without any roll having been delivered to him, & without having taken the oath of office, forms no defence for his surety to an action for not paying over such money.—*WHITBY CORPN. v.*

**Pltfs. sued defts., as sureties, on two bonds, the first given to pltfs., as urban sanitary authority, to secure the due performance of the duties of a collector of district rates, under Public Health Act, 1875 (c. 55), & the second given to pltfs., as the corpn. of a borough, to secure the performance by the same person of his duties as collector & receiver of borough rates under Municipal Corporations Act, 1882 (c. 50).** The evidence showed that pltfs. had acquiesced in an irregular mode of accounting on the part of the collector, but that the collector was never suspected of dishonesty until a year after the date of the second bond, when defalcations were discovered, & he was dismissed. The jury in answer to questions put to them found that pltfs. had permitted the collector to retain moneys in his hands for a longer period than a week (which was contrary to Public Health Act, 1875 (c. 55), s. 195), & to the conditions of the bonds, & to a resolution passed by pltfs. before the bonds were given; & that pltfs. had permitted him to mix the proceeds of the different rates:—*Held*: (1) pltfs.' acquiescence in the collector's irregular mode of accounting was not such connivance as to discharge the sureties, & pltfs. were entitled to judgment; (2) on the construction of the second bond, in which the person guaranteed was described as "collector & receiver" the sureties were liable for his breach of the condition to pay over moneys received by him, independently of the question of the validity of the rate.—**DURHAM CORPN. v. FOWLER** (1889), 22 Q. B. D. 304; 53 J. P. 374; *sub nom.* **DURHAM CORPN. v. FOWLER, DURHAM CORPN. v. CRICHTON** 58 L. J. Q. B. 246; 5 T. L. R. 238; *sub nom.* **DURHAM CORPN. v. PORTER, DURHAM CORPN. v. CRICHTON**, 60 L. T. 456, D. C.

*Annotations*:—**Reid. Kingston-upon-Hull Corpn. v. Harding**, [1892] 2 Q. B. 494; **Carlton & Ayrington Union v. Dow** (1899), 68 L. J. Q. B. 380.

**586. — No collection made.**—To debt on bond given to pltf. as treasurer, appointed by the comrs. acting by virtue of a certain Act of Parliament, & the condition of which after reciting that J. had been appointed collector of rates due & payable under the Act was, that J. should collect all rates which he might be directed to demand by virtue of his office, & should deliver a true account in writing of all matters & things committed to his charge, by virtue of the recited Act, & of all moneys by him received by virtue, & for the purposes of the Act, & should pay over all moneys received by him to the treasurer for the time being, relative to the collectorship of the rates, then the obligation to be void, defts. pleaded that during the appointment of J. no rate was made or in any way existed, which he could legally or according to law collect by virtue of his office, & that he did not legally receive any money by virtue or for the purposes of the Act, or relative to the collectorship of the rates:—*Held*: the plea

was a substantial answer to the action.—**WEBB v. JAMES** (1840), 7 M. & W. 279; II. & W. 89; 10 L. J. Ex. 89.

*Annotations*:—**Consd. Kepp v. Wiggett** (1850), 10 C. B. 35. **Reid. Kingford v. Dutton** (1850), 1 L. M. & P. 479; **Skillett v. Fletcher** (1866), 12 Jur. N. S. 295; **Durham Corpn. v. Fowler** (1889), 22 Q. B. D. 391.

#### SUB-SECT. 3.—UNDER GUARANTEE OF RENT.

**587. Construction of guarantee—Guarantee of "all rent reserved under agreement"—Agreement for one year with option of renewal—Option exercised.**—**PHILP v. RYAN** (1901), *Times*, Jan. 12.

**588. Rent for yearly tenancy guaranteed—Notice to quit—Waiver by acceptance of rent—Effect on liability for second year's rent.**—By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year & a waiver of the notice creates a new tenancy taking effect on the expiration of the old one.

M. being yearly tenant to pltf. on the terms of a written agreement, deft. in consideration of pltf.'s continuing M. as such tenant gave to pltf. a guarantee for the rent of the L. farm in the occupation of M. Pltf. afterwards gave M. notice to quit, but on the payment of arrears of rent, withdrew it before the expiration of the current year. The next year the rent became in arrear & pltf. sued deft. on his guarantee:—*Held*: the old tenancy was determined by the notice to quit; the guarantee applied only to the tenancy which existed at the time when it was given, & deft. was therefore not liable.—**TAYLOR v. WILDIN** (1868), L. R. 3 Exch. 303; 37 L. J. Ex. 173; 18 L. T. 655; 32 J. P. 630; 16 W. R. 1018.

*Annotations*:—**Distd. Holme v. Brunskill** (1878), 3 Q. B. D. 195. **Reid. Santley v. Wilde** (1899), 68 L. J. Ch. 681; **Freeman v. Evans**, [1922] 1 Ch. 36; *Je Perrot & Bennett-Stanford's Arbitration*, [1922] 2 K. B. 592; **Simpson v. Batey**, [1924] 2 K. B. 666.

*See, generally, LANDLORD & TENANT.*

#### SUB-SECT. 4.—COSTS OF PROCEEDINGS.

##### A. Against Principal Debtor.

**589. How far recoverable—Notice of intention to sue—Necessity for.**—In an action against the sheriff for taking insufficient sureties in replevin, the assignee of the replevin bond cannot recover as special damage beyond the penalty of the bond, the expenses of a fruitless action against the pledges, unless he gives the sheriff notice of his intention to sue them.

If a man becomes surety for a debtor, the creditor, in case the debtor fails, may recover

**HARRISON** (1859), 18 U. C. R. 603. — **CAN.**

1. — — — — — The treasurer of pltfs., who was also clerk, was in that capacity permitted by resolution of the council to retain the collector's roll for three months, & he was granted a percentage on money received by him for taxes. In an action against him & his surety:—*Held*: when the money came to his hands with which he charged himself as treasurer, the responsibility of the surety began, but the latter should not be charged with any sums which did not appear in the books of the former as treasurer, & which were referable to taxes otherwise received by him.—**VILLAGE OF WESTON v. CONNOR** (1888), 15 O. R.

**595.—CAN.**

m. — — — — — A. was secretary, treasurer & collector of rates for a council. B. became surety for the due discharge of his duties by A., the surety bond referring to A. as secretary & treasurer. Subsequently A. became insolvent, but was retained in his office, in which he subsequently embezzled £128 in his capacity as secretary & treasurer & further large sums in his capacity as collector of rates:—*Held*: B. was only liable in respect of embezzlement committed by A. as secretary & treasurer, & not in respect of embezzlement committed by him as collector of rates.—**MIDDLEBURY DIVISIONAL COUNCIL v. CLOKE** (1885), 3 S. C. 411.—**S. AF.**

#### PART V. SECT. 3, SUB-SECT. 3.

n. *Construction of guarantee—One year's rent guaranteed—Claim for second year.*—B. undertook "to be security to H. for one year's rent of" (1. "at present in the possession of W. & which, on being surrendered by W., B. is to be put in possession of")—*Held*: a limited guarantee for the first year's rent.—**HUTCHINSON v. ROYD** (1854), 6 Ir. Jur. 353.—**IR.**

#### PART V. SECT. 3, SUB-SECT. 4.—A.

o. *How far recoverable—Whether bound to indemnify—Against legal result of actions.*—A person giving a bond to hold harmless in any actions that may be brought, & to pay all

**Sect. 3.—Extent of liability: Sub-sect. 4, A. & B.; sub-sect. 5, A. & B.]**

the debt against the surety but not the costs of a fruitless suit against the debtor, unless he gave notice of his intention to sue (BEST, C.J.).—BAKER v. GARRATT (1825), 3 Bing. 56; 10 Moore, C. P. 324; 3 L. J. O. S. C. P. 145; 130 E. R. 434. *Annotation:—*Reid, Plumer v. Briscoe (1847), 11 Q. B. 46

*Compare* Nos. 1833, 1844, *post*.

**590. — Proceedings taken at surety's request — Agreement as to costs.**—An action having been commenced against a surety on a promissory note, he agreed that, if pltf. would take proceedings against the principal, he (the surety) would pay the extra costs occasioned thereby; pltf. having done so, afterwards issued execution against the surety for the balance due on the note, & also the extra costs; the ct. ordered the execution to be reduced to the extent of the costs included in it.—EVANS v. PUGH (1834), 2 Dowl. 360.

**591. — What costs included.]**

In consideration of pltf.'s having, at the instance of deft. consented to pay to the holder the amount of a dishonoured bill of exchange, on which deft. was liable as indorser, & to bring an action on the bill in pltf.'s own name against H. the acceptor, deft. gave pltf. the following guarantee. "I hereby agree to be answerable to you for all costs, damages & expenses which you may sustain by reason of trying the action, & relating & incidental thereto." Pltf. brought the action against H., who obtained the verdict. H.'s costs of suit were taxed & paid by pltf. The bill of costs of pltf.'s own attorney, in the same suit, having been delivered to but not paid by pltf. he sued deft. on the guarantee: *Held*: he was entitled to recover, as damages, not only the costs which he had paid to H., but also those for which he was thus liable to his own attorney.—SPARK v. HESLOP (1859), 1 R. & B. 563; 28 L. J. Q. B. 197; 32 L. T. O. S. 294; 5 Jur. N. S. 730; 7 W. R. 312; 120 E. R. 1020.

*Annotations:—*Reid, Thacker v. Hardy, Thacker v. Hardy, Thacker v. Whately (1878), 48 L. J. Q. B. 289; *Id* Perkins, Poyser v. Bexfus (1898), 67 L. J. Ch. 451.

*Compare* Nos. 1838, 1855, *post*.

**592. Proceedings against committee of lunatic On failure to obey order of court.]—***Re* LOCKEY, No. 581, *ante*.

**593. Criminal proceedings Costs of prosecution.]—**Deft. guaranteed the honesty of a servant of pltf's. up to £250. The servant, while in pltf's employment, acting in concert with a confederate, from time to time stole a quantity of pltf's cigars of the value of £269. The servant & the confederate were prosecuted by pltf's & convicted, & an order was made for the restitution of the stolen property. Under the order £114 worth of the cigars were recovered. The net costs incurred by pltf's after giving credit for the amount allowed by the county, in tracing the guilty parties & prosecuting them, amounted to £98:—*Held*: it was a reasonable course to prosecute so as to recover the stolen cigars, & the costs incurred by pltf's should be deducted from the value of the cigars recovered before giving deft. credit for it

costs & charges thereby accruing, is bound to indemnify as well against the legal result of any such actions, as for the trouble & expense occasioned by them to the person to be indemnified.—HAMILTON'S EXECUTRIX v. DAVIS & FORD (1844), 1 U. C. R. 176.—CAN.

**p. — Costs & sum secured by recognizance.]—**KEELY v. MURPHY (1837), Sau. & Sc. 479.—IR.

**q. — Expenses incurred on behalf**

*of ship—Covered by "costs" in bail bond.]—*ABERDEEN HARBOUR COMRS. v. ADAM, [1910] S. C. 1009.—SCOT.

**r. — Costs of appeal.]—**BLACKSHIRE v. STEGMANN, EISELEN & ROOR, [1906] T. S. 768.—S. AF.

**s. — Liability on bond de restituyendo.]—**BEPLAT v. BOLD & STONE (1809), 26 S. C. 160; 19 C. T. R. 379.—S. AF.

under his guarantee.—HATCH, MANSFIELD & CO., LTD. v. WEINGOTT (1906), 22 T. L. R. 366.

*Annotation:—*Apud. Assicurazioni Generali de Trieste v. Empress Assec. Corp., [1907] 2 K. B. 814.

**594. Arbitration proceedings—Agreed procedure—Different procedure—Different arbitrator.]—**Pltf's. employed a contractor to execute certain works, & defts. as sureties for the contractor, gave a bond for the due performance & completion of the works in accordance with the contract by the contractor. The contract did not contain any provision that, if any legal proceedings took place between the contractor & pltf's. the contractor would pay pltf's. the costs which he might be ordered to pay if unsuccessful. A dispute arose between the contracting parties which was referred to arbn. The arbitrator gave judgment for pltf's. & ordered the contractor to pay the costs. The costs & the judgment together exceeded the amount of the bond given by defts. Pltf's. sued defts. for the amount of the bond. Defts. admitted liability for the amount of the judgment, but denied that they were liable for the costs. By clause 12 of the contract it was provided that "if any dispute or difference shall arise between the contractor & the council concerning the works or any alterations, additions, or omissions thereto or therefrom, or in anywise relating to this contract, such dispute or difference shall be referred to D. who was the surveyor of the council & his decision thereon shall be final & conclusive." The dispute was not in fact referred to D. but to another arbitrator:—*Held*: as the council did not refer their dispute with the contractor to their surveyor in pursuance of clause 12 of the contract, but had agreed to an independent arbitrator, they would not recover from defts. the costs of the arbn.; & as the procedure adopted was an entirely different method of procedure, of which no notice was given to the guarantors, & as that procedure was not within the contemplation of the parties at the date of the contract, or accepted by the guarantors in substitution for the original procedure, the costs of the arbn. were not reasonably within the contemplation of the parties at the time of the contract, & could not be recovered from the guarantors.—HOOLE URBAN COUNCIL v. FIDELITY & DEPOSIT CO. OF MARYLAND, [1916] 2 K. B. 568; 85 L. J. K. B. 1018; 115 L. T. 21; 80 J. P. 353; 11 L. G. R. 950, C. A.

**B. Other Proceedings.**

**595. Action against sheriff—Insufficient security on replevin bond Costs & damages.]—**If a sheriff take a replevin bond from one surety only, & he be sued thereon by the person making cognisance for having taken insufficient pledges, who recovers damages & costs in such action:—*Held*: the sheriff having sued the surety on the bond for not having returned the goods & suggested breaches according to 8 & 9 Will. 3, c. 11, is not entitled to recover the costs incurred in defending the action against him as such sheriff, & as the surety is deprived of calling on his co-surety for contribution, he is only liable to a moiety of the damages awarded by the jury in the action against the

**t. — Costs of unsuccessful action.]—**IMPERIAL COLD STORAGE & SUPPLY CO., LTD. v. WEIL & CO., [1912] App. D. 747.—S. AF.

**PART V. SECT. 3, SUB-SECT. 4.—B.**

**a. Costs of appointing a new receiver.]—**The sureties for a receiver are liable for the costs of an attachment against the receiver for not passing his account, & for all costs

sheriff.—AUSTEN v. HOWARD (1817), 7 Taunt. 327; 1 Moore, C. P. 68; 129 E. R. 131.

**598. — False return by bailiff—What costs included.]**—If a sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another & subsequent suit between other parties, involving the same question, was obtained.

*Semble*: if in such an action, after he has obtained a rule *nisi* for a new trial, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, & a less sum for costs than were incurred, he may recover his own costs against the surety who did not assent, if it appears that the compromise was, under the circumstances, reasonable.

*Semble*: in such a case the words “costs of any application to the ct. touching or concerning any matter, wherein the bailiff should act or assume to act as bailiff,” will comprise the costs of an application to the ct. to set aside the judgment on which the execution was founded, the return to which gave rise to the action against the sheriff.—FAREBROTHER v. WORSLEY (1831), 5 C. & P. 102, N. P.

**597. Action against sheriff compromised — Assent by some of sureties only — Liability of non-assenting sureties.]**—FAREBROTHER v. WORSLEY, No. 596, *ante*.

**598. Action by creditor against third party — Not authorised by surety.]**—COLVIN v. BUCKLE, No. 725, *post*.

#### SUB-SECT. 5.—LIABILITY FOR INTEREST.

##### A. Apart from Agreement.

*See, generally, MONEY & MONEY-LENDING.*

**599. General rule—Interest payable.]** The rule as to interest being payable on sums which ought to have been paid by a person who has contracted as a surety applies not merely to suretyship contracts but to contracts of indemnity generally.—OMNIUM INSURANCE CORPN., LTD. v. UNITED LONDON & SCOTTISH INSURANCE CO., LTD. (1920), 36 T. L. R. 386.

**600. Fidelity guarantee — Receiver liable for interest—Relief of surety.]**—A receiver, who had omitted to account regularly, became bkpt., being indebted to the trust estate in a large sum. For some time no steps were taken to have his accounts duly passed:—*Held*: under the particular circumstances of the case, his sureties were not liable to pay interest on the balance found due from him, though he himself, if solvent, would have had to pay such interest.

*Semble*: in general, the sureties of a receiver are answerable for such interest as well as for such principal, as the receiver himself is liable to pay.—DAWSON v. RAYNES (1826), 2 Russ. 406; 38 E. R. 411, L. C.

*Annotation*:—*Reid*. *Re Graham*, *Graham v. Noakes*, [1893] 1 Ch. 68.

**601. — Trustee in bankruptcy—Interest surcharged on retention of assets—As penalty.]**—A trustee in bkpcy. & his surety entered into a bond with the Board of Trade in the sum of £500 afterwards reduced to £100, for the due perform-

ance by the trustee of his duties as trustee, subject to a condition avoiding the bond if the trustee should “well & sufficiently perform & execute all & singular the duties required of him as trustee by the Bkpcy. Acts, 1883 & 1890,” or if he should fail therein & the surety should “make good any loss or damage occasioned by any such default to the estate of the bkpt.” The trustee improperly retained for some years a sum of money exceeding £50, & on his default being discovered, he was removed from his office, & pursuant to Bkpcy. Act, 1883 (c. 52), s. 74 (6), he was surcharged with interest at the rate of 20 per cent. *per annum* on the sum he had improperly retained. The trustee made good the sum he had improperly retained, but did not pay the interest with which he had been surcharged:—*Held*: the interest surcharged was in the nature of a penalty & was not a measure of the loss or damage to the estate occasioned by the default of the trustee, & the surety was not liable under the terms of the bond to pay to the Board of Trade the penal interest or any part of it.—BOARD OF TRADE v. EMPLOYERS’ LIABILITY ASSURANCE CORPN., LTD., [1910] 2 K. B. 619; 79 L. J. K. B. 1001; 102 L. T. 850; 26 T. L. R. 511; 51 Sol. Jo. 581; 17 Mans. 273, C. A.

**602. Bill of exchange—Interest from date when bill due.]**—A party who guarantees the due payment of a bill of exchange by the acceptor, is liable for interest upon it, if it be not paid when due.—ACKERMANN v. EIRENSPERGER (1816), 10 M. & W. 99; 16 L. J. Ex. 3; 153 E. R. 1115.

*See, generally, BILLS OF EXCHANGE*, Vol. VI., pp. 327 *et seq.*

**603. Future interest — Proof in bankruptcy.]**—By an indenture of mtgce. the mtgor. assigned to the mtgee. a policy of insurance on the mtgor.’s life to secure the repayment of an advance of £500 which the mtgor. covenanted to repay on a certain date, & the mtgor. & another person as surety jointly & severally covenanted with the mtgee. to pay interest so long after the said date as any principal money remained due, & to pay all premiums on the policy, & if the policy should become void, the cost of effecting a new policy. The mtgor. subsequently agreed to indemnify the surety against any sums which he might be called upon to pay under his covenants with the mtgee. No part of the principal money was repaid, & the mtgor. became bkpt. The mtgee. proved in the bkpcy. for the principal money less an amount at which he valued the policy. The surety claimed, under the agreement to indemnify, to prove for the estimated amount of his liability to the mtgee. for future interest & premiums:—*Held*: the surety was not entitled to prove under either head.—*Re Moss*, *Ex p. HALLER*, [1905] 2 K. B. 307; 71 L. J. K. B. 764; 92 L. T. 777; 53 W. R. 558; 49 Sol. Jo. 538; 12 Mans. 227, D. C.

*Annotations*:—*Reid*. *Re Pyke*, *Davis v. Jeffreys* (1910), 55 Sol. Jo. 109. *Mentd. Re British Salicylates*, [1919] 2 Ch. 155.

**Proof in bankruptcy for interest.]**—*See BANK-*

Vol. VII., pp.

215 *et seq.*

##### B. Under Agreement to Pay Interest.

**604. Claim for interest — Whether necessary before action.]**—M’KEWAN v. THORNTON (1861), 2 F. & F. 591, N. P.

incurred in discharging him & appointing a new receiver.—MAUNSELL v. EGAN (1846), 9 L. E. R. 283; 3 Jo. & Lat. 251.—IR.

#### PART V. SECT. 3, SUB-SECT. 5.—A.

b. Fidelity guarantee—Defalcations of agent—Interest from three months

after proof of loss.]—LONDON (CITY) & CITIZENS’ INSURANCE CO. (1887), 13 O. R. 713.—CAN.

*Sect. 3.—Extent of liability: Sub-sect. 5, B.; sub-sects. 6 & 7.]*

**605. Interest on mortgage—Default in repayment of mortgage—Duration of liability.]**—Upon a mtge. from B. to A., the mtge. deed, dated Feb. 13, 1834, recited that, "as an inducement to A. to advance the money, C. had agreed to covenant for the due payment of the interest." B. covenanted to pay the principal, & interest for the same after the rate of 5 per cent., on Feb. 13, 1835, & C. covenanted "that B. & C., or one of them, would, during the continuance of the mtge. security, pay the interest to become due in respect of the principal sum after the rate of, etc., by two even half-yearly payments, on Aug. 13, & Feb. 13." The indenture also contained a power of sale, on six months' notice, in default of payment of principal & interest, with authority to A., out of the proceeds, to pay herself the principal & interest, "or so much thereof as shall be then due":—*Held*: C.'s covenant was not limited to the payment of the first two half-years' interest, but was a covenant for payment of the interest so long as the principal remained unpaid. —*KING v. GREENHILL*, (1843), 6 Man. & G. 59; 6 Scott, N. R. 869; 12 L. J. C. P. 333; 1 L. T. O. S. 288; 7 Jur. 604; 134 E. R. 808.

**606. Interest on loan—Liability limited to specific amount.]**—Deft. as surety, bound himself jointly to the banking co. of which pltf. was public officer in the sum of £500, the condition of the bond being that if the obligors should from time to time pay all & every such sum or sums of money as should become due to the bank for money advanced to deft.'s co-obligor, & pay interest at 5 per cent. *per annum*, for such sum or sums of money as aforesaid, to be computed as is usual with the banking co. in ordinary banking accounts with them; & also the lawful commission, charges & expenses incident to or occasioned by the transactions or matters between the bank & the co-obligor; & should indemnify & save harmless the banking co. from all actions, suits, & expenses, & all liability whatsoever by reason of the transactions & matters, then the bond was to be void. Provided that the principal moneys to be ultimately recovered on the bond were thereby limited not to exceed £250, & that the obligors or any of them should not be liable to pay, by virtue thereof, any greater principal sum than £250. But that the bond should be a continuing security to that amount, for the sums from time to time owing as aforesaid, exclusive of interest to be computed as aforesaid, commission, costs, charges, & expenses:—*Held*: deft. was liable on this bond only for £250 principal moneys advanced, & interest accrued upon that sum; but not for interest upon any further principal sum advanced by the bank. —*MEEK v. WALLIS* (1872), 27 L. T. 650; *sub nom.* YORK CITY BANKING Co. v. WALLIS, 36 J. P. Jo. 741.

**607. Judgment against debtor—Release of liability for interest—Merger.]**—By a deed £1,400 was advanced to H. on the security of three life policies, whereby H. covenanted to keep up the premiums & pay interest at 3 per cent. on the loan. By a covenant in the deed, which was made between M. of the one part, G. & L., sureties

of the second part, & H. of the third part, G. & L. covenanted with M. "that they or one of them will, during the continuance of the present security, in the event of the premiums on the said policies . . . & the interest in respect of the said principal sum of £1,400 not being paid, as to the premium within three days, & as to the interest within thirty days, of their falling due by H. . . . duly pay the premiums . . . & also pay the interest on the said sum of £1,400. Judgment was recovered for the £1,400 against H.:—*Held*: it operated as a merger with regard to the liability to pay future interest, & the surety was released. *Semble*: there could be no merger of interest accrued before the judgment.

The second defence, that H. [the principal debtor] had made no default in payment of the premiums on the policies & that without such default pltf. cannot recover, is based & depends upon the words of the covenant entered into by G. & deft., that they "will during the continuance of the security in the event of the premiums on the policies & the interest in respect of the principal sum of £1,400 not being paid" duly pay the premiums & the interest on such sum, & it was contended before me that the double event—viz., both the non-payment of the premiums & the interest, must exist as a condition precedent to the liability of the sureties to pay, that the word "and" could not be treated as "or". In my opinion this argument must fail; reading the whole covenant together, & having regard to the object of it, which was clearly to secure the payment of both premiums to keep up the security & interest upon the loan, it seems to me that the true way to read the covenant is this, that in the event of the non-payment of both premiums & interest, that is unless both were paid, the liability shall attach for so much as remains unpaid. This is what clearly was, as I think, the object of the parties to be collected from the language & words of the covenant, & it never could have been in the contemplation of either party that a partial performance of the obligation, viz., by paying the premiums, should exonerate the obligor from the performance of it in its integrity (*HAWKINS, J.*). —*FABER v. LATHOM* (EARL) (1897), 77 L. T. 108.

**608. — Claim for principal sum barred—Interest accrued within six years before action.]**—In an action on a guarantee it appeared that deft. had guaranteed to pltf., a banking co., payment of all moneys which might be owing to them in account with a customer with interest, commission, & other banking charges. It was provided that the guarantee should be a continuing guarantee, & should not be withdrawn except by six months' written notice from the guarantor. Pltf. made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action, but made no advances subsequently to that period, & the customer paid sums in to his account with the bank against his liability from time to time down to a period within six years before the action. At the end of each half-year pltf. debited him in account with the interest for the half-year on the amount owing by him from time to time, & carried forward the balance to his debit as the amount owing at the commencement of the next half-year:—

**PART V. SECT. 3, SUB-SECT. 5.—B.**

*Interest on loan—Liability limited to specific amount.]*—Sureties undertook to pay on demand all sums of money which the principal debtor should from time to time owe, "provided nevertheless that the total

amount to be recoverable from them shall not exceed in the whole the sum of £3,900, together with such further sum for interest charges as shall from time to time have accrued or become due & payable thereon":—*Held*: sureties were liable for interest in

debtor's overdraft for £3,900 for the whole period covered by the guarantee, & not merely from the date of demand for payment made on them. —*NATIONAL BANK OF SOUTH AFRICA v. GRAAFF* (1904), 21 S. C. 457; 14 C. T. R. 680.—S. AF.



*Held*: plffs.' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by Stat. Limitations, but the action was maintainable in respect of interest which had accrued due from the customer within six years before the action & had not been paid.—*PARR'S BANKING CO. v. YATES*, [1898] 2 Q. B. 460; 67 L. J. Q. B. 851; 79 L. T. 321; 47 W. R. 42, C. A.

*Annotations*:—*Reid*. *Ascherson v. Trolegar Dry Docks & Wharf Co.*, [1909] 2 Ch. 401; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833.

**609. Interest on debentures—Subsequent scheme of arrangement—Rate of interest reduced.**—*Applts. insured by a policy the principal & interest of debentures of a limited co., the directors of which, resps. in the appeal, by an agreement undertook to repay to the insurers all sums within a prescribed amount which the latter should have paid under the policy. Default was made in payment of the debenture interest, & applts. finding themselves unable to meet their liabilities, a resolution for their voluntary winding-up was passed; & a scheme of arrangement was subsequently sanctioned by the ct. under which, "in lieu of its liabilities under such policies," the rate of interest payable by applt. corp'n. was, as from the date of the winding-up resolution, reduced, & the time for payment of principal was extended. A payment of interest was made by applts. calculated at the original rate up to the resolution for winding up & at the reduced rate for the period subsequent thereto, & applts. claimed to be reimbursed by resps.:*—*Held*: resps. were not liable, as the payment was made wholly under the scheme, & not under the policy, & no distinction could be drawn between the amount calculated at the higher & that at the lower rate of interest.—*MORTGAGE INSURANCE CORPN., LTD. v. POUND* (1895), 65 L. J. Q. B. 129; 11 T. L. R. 543, H. L.

**610. Dissolution of company—Proof for future interest.**—*A. guaranteed B. the regular payment of the interest payable under the debenture of a limited co. until the principal sum secured by the debenture was repaid by the co. Sometime afterwards the co. went into liquidation & was dissolved by virtue of Cos. Act, 1862 (c. 89), s. 143. Subsequently A. became bkpt.:*—*Held*: notwithstanding the dissolution of the co., B. was entitled to prove in A.'s bkpty. for the estimated value of the future interest payable under the guarantee.—*Re FITZGEORGE, Ex p. ROBINSON*, [1905] 1 K. B. 402; 74 L. J. K. B. 322; 92 L. T. 206; 53 W. R. 384; 49 Sol. Jo. 204; 12 Mans. 14.

*Annotations*:—*Distd. Re Moss, Ex p. Hallet*, [1905] 2 K. B. 307. *Consd. Re Pyke, Davis v. Jeffreys* (1910), 55 Sol. Jo. 109.

**611. Voluntary release as to interest—By person**

#### PART V. SECT. 3, SUB-SECT. 6.

**c. Liability limited to amount of notes secured.**—*A bill of sale given as collateral security to promissory notes of even date & clearly meant to become void on satisfaction of notes cannot be treated as security for advances subsequent to the satisfaction of the notes.*—*AMHERST BOOT & SHOE CO. v. CARTER* (1922), 70 D. L. R. 110.—*CAN.*

#### PART V. SECT. 3, SUB-SECT. 7.

**612 i. Construction of promise—Whether joint or several.**—*H.*, having been appointed collector, signed the following contract at the foot of the instrument appointing him: "I agree to collect & bind myself, by my sureties, in the sum of £250." Immediately under, S. & F., his sureties,

signed the following: "We hereby agree to become security for the due fulfilment of the above contract":—*Held*: the sureties were not jointly liable with their principal, but the agreements were distinct.—*YORK SCHOOL TRUSTEES v. HUNTER* (1860), 10 C. P. 359.—*CAN.*

**612 ii.** ————] — *HARPER v. KNOWLSON* (1863), 2 E. & A. 253.—*CAN.*

**612 iii.** ————] — *Where a party becomes surety to another under an instrument which, in terms, creates only a joint liability, then, in the absence of proof to the contrary, the intention of the parties must be taken to be that the surety is only liable to the extent limited by the instrument & does not become a surety out & out.*—*MAYTAG CO. v. KOLB* (1915), 32 W. L. R. 3; 23 D. L. R. 221.—*CAN.*

entitled as tenant for life—Extent of discharge.]—*COATES v. COATES*, No. 031, *post*.

#### SUB-SECT. 6.—UNDER GUARANTEE OF DIVIDENDS OR SHARES.

*See COMPANIES*, Vol. IX., pp. 598, 599, Nos. 3997–3999; *CONTRACT*, Vol. XII., p. 175, No. 1295.

#### SUB-SECT. 7.—JOINT, SEVERAL OR JOINT AND SEVERAL LIABILITY.

*See, generally*, *CONTRACT*, Vol. XII., pp. 24 *et seq.*

**612. Construction of promise—Whether joint or several.**—*COLLINS v. PROSSER*, No. 702, *post*.

**613.** ————] — *LEE v. NIXON*, No. 703, *post*.

**614.** ————] — *Assumpsit by plff. against defts. jointly, upon the following guarantee*: "In consideration that you will sell to F. the distillery situate at, etc., & will take F.'s acceptance to be dated Sept. 29, 1849, for £400, the amount of the purchase-money, & interest, payable at six months after the date, we undertake & guarantee that the sum of £400 & interest shall be duly paid to you when the acceptance arrives at maturity, in the proportion of £200 each:—*Held*: defts. were severally liable to plff. to the extent only of £200 each."—*FELL v. GOSLIN* (1852), 7 Exch. 185; 21 L. J. Ex. 145; 155 E. R. 909.

**615.** ————] — *ELLIS v. IMMANUEL*, No. 027, *post*.

**616. Original joint liability—Subsequent separate promise.**—*A surety who as such was indebted together with his principal upon a joint note received from the holder a letter, stating that the holder was about to make the principal a bkpt. but could not proceed without joining the surety, & asking whether the surety would join the principal in a fresh note payable jointly & severally. The surety's solr. answered that the surety would in a post or two pay the amount & interest due on the joint security:*—*Held*: the contract was not changed, & the surety had, neither at law nor in equity, rendered himself severally liable.—*JONES v. BRACH* (1852), 2 De G. M. & G. 886; 22 L. J. Ch. 425; 20 L. T. O. S. 230; 42 E. R. 1110, J. J.

*Annotations*:—*Reid*. *Other v. Iveson* (1855), 3 Drew. 177. *Mentd.* *Beresford v. Browning*, *Browning v. Beresford* (1875), L. R. 20 Eq. 561.

**617. Joint liability—Extinguishment by death of one.**—*THORPE v. JACKSON*, No. 091, *post*.

— — — —] — *OTHER v. IVESON*, No. 095,

**612 iv.** ————] — *ARMSTRONG v. CAMILL* (1880), 6 L. R. Ir. 140.—*IR.*

**612 v.** ————] — *A bond for a cash-credit being signed by a co. & two individual partners, & also by another party & the principal, for whose behoof the credit was granted:*—*Held*: there were only two cautioners, & the individual partners & the co. were not liable each in a separate share, but together only in one single share.—*CHRISTIE v. REID* (1826), 4 Sh. (Ct. of Sess.) 368.—*SCOT.*

**612 vi.** ————] — *ALEXANDER v. SCOTT* (1827), 6 Sh. (Ct. of Sess.) 150; 3 Fac. Coll. 142.—*SCOT.*

**612 vii.** ————] — *COMMERCIAL BANK OF SCOTLAND v. SPROTT* (1841), 16 Fac. Coll. 955.—*SCOT.*

**612 viii.** ————] — *MACBRIDE v. CLARK, GRIFFITHSON & CO.* (1865), 4 Macph. (Ct. of Sess.) 73.—*SCOT.*



of liability: Sub-sect. 8, A. & B.]

**SUB-SECT. 8.—DEDUCTIONS TO WHICH SURETY ENTITLED.**

**A. Payments Made by Principal Debtor.**

See Part IX., Sect. 1, sub-sect. 1, A. (b), *post*.

**B. Dividends Received by Creditor in Bankruptcy of Principal Debtor.**

For position of parties in bkpey. generally, see Part XI., *post*.

**619. Necessity for payment by surety—Before right to deduction.]**—Where, after proof of a debt, a surety pays part of it to the creditor, but not in discharge of the whole debt, the creditor may receive dividends on the full amount of his proof.

There was no payment here of the entirety, nor any partial payment in discharge of the entirety. By the terms of the statute [6 Geo. 4, c. 16, s. 52] the surety is only entitled to stand in the place of the creditor, when he pays the debt, or any part thereof, in discharge of the whole debt (SIR GEORGE ROSE). *Re SNELL, Ex p. COPESTONE* (1839), Mont. & Ch. 262; 3 Deac. 546; 4 Deac. 54.

See, also, Nos. 620, 621, 625, 626, 628, *post*.

**620. Extent of deduction—Dependent on construction Whether guarantee of whole or part of debt.]** Surety by bond for advances generally, but under a limited penalty, not liable beyond that amount, & paying that sum, is entitled to a proportion of the dividends on the proof by the creditor to a greater amount under the bkpey. of the principal debtor.

The rule certainly has been that where a man, engaged for the whole of a debt, pays only a part, he has no equity to stand in the place of the person paid. That brings it to the question, what is this engagement, whether for the whole or a part? . . . The instrument upon the face of it is an agreement to advance all such sums as the two bkpts. should draw for, & the bond is for £10,000. A written notice was given by the bankers to the surety, & it appears they had swelled the debt to £20,000. The commission afterwards issued. Proof was made by the bankers to the extent of £20,000, they called upon the surety to pay £10,000. He did pay alone £4,000, & was willing to pay the residue upon having an assignment to him of the benefit of proof made by the principal creditor. It is clear that if the debt had been only £10,000 this equity would have resulted, & he could have compelled the bankers to prove for his benefit & make over their securities. But it is said, here the debt is £20,000 & they are entitled to hold the whole proof against the surety. The question comes round to this, whether according to the true nature of such an engagement it was competent to these bankers to go on without giving notice to the surety, for this is a case in which they contracted to give him notice before forfeiture of the bond; whether they were at liberty to swell the demand to his prejudice beyond £10,000. The agreement was to advance all such sums as should be required, but it is limited by an express contract for an obligation to secure all those sums; & the question is whether that limitation in the extent of the obligation is not a sufficient ground for the inference that those sums were not to be extended beyond £10,000 to the destruction of every right of the surety. Take the case of two

sureties, each for the separate sum of £10,000, each paying the creditor, would be entitled to stand in his place for the sum paid. It would be very strong to hold that, as they have taken but one surety, he shall be in a worse situation. The bankers are not entitled in equity to say as against the surety that their demand to more than £10,000, the amount of the bond he has given, upon which he would be *primâ facie* entitled to stand in their place (LORD ELDON, C.).—*Ex p. RUSHFORTH* (1805), 10 Ves. 409; 32 E. R. 903.

*Annotations:—Apld.* Paley v. Field (1806), 12 Ves. 435. *Consd.* Reed v. Norris (1837), 2 My. & Cr. 361; Gray v. Seckham (1872), 7 Ch. App. 680; Ellis v. Emmanuel (1876), 1 Ex. D. 157. *Refd.* *Re* Garner, *Ex p.* Holmes (1839), 4 Deac. 82; Jackson v. Magee (1842), 3 Q. B. 48; *Re* M'Master (1858), 32 L. T. O. S. 288; *Re* Croudace (1866), 15 L. T. 19; Midland Banking Co. v. Chambers (1868), L. R. 7 Eq. 179; *Re* Parker, Morgan v. Hill, [1894] 3 Ch. 400. *Mentd.* *Re* Wyatt & Thompson, *Ex p.* Groom (1837), 2 Deac. 265; Thompson v. Deham, Thompson v. Goodman (1812), 1 Hare, 358.

**621. ————.]**—Surety for indemnity to a limited amount, having paid to the extent of his engagement, entitled to dividends upon proof by the creditor under the bkpey. of the principal debtor, subject to a deduction of the proportion of dividend upon the residue of the debt proved, beyond that for which the surety was engaged, supposing that expunged.

This instrument marks distinctly that the sum for which the surety was to be answerable, was as against him to be considered as the whole amount of the creditor's demand . . . The proviso, which qualifies, & controls all the rest of the instrument declares expressly that the true intent & meaning is that the bankers shall not be indemnified by pltf. by virtue thereof for any loss they should sustain by giving credit to B. beyond the sum of £1,500 & interest. . . I hardly know how the parties could have more clearly provided, not merely that pltf. should not be called upon to answer more than £1,500, but that with regard to him the creditor should be considered as limited to that sum (GRANT, M.R.).—*PALFY v. FIELD* (1806), 12 Ves. 435; 33 E. R. 161.

*Annotations:—Apld.* *Bardwell v. Lydall* (1831), 7 Bing. 489. *Consd.* *Hobson v. Bass* (1871), 6 Ch. App. 792; Ellis v. Emmanuel (1876), 1 Ex. D. 157. *Refd.* *Re* Garner, *Ex p.* Holmes (1839), 4 Deac. 82; Bower v. Mann (1811), Cr. & Ph. 351.

**622. ————.]**—Deft. guaranteed pltf's. against debts to be contracted by M. to the extent of £100. M. became indebted to pltf's. to the amount of £625, upon which, by a composition with his creditors, he paid them 8s. 7d. in the pound, leaving due to pltf's. out of their whole claim £356. Defts. being sued for that sum on their guarantee: *Held*—: they were entitled to deduct from it £171 13s. 4d., the amount of the dividend of 8s. 7d. in the pound upon £100.

The guarantee [was] in these terms—"in consideration of your giving credit in the way of your trade to M., I guarantee to you the payment of any debt which he may contract with you from time to time as a running balance of account to any amount not exceeding £100." . . . Deft. contended that pltf. had no right to deduct the whole sum received as a dividend, from the gross amount of the debt, & to hold deft. liable on the guarantee for the residue of the demand up to the extent of the guarantee; but that the dividend received by pltf. was to be applied ratably to the whole debt, as well the part covered by the guarantee as the part which was left uncovered & consequently a ratable deduction was to be made

**PART V. SECT. 3, SUB-SECT. 8.—B.**

**6191. Necessity for payment by surety—Before right to deduction.]**—*Re* STRATFORD FULL, ICE & CONSTRUCTION CO., COUGHLIN & IRWIN'S CLAIM (1913), 28 O. L. R. 481; 4 O. W. N. 1051.—CAN.

for the sum covered by the guarantee. . . . We are of opinion that such deduction ought to be made. If the whole amount of the debt from M. had not exceeded £400, it is clear that debt. would have received the full benefit of the dividend, . . . & although the amount of the debt does exceed £400, & thereby the position of the creditor is so far altered, that one part of his debt, to the extent of £400 is guaranteed, & the remainder not, still there seems no reason why the application of a payment of so much in the pound upon the whole debt should in any way be affected by the collateral circumstances of the guarantee. . . . For, suppose the sum which exceeds £400 had been covered by the guarantee of another person, could it be contended that plffs. might have applied the whole of the dividends to either part of the demand at their own election, & thus have varied, at their own pleasure, the extent of the responsibility of the two sureties? In the case supposed, each of the sureties might have claimed a ratable deduction, out of each pound of the amount of debt, to which their respective guarantees extended (TINDAL, C.J.).—*BARDWELL v. LINDALL* (1831), 7 Bing. 489; 5 Moo. & P. 327; 9 L. J. O. S. O. P. 148; 131 E. R. 189.

*Annotations*.—*Follid*. (See *r. Pack* (1863), 33 L. J. Q. B. 49. *Consd.* *Ellis v. Emmanuel* (1876), 1 Ex. D. 157. *Reid*. *Baikes v. Todd* (1838), 1 Per. & Dav. 138; *Re Garner, Ex p. Holmes* (1839), Mont. & Ch. 301; *Bower v. Morris* (1841), Cr. & Ph. 351; *Thornton v. McKewan* (1862), 32 L. J. Ch. 69.

623. — — — —.]—Where a limited guarantee has been given, & the limit has been exceeded by the guarantee, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceeds the amount of such guarantee.

Where, in such a case, the guarantee has recovered the whole sum guaranteed in an action against the guarantor, the right of the latter to file a bill for an account & payment to him of such dividends is not barred by the fact that he might have pleaded a set-off to that extent in the action, & omitted to do so.

Such a claim is not a "mere money demand" within the meaning of the principle which excludes suits for damages merely.

The construction of this guarantee is clear. . . . The question can only arise on a case of this description, where there is a large general debt, part only of which is secured & the creditor has received a sum generally in part payment of the debt, which still leaves more than the secured amount due. Then a question may arise whether the creditor is entitled to the benefit of the whole guarantee, or whether he must give credit for a proportional part of what he has received. I cannot hold that there is anything special in the form of this guarantee to take it out of the general rule (*PAGE-WOOD, V.-C.*).—*THORNTON v. M'KEWAN* (1862), 1 Hem. & M. 525; 1 New Rep. 16; 32 L. J. Ch. 69; 11 W. R. 140; 71 E. R. 230.

*Annotations*.—*Follid*. *Goodwin v. Gray* (1874), 22 W. R. 312. *Reid*. *Midland Banking Co. v. Chambers* (1869), 4 Ch. App. 398; *Ellis v. Emmanuel* (1876), 1 Ex. D. 157. *Consd.* *Luke v. South Kensington Hotel Co.* (1879), 27 W. R. 514.

624. — — — —.]—A., wishing to be allowed from time to time to overdraw his account with his bankers, plffs., deft. gave them the following document: "On demand I promise to pay to G. & Co., plffs., £300, with interest on same, to secure an advance now or hereafter on a banking account with A." A. became insolvent & paid

by agreement with his creditors a composition of 10s. in the pound, & plffs., who had advanced much more than £300, received the dividend on their whole advance, leaving a balance on the whole of more than £300:—*Held*: the promise by deft. was only to repay an advance of £300 & he was therefore only liable for the balance of £300 after deducting 10s. in the pound from that amount.

The question is whether this document amounts to a promise to be liable to the extent of £300 in respect of an advance to that amount, or a general promise to pay £300 on any balance, however arrived at, that may remain due on a general advance by plffs. to the principals. The former is the true construction of the document, & the case is on all fours with *Bardwell v. Lindall*, No. 622, *ante* (COCKBURN, C.J.).—*GEE v. PACK* (1803), 33 L. J. Q. B. 49; 9 L. T. 200. *Annotation*.—*Reid*. *Ellis v. Emmanuel* (1876), 1 Ex. D. 157.

625. — — — —.]—J. gave to B. a guarantee: "I hereby guarantee to you the payment of all that you may supply to E., but so as my liability to you under this or any other guarantee shall not at any time exceed the sum of £250." J. gave a similar guarantee. B. supplied goods to E. to the amount of £657. E. then became bkpt. B. proved for the whole sum, & then called on the guarantors, who paid him £250 each. B. having afterwards received a dividend of 2s. 1d. in the pound on the £657:—*Held*: each of the guarantors was entitled to a part of this dividend, bearing to the whole the same proportion as £250 to £657.

If a person guarantees a limited portion of a debt, all the authorities show that if he pays that portion, he has in respect of it, all the rights of a creditor. The question is whether the guarantor means "I will be liable for £250 of the amount which B. shall owe you," or "I will be liable for the amount which B. shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250." I think the meaning of the instrument is "I guarantee the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250. When it reaches that sum I am to be a surety for it with all the rights of a surety." It is not then competent for the creditor to say "I will increase the debt, I will take a dividend on the whole, & although you have paid me the £250, you shall have no rights as a surety till I am paid in full." A surety may enter into an obligation to be liable to a limited amount for the ultimate balance remaining after all money obtainable from other sources have been applied in the reduction of the debt, but a guarantee of that nature must be in a very different form from the present (*LORD HATHFIELD, C.*).—*HOBSON v. BASS* (1871), 6 Ch. App. 792; 19 W. R. 902, 1 L. C.

*Annotation*.—*Reid*. *Ellis v. Emmanuel* (1876), 1 Ex. D. 157.

626. — — — —.]—Four directors of a co. by way of security for any balance which might be due from the co. to a bank, gave the manager of a branch of the bank their promissory note for £2,000, & the manager indorsed the note to the bank. The co. was wound up. The bank proved in the winding-up for £3,059 as due by the co. to the bank, & was declared entitled to a dividend of £1,051 on that sum. The bank afterwards brought an action against one of the makers of the note, who paid the bank £2,007 for debt & interest due on the note:—*Held*: the giving the note was in pursuance of an ordinary contract of

Secl. 3.—Extent of liability: Sub-secl. 8, B.]

suretyship, & the surety who had paid the £2,067 was entitled to receive from the bank a share of the dividend, bearing the same proportion to the whole dividend as the sum paid by him bore to the sum proved for by the bank. The rule established that in similar cases in bkpcy. the sum paid by the surety is, in calculating the proportions of dividend, to be considered as expunged, does not apply to cases in winding-up.

When a surety is only surety for a part of the debt, & has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged (MELLISH, L.J.).—GRAY v. SECKHAM (1872), 7 Ch. App. 680; 42 L. J. Ch. 127; 27 L. T. 290; *sub nom.* *Re GIFTYNOG LLANTWIT COLLIERY CO., LTD.*, GRAY v. SECKHAM, 20 W. R. 920, L. J.J. Annotation:—*Distd.* *Ellis v. Emmanuel* (1876), 1 Ex. D. 157.

627. — — — — —.]—Where a surety has become party to a bond conditioned for the payment of the debt & interest, with a proviso that he shall not be liable for more than a certain sum, & the creditor under a liquidation of the affairs of the debtor receives a dividend on the whole of the debt & interest then due, the right of the surety to have a proportion of those dividends applied in reduction of the claim against him depends upon whether the bond amounts to a guarantee of the whole debt with a limitation of the sum which he is to be called upon to pay, or to a guarantee of part only of the debt. In the former case he is liable for the whole unpaid balance to the extent of the sum limited in the proviso. In the latter case he is entitled to a deduction *pro rata* in respect of the dividends.

*Prima facie*, a continuing guarantee, limited in amount, to secure a floating balance, is, as between surety & creditor, a guarantee of so much only of the debt as does not exceed the sum named in the limitation, for it is to be presumed that the surety did not contemplate the creditor's allowing the debtor to become indebted to him beyond that amount. No such presumption arises where the debt, in respect of which the bond is given, is an ascertained amount exceeding the sum named in the limitation.

In every one of the cases [*Ex p. Rushforth*, *Gray v. Seckham*, Nos. 620, 626, *ante*] the limited suretyship was to secure a floating balance. These decisions establish that in such a case the suretyship is, *prima facie* at least, to be construed as a security for a part only of the debt, from which the consequence stated by MELLISH, L.J., [in *Gray v. Seckham*, No. 626, *ante*], follows; & I agree with what is intimated by LORD HATHERLEY in *Hobson v. Bass*, No. 625, *ante*, that if a creditor taking a limited security for a floating balance means it to be a security for the whole of the debt, & not merely for a part, he should take care that this is clearly expressed, for the *prima facie* construction is the other way (BLACKBURN, J.).—*ELLIS v. EMMAUEL* (1876), 1 Ex. D. 157; 46 L. J. Q. B. 25; 34 L. T. 553; 24 W. R. 832, O. A.

Annotation:—*Reid.* *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75.

628. — — — — —.]—Where, under the terms of a guarantee the surety becomes a surety for the whole amount of the debt, although his liability is limited to a specified sum, & has paid that sum to the creditor, the creditor is nevertheless entitled to prove in the bkpcy. of the debtor for the full amount of his debt without deducting

therefrom the amount received by him from the surety. It makes no difference whether the payment was made before or after the date of the receiving order.

Where the surety is surety for a part of the debt as between the principal creditor & the debtor, the right of the surety [to stand *pro tanto* in the shoes of the creditor] arises merely by payment of the part, because that part, as between him & the creditor, is the whole for the purpose of the guarantee. All that I have to do is to look at the guarantee & determine whether the surety became surety for the whole or for a part of the debt. It is true that his liability was to be limited to a certain amount, but, notwithstanding that his suretyship was in respect of the whole debt. . . . If there is any doubt about it, it seems to me that the last clause of the guarantee is sufficient to show that the bargain was that the bank should have the benefit of all sums paid by the debtor, whether by way of dividend or otherwise & of all securities held by the bank against the debtor's liability, until the whole amount of the debt was discharged (VAUGHAN-WILLIAMS, L.J.).—*Re SASS, Ex p. NATIONAL PROVINCIAL BANK OF ENGLAND*, [1896] 2 Q. B. 12; 65 L. J. Q. B. 481; 74 L. T. 383; 44 W. R. 588; 12 T. L. R. 333; 40 Sol. Jo. 686; 3 Mans. 125.

Annotation:—*Reid.* *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37.

629. — — — — — Creditor proving as trustee for surety —After payment in full by surety.]—*Ex p. ATKINSON* (1792), 2 Christian's Bankrupt Laws, 2nd ed., 355.

Annotation:—*Mentd.* *Phillips v. Poland* (1866), Har. & Ruth. 235.

630. — — — — — Future dividends.]—Bills of exchange amounting together to £523, drawn by A., & accepted for his accommodation by B., were deposited by A. with his bankers, as a security for any floating balance which might be due from him to them on his banking account. A. became bkpt. & his bankers proved a debt of £7,520 against his estate, exhibiting the bills of exchange as a security, but not proving on them specifically. The bankers afterwards received a dividend of 2s. in the pound on the whole debt. B. subsequently paid the amount of the bills:—*Held*: B. was entitled to have the dividend of 2s. in the pound, on the value of the bills, refunded by the bankers, as well as to receive the future dividends on the same amount.

These being mere accommodation bills, B., as between himself & the bkpt., was a mere surety for the £523. Upon what principle is the surety entitled to the future & not to the past dividends? It was contended that the security not being for any specific part of the debt, but for a floating balance, the creditor was entitled to receive all the dividends upon the whole debt, & to come upon the surety for the difference, or so much as might be necessary to pay the creditor in full, upon the principle that the creditor receiving money would be entitled to appropriate it to the part of the debt which is not secured. But the order negatives the application of any such rule, by giving to the surety all future dividends upon the £523; & that principle of appropriation can have no application to a case in which the payment is specifically on account of the debt secured. It is clear that the payment of 2s. in the pound upon the whole debt, including the £523, was a payment specifically of 2s. in every pound of the £523; & if the creditor, who has received the whole £523 from the surety, also retains the 2s. received as dividend upon that sum, he will be paid above £50 beyond

the amount of the debt secured. That the dividend so received cannot be treated as a payment generally on account of the whole debt, but must be considered as a payment of part of each pound of the debt, is clear from the form in which it is made; & the law directing the payment, & several decisions, have held that such payments are to be so considered, particularly the case of *Bardwell v. Lydall*, No. 622, *ante*. The earlier cases of *Paley v. Field*, & *Ex p. Rushworth*, Nos. 620, 621, *ante*, proceeded upon a similar principle. If, then, the dividend received upon £523 is to be attributed to that portion of the debt which was secured by the bill of B. it is immaterial that the bankers had larger or other demands against the bkpt.; & if there had been no other debt but £523 due to the bankers, the right of B. paying the debt, to receive all the dividends upon such debt against the estate of the bkpts., would not be questioned (LORD COTTENHAM, C.).—*Re GARNER, Ex p. HOLMES* (1839), Mont. & Ch. 301; 4 Deac. 82; 9 L. J. Ch. 33; 3 Jur. 1023, L. C.

*Annotations*.—*Appl. Hobson v. Bass* (1871), 6 Ch. App. 792. *Consd. Ellis v. Emmanuel* (1876), 1 Ex. D. 157. *Reid. Bower v. Morris* (1841), Cr. & Ph. 351; *Re Fernandez, Ex p. Hope* (1844), 3 Mont. D. & De G. 720; *Re Clark, Ex p. Stokes & Goodman* (1848), De G. 618; *Midland Banking Co. v. Chambers* (1868), L. R. Eq. 179.

**631. — Dividends before proof.**—Where proof is made against a bkpt.'s estate on a guarantee entered into by the bkpt. on behalf of another person, if at the time of proving the creditor has received part of the debt, either by payment or as a dividend from the estate of the principal debtor, or even if such dividend has been declared though not actually paid, such creditor will be allowed to prove for the residue only after deducting the amount so paid or declared. But if after proof is made the creditor receives a dividend from the estate of the principal debtor that will not be deducted from the amount of his proof.

In Nov. 1889, the bkpt. gave to applts. who were a German banking co. a guarantee on behalf of his son to the extent of £7,500. In Jan. 1891, the son went into liquidation in Germany, & in Apr. 1891 a receiving order was made against the bkpt. in England upon which adjudication followed. The guarantee provided by its terms that the engagement of the guarantor was to be continuing & standing guarantee to the amount of £7,500 until notice in writing terminating it should be given, & until such notice it should not be considered as wholly or partially satisfied by the payment or liquidation at any time of any sum or sums of money for the time being due to the bank, but should extend to cover & be security for all future sums of money at any time due notwithstanding any such payment or liquidation; & it was further declared that all dividends, compositions & payments received from other parties should be taken & applied as payments in gross, & should not go or be taken as in discharge of any part of the guarantee, but that the guarantee should apply to & secure any ultimate balance which should remain due.—*Held*: on a proof made in the English bkpcy. that credit must be given by applts. for a sum of £1,593 received by them by way of dividend in the German liquidation of the son before the date of proof, but that certain further sums alleged to have been received in the German liquidation after the proof was made need not be deducted.—*Re BLAKELEY, Ex p. AACHENER DISCONTO GESELLSCHAFT* (1892), 9 Morr. 173, D. C.

**632. — Whole dividend received.**—A bond

was executed by an insurance broker, as the principal obligor, & two sureties, with a condition that if they should pay the obligees certain premiums which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, & that within six months after the making the assurances, the bond was to be void. The broker became bkpt., & was indebted to the obligees in a considerable sum for premiums, & they received a dividend of 6s. in the pound under the commission. The premiums were due three years before the bkpcy., & the obligees did not call on the sureties until after the bankruptcy.—*Held*: (1) the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; (2) the dividend received by them under the commission, was to be deducted as against the sureties, from the penalty contained in the bond.—*LONDON ASSURANCE Co. v. BUCKLE* (1820), 4 Moore, C. P. 153.

*Annotation*.—*As to* (1) *Appl. Goring v. Edmonds* (1829), 6 Bing. 94.

**633. — — — — — S. guaranteed the account of T., at a bank by two guarantees one for £150, the other for £400. By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you," the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named & was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; & any indulgence granted by the bank was not to prejudice the guarantee. S. having died leaving T. & another exor., the bank on receiving notice of his death without any communication with the exors. beyond what would appear in T.'s pass book closed T.'s account which was overdrawn, & opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same & continued the account until he went into liquidation when it also was overdrawn.—*Held*: there was no contract express or implied which obliged the debtor & creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee & the bank were entitled to prove against the estate of S. for the amount of the old overdraft less the amount of the dividend which they had received on it in the liquidation.—*Re SHERRY, LONDON & COUNTY BANKING Co. v. TERRY* (1884), 25 Ch. D. 602; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 391, C. A.**

*Annotations*.—*Reid. Re Cator, Ex p. Phillips & Cator* (1886), 2 T. L. R. 766; *Ascherson v. Tredegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 833. *Mentd. Davis v. Petrie* (1906), 22 T. L. R. 771; *Deeley v. Lloyds Bank*, [1912] A. C. 756.

**634. — Half dividend received.**—A. was indebted to B. in two sums of £1,000 each, for one of which S. was surety. B. afterwards obtained from A. a life policy as a security for both debts. A. subsequently became bkpt. & B. proved for £1,500 on the two debts, & he received a dividend of £97 & a sum of £97 10s. upon the surrender of the policy.—*Held*: (1) by surrendering the policy the surety was not released; (2) the surety was only liable for half the debt proved, after deducting half the dividends & half the produce of the policy.

Where testator bequeathed the residue of his property to his widow & extrix. for her life, & she released the surety for a debt due to her husband's

**Sect. 3.—Extent of liability: Sub-sect. 8, B. Sect. 4: Sub-sect. 1, A.]**

estate from payment of all interest on the debt:—**Held:** (3) such release extended only to her life interest on the principal moneys due in respect of the debt.—**COATES v. COATES** (1864), 33 Beav. 249; 3 New Rep. 355; 33 L. J. Ch. 448; 9 L. T. 795; 10 Jur. N. S. 532; 12 W. R. 634; 55 E. R. 363.

**Annotation:—Generally, Mentd. Gee v. Mahood** (1874), 23 W. R. 71.

**SECT. 4.—UNDER CONTINUING GUARANTEES.**

**SUB-SECT. 1.—IN RESPECT OF MERCANTILE TRANSACTIONS.**

**A. Goods Supplied or to be Supplied.**

**635. Liability limited to specific sum—Whether applicable to series of transactions—Past & future supplies contemplated.]—**A guarantee by deft. to pltf. "for any goods he hath or may supply W. P. with to the amount of £100" is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to W. P. until the credit was recalled, although goods to more than £100 had been before supplied & paid for.

The words were to be taken as strongly against the party giving the guarantee as the sense of them would admit of (*per* 'UR.).—**MASON v. PRITCHARD** (1810), 12 East, 227; 2 Camp. 436; 104 E. R. 89.

**Annotations:—Distd. Melville v. Hayden** (1820), 3 B. & Ald. 593. **Expld. Nicholson v. Paget** (1832), 1 Cr. & M. 48. **Apd. Mayer v. Isaac** (1840), 6 M. & W. 605; **Weston v. Empire Assoc. Corpn.** (1868), 19 L. T. 305. **Refd. Hargrave v. Smeed** (1829), 6 Bing. 214; **Raikes v. Todd** (1838), 8 Ad. & El. 816; **Jones v. Clarke** (1842), 3 Q. B. 194; **Honor v. Carpenter** (1857), 3 C. B. N. S. 172.

**636. ————.]—**An undertaking to be answerable to a given amount for any goods supplied by A. to B. after goods to that amount have been supplied & paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. But as soon as A. alters the credit on which he supplied the goods to B. the surety is discharged.—**BASTOW v. BENNETT** (1812), 3 Camp. 220, N. P.

**637. ————.]—**"Whereas W. is indebted to you, & may have occasion to make further purchases from you, as an inducement to you to continue your dealings with him, I undertake to guarantee you in the sum of £100 payable to you in default on the part of the said W. for two months":—**Held:** a continuing guarantee.—**ALLAN v. KENNING** (1833), 9 Bing. 618; 2 Moo. & S. 708; 131 E. R. 746; *subsequent proceedings*, 3 Moo. & S. 80.

**638. ————.]—***Assumpsit* on the following guarantee. "In consideration of your agreeing to supply goods to K. at two months' credit, I agree to guarantee his present or any

future debt with you to the amount of £80. Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days from the date of receiving notice from you":—**Held:** this was a continuing guarantee; & as to all the debts guaranteed, it was an agreement relating to the sale of goods, within the exemption in the Stamp Act, 1815 (c. 184), Sched. Part I., Agreement.—**MARTIN v. WRIGHT** (1845), 6 Q. B. 917; 14 L. J. Q. B. 142; 9 Jur. 178; 115 E. R. 345.

**639. ————.]—**Deft.'s son being indebted to pltf. for coals supplied on credit, & pltf. refusing to continue to supply coals unless guaranteed, deft. gave this guarantee: "In consideration of the credit given by the H. Co. to my son, for coal supplied by them to him I hereby hold myself responsible as a guarantee to them for the sum of £100; & in default of his payment of any accounts due, I bind myself by this note to pay to the H. Co. whatever may be owing, to an amount not exceeding the sum of £100":—**Held:** a continuing guarantee.

It is immaterial, in the legal construction of a guarantee, that the party signing it knew nothing of the circumstances or the dealings between the debtor & his creditor, because generally, a person signing such an instrument must be taken to have intended that which the words themselves naturally import, with reference to the circumstances that exist, whether he has taken care to make himself acquainted with the circumstances or not (**KELLY, C.B.**).

A guarantee . . . ought to be construed in the same manner as any other contract (**KELLY, C.B.**).

The guarantee is expressed to be in consideration of credit given; if this referred to past credit, it would refer also to a past consideration, & the contract stating a had consideration would not be helped by the Mercantile Law Amendment Act, 1856 (c. 97), s. 3 (**BRAMWELL, B.**).—**WOOD v. PRIESTNER** (1866), L. R. 2 Exch. 66; 4 H. & C. 681; 36 L. J. Ex. 42; 15 L. T. 317; *affd.* (1867), L. R. 2 Exch. 282, Ex. Ch.

**640. ————.]—**Only future supplies contemplated.]—Where by a written guarantee, A. becomes bound to B. for any debt C. may contract with him, not exceeding £100, the guarantee is not extinguished by one dealing between B. & C. to that amount; but extends to any debt of £100 which C. may afterwards owe to B.—**MERLE v. WELLS** (1810), 2 Camp. 413, N. P.

**Annotation:—Expld. Nicholson v. Paget** (1832), 1 Cr. & M. 48.

**641. ————.]—**I do hereby agree to guarantee the payment of goods to be delivered in umbrellas & parasols to J. & E., according to the custom of their trading with you, in the sum of £200:—**Held:** a continuing guarantee.

There is no reason for putting on a guarantee a construction different from that which the cts. put on any other instrument. With regard to other instruments, the rule is that if the party

**PART V. SECT. 4, SUB-SECT. 1.—A.**

**d. Liability limited to specific amount.—Whether applicable to series of transactions.]—**"I hereby hold myself accountable to you for any goods M. may purchase of you, to the amount of £250 currency."—**ROSS v. BURTON** (1848), 4 U. C. R. 357.—**CAN.**

**e. ————.]—**F. informs me that he wishes to purchase goods from you. Being acquainted with his circumstances, & knowing him to be a man of prudence & integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods should he require that amount":—**Held:** not

a continuing guarantee.—**SHAW & SHAW v. VANDUSEN** (1849), 5 U. C. R. 353.—**CAN.**

**f. ————.]—**"I understand that you are prepared to furnish C. with stock to the extent of \$5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars including your own credit of

five thousand, unless sanctioned by a further guarantee":—**Held:** there could be no liability on this guarantee unless the indebtedness of C. should exceed the sum of \$5,000.—**ALEXANDER v. WATSON** (1894), 23 S. C. R. 670.—**CAN.**

**g. ————.]—**Deft. gave a guarantee to pltf. for goods to be supplied to G. "in accordance with your terms," which deft. understood to be thirty days, stipulating that his liability was not to exceed \$300:—**Held:** the words "your terms" as used in the guarantee meant any terms upon which pltf. might supply

executing them, leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself (TINDAL, C.J.).—*HARGREAVE v. SMER* (1829), 6 Bing. 244; 3 Moo. & P. 573; 8 L. J. O. S. C. P. 46; 130 E. R. 1274.

*Annotations*.—*Expld. Nicholson v. Paget* (1832), 1 Cr. & M. 48. *Refd. Hutchinson v. Boyle* (1855), 26 L. T. O. S. 80.

642. ————.]—*MAYER v. ISAAC*, No. 378, *ante*.

643. ————.]—*HITCHCOCK v. HUMFRY*, No. 495, *ante*.

to pltf. the following memorandum: "I agree to guarantee for J. to C. to the amount of £50 for timber, etc.":—*Held*: a valid & continuing guarantee.—(*OAKES v. SHERRINGTON* (1848), 11 L. T. O. S. 173.

645. ————.]—*HOAD v. GRACE*, No. 427, *ante*.

646. ————.]—*Deft. gave to pltf., a cattle dealer, a guarantee in the following words: "£50. I, J., will be answerable for £50 sterling that W., butcher, may buy of H."—Held*: a continuing guarantee to the extent of £50, as it appeared from the circumstances under which the guarantee was given that the parties contemplated a continuing supply of stock to W. in his trade of a butcher.—(*HEFFIELD v. MEADOWS* (1869), L. R. 4 C. P. 595; 20 L. T. 746.

*Annotations*.—*Consd. Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756. *Refd. Anstruther-Gough-Cuthorpe v. McOscar*, [1924] 1 K. B. 716. *Mentd. Brook v. Hook* (1871), L. R. 6 Exch. 89.

647. ————.]—*Continuing supply not contemplated.*—A guarantee in the following words: "You may let L. have coals to £50 for which I will be answerable at any time" is not a continuing guarantee.

There was evidence that the words "at any time" were introduced afterwards, because pltf. thought they were omitted (ABBOTT, C.J.).—(*BOVILL v. TURNER* (1815), 2 Chit. 205.

648. ————.]—A guarantee of the payment of A. to the extent of £80 at quarterly account, bill two months, for goods to be purchased by him of pltf. is not a continuing or standing guarantee to that extent for goods to be at any time supplied to A. until the credit is recalled.

The case of *Mason v. Pritchard*, No. 635, *ante*, is distinguishable from the present. There the words were "for any goods"; here no such expression is to be found. The words "quarterly account" do not affect this question. They were introduced only to prevent pltf. from calling for payment at so early a period as they might otherwise have done. It ought to appear unequivocally that it was the intention of deft. to guarantee payments for goods to be furnished from time to time (BEST, J.).—(*MELVILLE v. HAYDEN* (1820), 3

649. ————.]—"I hereby agree to be answerable to K. for the amount of five sacks of flour, to be delivered to T., payable in one month. Nov. 18.—T. G."—*Held*: a guarantee for flour, not exceeding five sacks delivered at one time, & not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks.—(*KAY v. GROVES* (1829), 6 Bing. 276; 4 C. & P. 72; 3 Moo. & P. 631; 8 L. J. O. S. C. P. 9; 130 E. R. 1287.

650. ————.]—*NICHOLSON v. PAGET*, No. 377, *ante*.

651. ————.]—The following guarantee was construed to be a limited one: "I agree to guarantee the due payment of any amount of purchase J. may make of you not exceeding the total value of £500 sterling." Goods exceeding £500 in value had been sent in, & £500 paid; more goods were also subsequently supplied:—*Held*: the above guarantee was not a continuing guarantee, & one £500 having been paid for goods since such guarantee was given, deft. was not liable for any subsequent supply.—(*SHOOSTER v. COOPER* (1817), 9 L. T. O. S. 151.

652. ————.]—*CHALMERS v. VICTORS*, No. 105, *ante*.

653. *Liability not limited to specific amount—Indefinite supplies.*—In April, 1867, in order to induce pltf. to continue his dealings with F., who was then largely indebted to him, deft. gave pltf. a guarantee as follows: "In the event of your supplying F. with coals during the next twelve months from April 1 last past, I do hereby guarantee the payment to you of the amount for the time being due from F. for coals sold by you to him." Before the expiration of the twelve months mentioned in the above guarantee, on July 23, 1867, the debt due from F. to pltf. having greatly increased, & pltf. pressing for a settlement, deft. gave him a further guarantee, as follows: "Whereas F. is & stands indebted to you in the sum of £2,205 3s. 9d. upon an account this day stated & settled between you & the said F., in addition to his liability upon two acceptances of mine to his drafts each for £750, dated July 3, 1867, & payable three & four months after date, & respectively indorsed to you by the said F.; & whereas you are pressing for the immediate payment of the said sum of £2,205 3s. 9d.; now, I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of, & agree to become responsible for, any sum of money for the time being due from the said F. to you, whether in addition to the said sum of £2,205 3s. 9d. or no":—*Held*: this was a guarantee for future supplies of coal, unlimited both as to time & amount.

244. *Folld. Nicholson v. Paget* (1832), 1 Cr. & M. 48.

little or no

goods to G., & the case was within the express words of the guarantee.—(*MANTLE LAMP CO. v. DEVEAU*, [1923] 1 D. L. R. 1182; 55 N. S. R. 568.—*CAN*.

h. ————.]—*WHELAN v. KEEGAN* (1858), 7 I. C. L. R. 544.—*IR*.

k. ————.]—Engaged to see you paid for stuffs furnished to B. to the extent of £200, at the usual credit of four months, you giving him credit to the same amount without security":—*Held*: the guarantee was for future furnishings, & not for goods then furnished.—(*DOWNIE v. BARR* (1840), 3 Duml. (Ct. of Sess.) 59.—*SCOT*.

l. ————.]—*TENNANT & CO. v. BUNTON* (1859), 21 Duml. (Ct. of Sess.) 631; 31 Sc. Jur. 342.—*SCOT*.

m. ————.]—*HARNER & CO. v. GIBB*, [1911] S. C. 1341.—*SCOT*.

n. ————.]—*Applts. wrote to resps., "Kindly let H. have meal & flour to the value of £25. We hold ourselves responsible for the above amount":—Held*: on the face of it the document was not a continuing guarantee, & payment for the first goods supplied up to the value of £25 having been made, applts. were no longer liable under their guarantee.—(*GLENN BROTHERS v. COMMERCIAL GENERAL AGENCY CO., LTD.*, [1905] T. S. 737.—*S. AF*.

653 i. *Liability not limited to specific amount—Indefinite supplies.*—"In consideration of your supplying my son with what goods he may from time

to time require of you this season, on your usual terms of credit, I do hereby guarantee the payment of the same." Deft. was not aware when he signed this that his son had already obtained any goods from pltf.:—*Held*: the guarantee applied only to the goods purchased after it, not to those previously furnished.—(*WOOD v. CHAMBERS* (1876), 40 U. C. R. 1.—*CAN*.

653 ii. ————.]—A firm, being indebted to pltf. for goods supplied, on ordering further goods received from pltf. a telegram—"Let M. deft., wire guarantee for payment of all accounts to us, & everything will be satisfactory." Deft.: "Will guarantee payment of all accounts" for the firm:—*Held*: the guarantee was a



**Sect. 4.—Under continuing guarantees: Sub-sect. 1, A. & B.]**

another which is given under other & different circumstances (BOVILL, C.J.).—*COLES v. PACK* (1869), L. R. 5 C. P. 65; 39 L. J. C. P. 63; 18 W. R. 292.

**654.** — — — — —.]—Pltfs. were in the habit of holding weekly sales of hides, skins, etc., the course of business being that the goods bought at each sale were paid for in the following week. D., who had for some time bought skins at these sales, on Dec. 29, 1871, bought to the extent of £34 7s. 6d. Having heard that D. had executed a bill of sale, pltfs. declined to deliver the skins unless defts. would engage to be responsible for the price. This being communicated by D. to defts. the latter on Jan. 1, 1872, telegraphed to pltfs.: "We agree to be answerable for the skins," & on the same day sent them a covering letter, in which, after stating that they had had dealings with D. for five years, & had never known anything dishonourable or dishonest in any of his transactions, they wrote, "What you have heard was done to protect him from a dishonest tradesman, & will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque & have it with pleasure for any account he may have with you; & when to the contrary we will write you." Pltfs. accordingly sent D. the goods, & continued to deal with him down to May 3, 1872, at which time he was indebted to them in £92 ls. 10d., which he was unable to pay, defts., who were the holders of the bill of sale, having seized & sold all his effects under it: *Held*: defts.' letter of Jan. 1 was a continuing guarantee.—*NOTTINGHAM ILDE, SKIN & FAT MARKET Co. v. BOTTRILL* (1873), L. R. 8 C. P. 694; 42 L. J. C. P. 256; 29 L. T. 134; 38 J. P. 7; 21 W. R. 739.

**B. Money Advanced and to be Advanced.**

*See, generally, BANKERS, Vol. III., pp. 295 et seq.*

**655. Liability limited to specific sum.—Whether applicable to floating balance.—Appropriation of subsequent repayments.**—A bond entered into by A. & B. to ptfs. to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding £3,000, which should at any time thereafter be advanced by ptfs. to A., is not a continuing guarantee to the extent of £3,000 for advances made at any time, but only a guarantee for advances once made to the extent of £3,000. Payments made generally to ptfs. on the account of A. may be applied by them in liquidation of a balance against A. before the execution of the bond, & B. cannot insist upon their being applied in exoneration of his liability on the bond although at the time of his entering into it ptfs. did not give him notice that any balance was then existing against A.—*KIRBY v. MARLBOROUGH (DUKE)* (1813), 2 M. & S. 18; 105 E. R. 289.

*Annotations*:—*Distd. Woolley v. Jennings* (1826), 5 B. & C. 105. *Consd. Re Sherry, London & County Banking Co. v. Terry* (1884), 25 Ch. D. 692.

continuing one, & deft. was liable for accounts incurred or to be incurred.—*ST. LAWRENCE STEEL & WIRE Co. v. LEYS* (1903), 7 O. L. R. 72; 6 O. L. R. 235; 3 O. W. R. 80; 24 C. L. T. 126.—*CAN.*

**PART V. SECT. 4, SUB-SECT. 1.—B.**

**655 I. Liability limited to specific sum.—Whether applicable to floating balance.—Appropriation of subsequent repayments.**—In consideration of your allowing K. an overdraft of £1,000 during the six months next ensuing, I

hereby guarantee you payment of such overdraft on demand":—*Held*: an overdraft may be permitted to any amount, but the guarantor will only be liable for six months to the extent of £1,000. Any payments made to the bank by the person guaranteed may be applied in reduction of a pre-existing debt, & not to the guaranteed debt.—*WARD v. NATIONAL BANK OF NEW ZEALAND* (1887), 3 N. Z. L. R. 33 (S. C.).—*N.Z.*

*o. — — — — —.]—COMMERCIAL BANK OF AUSTRALIA, LTD. v. COLONIAL*

**656.** — — — — —.]—A. & Co., bankers in the country, being pressed by B. & Co., bankers in town, to whom they are indebted, to send up any bills that they can procure, transmit for account an accommodation bill accepted by D.; when the bill becomes due, the balance is in favour of A. & Co., but the bills are not withdrawn, & afterwards the balance between the houses turns considerably in favour of B. & Co., & is so when A. & Co. become bkpt. B. & Co. are entitled to recover against the acceptor.

It appears from the letter in which the bills were sent to ptfs. that they were sent "on account," which means the then floating account. It is clear that there was a period when pltf.'s lien ceased to attach, when the bills might have been redeemed, but they were not reclaimed, & by allowing them to remain in the hands of ptfs., the lien revealed, when, upon fresh advances made, the balance turned in favour of ptfs. (*LORD ELLENBOROUGH, C.J.*).—*ATWOOD v. CROWDIE* (1816), 1 Stark. 483, N. P.

*Annotations*:—*Refd. Sturtevant v. Ford* (1842), 4 Man. & G. 101. *Mentd. Burdon v. Benton* (1847), 9 Q. B. 843; *Re Overend, Gurney, Ex p. Swan* (1868), L. R. 6 Eq. 344.

**657. In absence of provision by agreement.**—T. having a banking account with ptfs. on which he was indebted to them £10,000 in 1822, deft. then executed a bond, conditioned to secure ptfs. for any sums which for ten years ptfs. should advance on bills, etc., which T. should from time to time draw on them or make payable at their house, & all cheques, etc., not exceeding £5,000 in the whole. It was agreed that this bond should not affect a prior security to ptfs. by T. in 1817; but no notice was given to deft. by ptfs. that T. was indebted to them £10,000 at the time deft. executed his bond; T., however, saw the accounts every fortnight, & received the vouchers half-yearly. At the close of his account, T. was indebted to ptfs. more than £10,000, but subsequently to the executing of deft.'s bond he had paid into ptfs.' bank more than £5,000:—*Held*: deft. was liable to the extent of £5,000, & there being no agreement between the parties that the payments made by T. after the execution of the bond should be applied to the new account, to guarantee running accounts.—*WILLIAMS v. RAWLINSON* (1825), 3 Bing. 71; 10 Moore, C. P. 362; Ry. & M. 233; 3 L. J. O. S. C. P. 164; 130 E. R. 140.

*Annotations*:—*Consd. Re Sherry, London & County Banking Co. v. Terry* (1884), 25 Ch. D. 692. *Refd. Re Boys, Fedes v. Boys, Ex p. Hop Planters Co.* (1870), L. R. 10 Eq. 467.

**658.** — — — — —.]—R. & Co. opened a banking account with L., who placed £1,000 to R. & Co.'s account on A. & B. executing the following guarantee: "In consideration of L. agreeing to advance & advancing to R. & Co. any sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000, we hereby jointly & severally guarantee the payment of any such sum that may be owing to L. at the expiration of the said period of eighteen months, & undertake to pay the same

FINANCE MORTGAGE INVESTMENT & GUARANTEE CORPN., LTD. (1906), 4 C. L. R. 57.—*AUS.*

*p. — — — — —.]—DIME SAVINGS BANK v. MILLS* (1919), 46 O. L. R. 492; 52 D. L. R. 646; 17 O. W. N. 246.—*CAN.*

*q. — — — — —.]—Where a guarantee is given by a surety to secure the repayment of advances of money to the principal, provided such advances do not exceed a certain limited amount, the proviso does not render*

on demand in the event of R. & Co. making default in the payment of the same. Signed A. & B." R. & Co. paid into L.'s bank to their account more than £1,000 during the eighteen months, but they overdraw their account several times during the same period. At the end of the time R. & Co. made default in payment of the £1,000, & had overdrawn their account £24, whereupon L. sued A. on the guarantee. L. obtained a verdict against A. for £1,000 :—*Held* : (1) a continuing guarantee, & in placing a construction on it the position of the parties as well as the words of the contract were to be considered so that it was not to be avoided by L. allowing B. to overdraw his account to an amount together with the sum of £1,000 exceeding £1,000.

(2) The payment of the £500 by B. could not be given in evidence in reduction of debt, but ought to have been pleaded in bar.—*LAURIE v. SCHOLEFIELD* (1869), L. R. 4 C. P. 622; 38 L. J. C. P. 290; 20 L. T. 852; 17 W. R. 931.

659. ————.]—*CRTY DISCOUNT CO. v. MCLEAN*, No. 1149, *post*.

660. ————.]—Certain of the directors of a co. guaranteed personally to the co.'s bankers the drafts of the agent of the co. to the extent of £1,000, & £1,000 further, undertaking to provide the bankers with funds to meet the acceptances before maturity. The co. kept a current account with the bankers, & the drafts of its agent were from time to time honoured & debited to this current account. One of the guarantors died & his estate was under the administration of the ct. The co.'s current account had been constantly overdrawn; at the date of testator's death it was overdrawn to the amount of £1,605 18s. 6d.; & the co. was now in liquidation :—*Held* : the guarantees given were a continuing security not satisfied by the earlier credits in the current account, & therefore, the bankers were entitled to prove against testator's estate for the sum of £1,605 18s. 6d. & interest at four per cent. from the date of testator's death.

I am satisfied that it was not the intention of the parties that the advances under the guarantees should be considered as satisfied by the items of credit in the account (*BACON, V.-C.*)—*BROWNING v. BALDWIN* (1879), 40 L. T. 248; *sub nom. Re BOOTH, BROWNING v. BALDWIN*, 27 W. R. 644.

661. ————.]—*EXCHANGE & DISCOUNT BANK v. BILLINGHURST*, [1880] W. N. 2, C. A.

662. ————.]—*Form of guarantee—Simple money bond.*—Where a bond, which, on the face of it, appears to be a simple money bond, is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, & not to cover floating balances. The conduct of the principals, creditor & debtor, with respect to such a bond, will not affect the rights & liabilities of an innocent surety, who has not authorised their dealing with the bond in a particular manner. The fact that a bond is payable on demand, &

that interest is payable from the date of the bond, is a circumstance to show that it is a simple money bond, & not a bond to secure floating balances.—*WALKER v. HARDMAN* (1837), 11 Bli. N. S. 229; 4 Cl. & Fin. 258; 7 E. R. 99, 11. L. Annotation :—*Consd. Re Fidgeon, Ex p. Fidgeon* (1840), 4 Deac. 217.

663. ————.]—*Series of advances contemplated—In amounts specified.*—Debt against one of the obligors of a joint & several bond. By the condition, which recited an agreement by plffs., a banking firm, to discount bills, & otherwise advance to one of the obligors any sums of money not exceeding at any one or more time or times £200 upon security, the bond was to be void if the obligors, or any or either of them, should pay to plffs. & any other person who should become a partner in the firm, all such sums, not exceeding £200 as plffs. or any future partner should advance the obligor on bills, etc., which he might from time to time draw upon plffs. or get discounted by them, within three months after notice to pay such sums :—*Held* : (1) the bond was a continuing security; (2) an averment that £200 was due, & that notice thereof had been given to deft., was no notice to him to pay.—*BATSON v. SPEARMAN* (1838), 9 Ad. & El. 298; 3 Per. & Dav. 77; 112 E. R. 1225.

Annotation :—As to (2) *Reid. Jones v. Williams* (1811), 11. & W. 80.

*Right of creditor to appropriate.* See, further, Part IX., Sect. 1, sub-sect. 1, A. (b) 1., *post*.

664. *Liability limited "balance due"*—*Confined to existing balance.*—A security given by a customer to his bankers for the balance "which shall or may be found due on the balance of" the account :—*Held* : to cover the existing balance only, & not to be a continuing security for the floating balance.—*Re MEDWEDE'S TRUST* (1859), 26 Beav. 588; 53 E. R. 1025; *sub nom. Re MEADOWS*, 28 L. J. Ch. 891; 5 Jur. N. S. 421; *sub nom. Re DE MEDWEDE*, 33 L. T. O. S. 253; 7 W. R. 319.

665. *Guarantee of advances to company—After composition deed with creditors—Liability limited to proceeds of sale of assets—Priority of composition creditors.*—(1) U. & co. being insolvent compounded with their creditors, by agreeing to pay them a composition of 7s. 6d. in the pound at three instalments, & execute a conveyance of their real & personal estate to defts., in trust to permit them (U. & co. to carry on the business, subject to the control of defts., & to pay thereout to the creditors the said three instalments; & in case of full payment thereof, to re-convey & reassign the estate to U. & co., but upon default of such payment, then in trust to sell, & after deducting out of the proceeds interest, costs, & amount of mtgs., etc., to divide the remainder amongst themselves & the other creditors. U. & co. continued, accordingly, to carry on the business, & opened an account with a banking co., from whom they obtained large advances. The bank applied to, & obtained from, defts. the following guarantee : "U. & co. having assigned over all

the obligation void if the advances go beyond it unless that clearly appears to have been the intention of the parties.—*BANK OF NEW ZEALAND v. WILSON* (1886), 5 N. Z. L. R. 215 (S. C.)—N. Z.

F. ————.]—*COMMERCIAL BANK v. PATTISON'S TRUSTEES* (1891), 18 R. (Ct. of Sess.) 476.—*SCOT.*

S. ————.]—*VEITCH v. NATIONAL BANK OF SCOTLAND*, [1907] S. C. 554; 44 Sc. L. R. 394; 14 S. L. T. 800.—*SCOT.*

t. ————.]—*Stipend of curate.*—"In consideration that you will engage a curate for the parish I undertake that he shall be paid a stipend of, etc., so long as you are the incumbent of the parish"—*Held* : a continuing guaranty, & not limited to the appointment of one curate.—*GUINNESS v. BOX* (1879), 5 V. L. R. 381.—*AUS.*

a. ————.]—*Sale & manufacture of specific wares.*—*ANGUS v. UNION GAS & OIL STOVE CO.* (1895), 24 S. C. R. 101.—*CAN.*

b. ————.]—*Guarantee of notes to be paid at maturity.*—Deft. gave to plff. co. a guarantee that in consideration of his endorsement for F. of certain promissory notes, for a large sum given by him for the purchase of a bkpt. stock, deft. would guarantee the due payment of the amount of such notes at maturity, provided that he was not called upon to pay in more than \$2,000 :—*Held* : the effect of the guarantee was that it continued in force to the full extent of \$2,000,



**Sect. 4.—Under continuing guarantees: Sub-sect. 1**  
*R.; sub-sect. 2. Sect. 5.]*

their real & personal estate to us, in trust for securing a composition of 7s. 6d. in the pound to their several creditors executing such deed, & it being necessary to open a banking account for the purpose of carrying on the said trade, in order that the stock & goods on hand may be brought up & converted into money, for the purpose of paying such dividends; & you having, at our request, consented to open a banking account, or on the credit of the names of the said C. & co. or of any person or persons for the time being carrying on that concern; we do hereby promise & engage, that any sum or sums of money to become due to you or to the said banking co., in respect of such account, shall, in the first instance, be paid to you out of the net proceeds of the said trust estate, so far as the same will extend to pay." Further advances were made by the bank to C. & co. subsequent to this guarantee. Defts. subsequently sold the property of C. & co. under the provisions of the composition deed, & the proceeds were insufficient to pay the creditors the composition of 7s. 6d. in the pound: *Held*: the meaning of the guarantee was not that defts. should be liable to the bank only out of the proceeds realised from the estate of C. & co. after payment of the composition of 7s. 6d. to the creditors, but they were liable in the first instance to repay out of the proceeds the whole amount of the advances made by the bank to C. & co. as well before as after the guarantee.

(2) In 1833, a joint stock bank was established, by the name of the M. & H. D. B. co. In 1836 H. & co., bankers, relinquished their business in favour of, & all took shares, in this co., & it was subsequently agreed, that the title of the bank should thenceforth be the W. R. U. B. co.; that the capital should be increased by the creation of new shares; & that additional directors should be appointed:—*Held*: the public officer of the W. R. U. B. co. might, notwithstanding the change of name, & the accession of new proprietors, maintain an action on a guarantee given to the M. & H. D. B. co., before their junction with H. & co. for advances made by them.—*WILSON v. CRAVEN* (1811), 8 M. & W. 584; 10 L. J. Ex. 418; 151 E. R. 1171.

**666. Liability not limited to specific amount.]—**

(1) A father, being desirous of obtaining advances for his son from a bank, gave the son a promissory note for £2,000, & gave the bank an agreement under seal to this effect, that, in consideration of the bank discounting the note for £2,000 for his son, certain deeds & documents which the father deposited with the bank should remain with the bank as security for the payment of all money due or to become due from the son to the bank on any account whatsoever; & that he would pay the bank upon demand all such money, & he thereby charged the property comprised in such documents with the repayment thereof:—*Held*: this agreement was not limited to the £2,000, but was a continuing guarantee for all

money already due, or which should become due from the son to the bank. *Semble*: a general guarantee under seal may, under certain circumstances, be withdrawn upon the terms of paying all that may be due under it at the time of giving notice of withdrawal.

(2) What I have to decide is, whether under a guarantee dated Mar. 21, 1870, signed by E. M., testator in the cause in which this summons is taken out, he became liable to pay only a particular debt of his son W. H. M., or whether he became liable to pay whatever the son owed, or should afterwards owe, to the bank, to whom the guarantee was given.

In order to determine that question, the ct., in this as in other matters, will put itself as well as it can in the position of the parties at the time of the transaction, & from the surrounding circumstances, as well as the words of the instrument, ascertain what was the real intention of the parties to it (*MALINS, V.-C.*).

(3) My opinion is that a person who gives a guarantee would have a right to say to the person taking it, "You will continue at your own peril to employ the person on whose behalf I gave the guarantee"; provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this ct., & in my opinion would succeed in the contest, because the ct. would direct the bond to be delivered up to be cancelled (*MALINS, V.-C.*).—*BURGESS v. EVE* (1872), L. R. 13 Eq. 450; 41 L. J. Ch. 515; 26 L. T. 540; *sub nom. BURGESS v. EVE, Ex p. LONDON & COUNTY BANKING CO.*, 20 W. R. 311.

*Annotations*:—*As to* (3) *Apprvd.* *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666. *Refd.* *Re Consolidated Land Co., Ellerbys Claim* (1872), 20 W. R. 855; *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *Durham Corp'n. v. Fowler* (1849), 22 Q. B. D. 394.

**SUB-SECT. 2.—FIDELITY GUARANTEES.**

**Change in position of parties—Effect on liability.]**

—*See* Part IX., Sect. 3, sub-sect. 3, A. & B., *post*.

**SECT. 5.—UNDER ILLEGAL OR VOID CONTRACTS OF PRINCIPAL DEBTOR.**

**667. Apprenticeship deed—Void by statute.]—**

Where an apprentice is bound for five years only, & a bond given conditioned for his service, the binding being void under 5 Eliz. c. 31, as not being for seven years, the bond is also void.—*BURNLY v. JENNINGS* (1806), 6 Esp. 8, N. P.

**668. — Avoided on attainment of majority.]**

—Covenant upon an indenture of apprenticeship, by the master against the father; breach, that the apprentice absented himself from the service;

**PART V. SECT. 5.**

**d. Apprenticeship deed—Unreasonable provision as to working hours.]**  
 —Articles of apprenticeship which require the apprentice during the term of four years of three hundred & ten working days of ten hours each, to devote to a firm, to whom he is apprenticed, ten hours each working day, or such number of hours as may be the regulation of the workshop for

until the last of the notes was paid.—*STOUTERS v. HENRY* (1909), 21 C. L. T. 124; 32 O. R. 365.—**CAN.**

**e. Liability of guarantor.]—**Deft. offered plff. shares in a vessel which he said would pay more than 25 per cent. Plff. asked deft. to guarantee his statement. Deft. thereupon wrote on one of his cards: "Will guarantee 25 per cent. per an." & signed it. Plff. bought shares:—*Held*: (1) the under-

taking having been given by deft. to induce the purchase of the shares, & having resulted in the purchase of the shares, by plff., & payment to deft. therefor, deft.'s liability under his undertaking was fixed; (2) it was doubtful whether deft.'s liability was to continue for two years, but that could not be said to be an unreasonable period.—*WINTERMUTE v. MOUTON* (1923), 56 N. S. R. 190.—**CAN.**

plea, that the son faithfully served till he came of age, & that he then avoided the indenture : *Held* : this was no answer to the action.

The father here binds himself that the son shall serve seven years. It is no answer for the father to say that it was in the option of the son whether he would serve or not. If the son does not choose to do that which the father covenanted he should do, the covenant is then broken, & the father is liable (*BAYLEY, J.*).—*CUMING v. HILL* (1819), 3 B. & Ald. 59 ; 106 E. R. 585.

**669. Non-payment of rent — Under defective lease of tolls.**—By a local statute prior to Turnpike Roads Act, 1822 (c. 126), trustees of a turnpike road were empowered to let the tolls by writing under their hands & seals; the rent to be made payable to their treasurer, in default of which every such lease should be “null & void to all intents & purposes whatsoever.”—*Held* : (1) this clause was still imperative, though by Turnpike Roads Act it is enacted, that after the tolls shall have been let, as there directed, the purchaser shall “enter into a proper agreement” for the taking thereof, & paying the rent, “under such conditions & in such manner” as the trustees shall think fit. (2) A lease making the rent payable to the trustees or their treasurer, was not conformable to the local Act; (3) the words “null & void” in that Act were not to be construed as “voidable,” but the lessee or their surety might treat the lease as absolutely void; & the lessee’s surety might take advantage of the above defect, in an action brought against him by the trustees for non-payment of the rent, though the lessee had taken the tolls for several years under the lease.—*PEARSE v. MORRICE* (1834), 2 Ad. & El. 81 ; 4 Nev. & M. K. B. 48 ; 4 L. J. K. B. 21 ; 111 E. R. 32.

*Annotations* :—As to (3) *Reid*. *Oldroyd v. Crampton* (1837), 3 Hodg. 261. *Generally*, *Mentd*. *R. v. St. Gregory* (1831), 2 Ad. & El. 99 ; *Willington v. Browne* (1815), 8 Q. B. 169.

**670. Illegal loan to principal.**—M., with S. & others, were joint obligors in a bond conditioned to answer for any balance which might become due from M. to a bank in Scotland, with whom he had obtained a credit according to the Scottish system of banking. M., in the course of his dealings, drew upon the bank by written orders for sums made payable to bearer, & issued at a place more than ten miles distant, & also post dated; being in both respects contrary to Stamp Act, 1815 (c. 184), s. 13, which not only imposes a penalty upon the parties to such drafts, but makes the transaction void. The mode of drawing was known by the bankers. M. having overdrawn the bank to the amount of £4,378 : an action upon the bond was brought against S. by the bank, to recover the amount :—*Held* : no debt had been incurred, & therefore the parties were not liable upon the bond.—*SWAN v. BANK OF SCOTLAND* (1836), 10 Bl. N. S. 627 ; 1 Deac. 746 ; 2 Mont. & A. 656 ; 6 E. R. 231, H. L.

*Annotation* :—*Distd*. *Garrard v. James*, [1925] 1 Ch. 616.

**671. — Ultra vires borrowing.**—By the certified rules of an unincorporated building

society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary in accordance with advertisements, issued with the authority of the directors, that such loans might be so made by bringing the money to the office of the secretary. In each case a receipt was given by the secretary for the money as a loan to the society, with a written undertaking by him “to procure the promissory note of the directors for the loan,” & afterwards, in pursuance to such undertaking, the receipt was exchanged for such note, which always bore the date of the receipt. After an amount had been so borrowed exceeding the limit prescribed by the rules, *plffs.*, who had on several previous occasions lent money to the society according to the above mode, paid a sum to the secretary as a loan to the society, & received from him the usual receipt & undertaking, but no promissory note of the directors was ever afterwards given, & the secretary absconded, appropriating that sum, with other moneys of the society to his own use. In an action against the society & directors, the jury found that the society held out the secretary to *plffs.* as having authority to receive the loan on their behalf on the terms on which it was received, & that the directors did the same :—*Held* : such finding was bad in point of law as against the society, & as the limit for borrowing prescribed by the rules had been exceeded when the loan was made by *plffs.*, the society, which had derived no benefit, was not liable for such loan; although there was no fraud on the part of the directors they were personally liable to *plffs.* for the money which had been so advanced.—(*HAPLEB v. BRUNSWICK BUILDING SOCIETY* (1881), 6 Q. B. D. 696 ; 50 L. J. Q. B. 372 ; 44 L. T. 449 ; 29 W. R. 529, C. A.

*Annotations* :—*Reid*. *Arnold v. Arncliffe* (1885), 1 T. L. R. 670 ; *Firbank's Exors. v. Humphreys, Mowbray, etc.*, *Charnwood Forest Ry., Directors* (1886), 3 T. L. R. 49 ; *Re Companies Acts, Ex p. Watson* (1888), 21 Q. B. D. 301 ; *Cross v. Fisher* (1891), 65 L. T. 111. *Mentd*. *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 61, n. ; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426 ; *Moss S.S. Co. v. Whinney*, [1912] A. C. 254 ; *Sun Bldg. Soc. v. Western Suburban & Harrow Road Bldg. Soc.*, [1920] 2 Ch. 141.

*Compare* No. 54, *ante*.

**672. — Void loan to infant — Infants Relief Act, 1874 (c. 62).**—*Plff.* sued *defts.*, father & son, on a promissory note given in respect of a loan to the son, who was under age when the money was advanced to him. The father joined in the promissory note as a guarantor :—*Held* : although by above Act the transaction of loan to the son was void, the guarantee was valid, & therefore the father was liable as guarantor.—*WAUTHIER v. WILSON* (1911), 27 T. L. R. 582 ; *affd.* on other grounds (1912), 28 T. L. R. 239 C. A.

**673. — Loan by friendly society to member.**—*LOUGHER v. MOLYNEUX*, No. 22, *ante*.

**674. Non-payment of medical fees.—To unregistered practitioner.**—Where medicine or attendance is supplied by an unregistered practitioner to a patient, under a guarantee for payment

the time being, or as special exigencies of the business may require, are unreasonable & cannot be enforced against the infant, nor against a surety for him.—*MACBREGGON v. SULLY* (1900), 31 O. R. 535.—CAN.

**6. Bond to sheriff — Salary paid by deputy.**—To guarantee sheriff fixed salary.—A bond given to secure a sheriff a certain fixed salary, to be paid by his deputy, is void.—*FOOT v. BUILOCK* (1848), 4 U. C. R. 480.—CAN.

J.—VOL. XXVI.

**f. Agreement to stifle prosecution.**—In an action on a bond executed by J. to secure a debt of L. to the bank the evidence showed the bond was given in consideration of an agreement not to prosecute :—*Held* : the consideration for the bond was illegal & J. was not liable thereon.—*PEOPLE'S BANK OF HALIFAX v. JOHNSON* (1892), 20 S. C. R. 541.—CAN.

**g. —**—Where a note is illegal & void as against a maker because

made by him to stifle a criminal prosecution, it is also void as against a surety for him who signed as maker. *UNITED STATES FIDELITY & GUARANTEE CO. v. CRUICKSHANK & SIMMONS*, [1919] 3 W. W. R. 821.—CAN.

**h. Guarantee of price of intoxicants —Sold contrary to statutory prohibition.**—An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory

*Sect. 5.—Under illegal or void contracts of principal debtor. Sects. 6 & 7: Sub-sects. 1 & 2, A. & B. (a).]*

given by a third person, Medical Act, 1858 (c. 90), will afford a defence either to the principal debtor or to the surety; for the patient does not the less require protection because the paymaster is a third person. A medical officer of a Peruvian vessel of war lying in the Thames engaged *pltf.*, an unregistered practitioner, to attend the crew & troops during his temporary absence. In an action against the Peruvian officer for the services thus rendered:—*Held*: *sect. 32 of the Act precluded pltf. from recovering, for, by whatever law the contract was to be interpreted, the remedy must be governed by the lex fori.*—*DE LA ROSA v. PRIETO* (1864), 16 C. B. N. S. 678; 4 New Rep. 463; 33 L. J. C. P. 262; 10 L. T. 757; 10 Jur. N. S. 851; 12 W. R. 1029; 2 Mar. L. C. 67; 143 E. R. 1253.

*Annotation:—Mentid. Howarth v. Brearley* (1887), 19 Q. B. D. 303.

**675. Guarantee by directors—Of ultra vires covenants by company.**—*Pltf.* being desirous of finding his son-in-law a business occupation advanced £1,500 for the purchase of 1,500 cumulative preference shares in the C. co. to enable his son-in-law to take a position in the co. for a probationary period, & an agreement dated Jan. 4, 1924, was entered into between the co., the two *defts.*, the directors of the co., & shareholders, *pltf.* & his son-in-law, whereby the co. covenanted with *pltf.* to guarantee the punctual payment of the cumulative 8 per cent. preferential dividends in the 1,500 shares, & if the agreement was terminated as therein provided for, to procure the repurchase from *pltf.* at par of the 1,500 shares, & to secure such repurchase the co. further covenanted to accept bills for £1,500 to be drawn upon the co. by *pltf.*; *defts.* also by the agreement jointly & severally covenanted with *pltf.* to guarantee the full & proper performance by the co. of the covenants on its part therein contained, & in the event of default by the co. under its covenants to accept liability & to guarantee the payment to *pltf.* in such manner as if the covenants by the co. had been repeated *in extenso* in this guarantee by *defts.* The co., which carried on the business of import & export merchants, had made no profits since Dec. 31, 1919. The agreement was drawn up in good faith in the belief that it was *intra vires* of the co. *Pltf.* having terminated the agreement in Feb. 1924, sent to the co. a bill of exchange for £1,500 for their acceptance, & subsequently on the co. refusing to accept the bill sent a bill for £1,500 to *defts.* who also refused to accept it. The co. & *defts.* denied liability under the covenants & guarantee entered into by them respectively on the ground that the covenants by the co. contained in the agreement of Jan. 4, 1924, were *ultra vires* & illegal, since they would have necessitated the co. trafficking in or buying its own shares & paying a preferential dividend out of capital. *Pltf.* claimed a declaration that *defts.* were bound under their guarantee to *pltf.* contained in the agreement to accept a bill for £1,500 & specific performance, but admitted that the covenants with him by the co. were *ultra vires* & illegal:—*Held*: the guarantee by

*defts.* to perform the covenants entered into by the co. if the co. did not perform them, was not dependent on whether the co. merely refused to perform its obligations under the covenants or were not legally liable to perform them, & there being good consideration for the guarantee in that the £1,500 was wanted by the co. for its business in which *defts.* were pecuniarily interested, such a bargain could be given effect to & the *defts.* were liable on their guarantee.—*GARRARD v. JAMES*, [1925] 1 Ch. 616; 94 L. J. Ch. 234; 133 L. T. 261; 69 Sol. Jo. 622.

## SECT. 6.—GUARANTEE IN FRAUD OF CREDITOR

*See, generally, MISREPRESENTATION & FRAUD.*

**676. Principal's name used as covenantor—Acts by surety in breach of covenant—Surety not bound in covenant.**—A. agreed with B. for the purchase of timber; & together with C. entered into a bond that A., his exors. & administrators, should not cut down any timber under a particular size; but A.'s name was only made use of in this agreement for C. C. cuts down timber under the size stipulated; but as there could be no remedy against C. upon this bond, it was held to be a fraud on B. the seller & relievable in equity.—*BUTLER v. PRENDERGAST* (1720), 4 Bro. Parl. Cas. 174; 2 Eq. Cas. Abr. 185; 2 E. R. 119, 11. L.

**677. Misrepresentation by surety—Liability to action for fraud—Apart from promise.**—If A. fraudulently represent the circumstances of B. to be good, in order to induce C. to give him credit, & add "if he does not pay for the goods, I will," an action may be maintained against A. for the misrepresentation, notwithstanding the addition of the promise.—*HAMAR v. ALEXANDER* (1806), 2 Bos. & P. N. R. 211; 127 E. R. 618.

**678. —As to value of property—Charged by way of security—Proof in administration.**—A. having accepted bills for the accommodation of B. who was unable to take them up, entered into an agreement to provide for payment of half of the amount of the outstanding bills, as they became due, a third person, party to the agreement, charging certain property to the extent of £1,500, for the benefit of A., by way of security, which property such third person alleged to be his own, & a security amply sufficient in value above incumbrances. More than half of the amount of the bills was afterwards paid by A., but the property of the third party charged as a security proved to be heavily incumbered, & insufficient:—*Held*: in a suit by A. against the exors. & devisees of the third party, the misrepresentation as to the surplus value proved, A. was entitled to have so much of the sum of £1,500 & interest as the specific property was insufficient to pay, raised & paid out of the general estate of testator.—*INGRAM v. THORP* (1848), 7 Hare, 67; 11 L. T. O. S. 171; 68 E. R. 27.

*Annotation:—Reid. Peek v. Gurney* (1873), L. R. 6 H. L. 377.

**679. Principal's cheques to creditor guaranteed by bank—With priority for amount due to bank—Principal's overdraft making guarantee worthless—Not disclosed to creditor.**—A principal is liable to an action for the fraudulent misrepresentation

prohibition is of no effect.—*BROWN v. MOORE* (1902), 32 S. C. R. 93.—CAN.

**K. Company not liable on ultra vires contract—Surety discharged—No guarantee.**—Where an assocn. incorporated under Agricultural Co-operative Assocns. Act, R.S.S., 1920

(o. 119), purchases & receives delivery of goods on credit the transaction is *ultra vires* & there is no liability on the part of guarantors who have guaranteed the due payment of the price.—*MACDONALD-CRAWFORD, LTD. v. BURNS*, [1924] 2 D. L. R. 977;

2 W. W. R. 413; 17 Sask. L. R. 586.—CAN.

**1. Contract by unregistered company—Surety not liable.**—*EATON, ROBINS & Co. v. NEL* (1908), 26 S. C. 365; 19 C. T. R. 625.—S. AF.

of his agent, acting in the course of his business. Pltf. having for some time on a guarantee of the debts supplied J., a customer of theirs, with oats on credit, for carrying out a govt. contract, refused to continue to do so unless he had a better guarantee. Defts.' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in pltf.'s favour in payment for the oats supplied, should be paid on receipt of the govt. money, priority to any other payment "except to this bank." J. was then indebted to the bank to the amount of £12,000, but this fact was not known to pltf., nor was it communicated to him by the manager. Pltf. thereupon supplied the oats to the value of £1,217: the govt. money amounting to £2,676 was received by J. & paid into the bank; but J.'s cheque for the price of oats drawn on the bank in favour of pltf. was dishonoured by defts., who claimed to retain the whole sum of £2,676 in payment of J.'s debt to them. Pltf. having brought an action for false representation, & for money had & received:—*Held*: there was evidence to go to the jury that the manager knew & intended that the guarantee should be unavailing & fraudulently concealed from pltf. the fact which would make it so.—**BARWICK v. ENGLISH JOINT STOCK BANK** (1867), L. R. 2 Exch. 259; 36 L. J. Ex. 147; 16 L. T. 401; 15 W. R. 877, Ex. Ch.

*Annotations*.—*Reid*, Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Swift v. Jewsbury (1874), L. R. 9 Q. B. 301; Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317; Charles v. Brunswick Bldg. Soc. (1881), 6 Q. B. D. 696; British Mutual Banking Co. v. Charnwood Forest Ry. (1887), 18 Q. B. D. 714; Hambro v. Burnand, [1903] 2 K. B. 399; Malcolm, Brunner v. Waterhouse (1908), 24 T. L. R. 854; Lloyd v. Grace, Smith, [1912] A. C. 716. *Mentd.* The Thetis (1869), L. R. 2 A. & E. 365; Edwards v. L. & N. W. Ry. (1870), L. R. 5 C. P. 445; Bollingbroke v. Swindon L. R. (1871), L. R. 9 C. P. 575; Dixon v. Reuter's Telegram Co. (1877), 41 J. P. 167; Swire v. Francis (1877), 3 App. Cas. 106; *Re Collico*, *Ex p.* Adamson (1878), 8 Ch. D. 807; Weir v. Bell (1878), 3 Ex. D. 238; Mullens v. Miller (1882), 31 W. R. 559; Thorne v. Henard, [1894] 1 Ch. 599; Marsh v. Joseph (1896), 66 L. J. Ch. 128; Spooner v. Browning, Todd & Whish (1897), 77 L. T. 685; Ormerod v. Rochdale Corp'n. (1898), 62 J. P. 153; Taft Vale Ity. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; Whitechurch v. Cavanagh, [1902] A. C. 117; Dunlop Pneumatic Tyre Co. v. Mason Talbot, Shrewsbury & Talbot & Weigel, Clipper Pneumatic Tyre Co. v. Same (1903), 52 W. R. 254; Giblin v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Hamlyn v. Houston, [1903] 1 K. B. 81; Citizens' Life Assoc. v. Brown, [1904] A. C. 439; Ruben v. Great Pingall Consolidated, [1906] A. C. 439; Pearson v. Dublin Corp'n., [1907] A. C. 351; Kottelwohl v. Kottelwohl & Assoc., [1908] 1 K. B. 545; Burdett v. Horne (1911), 27 T. L. R. 402; Wake v. Dyer (1911), 104 L. T. 448; Watkins v. Naval Colliery Co. (1912), 107 L. T. 321; Mair v. Rio Grande Rubber Estates, [1913] A. C. 853; Janvier v. Sweeney, [1919] 2 K. B. 316; Pratt v. British Medical Assocn., [1919] 1 K. B. 244.

**680. Misrepresentation by surety—As to credit of prospective tenant.**—A., who was about to grant a lease to B., wrote to C., who was named by B. as a referee: "B. is desirous of leasing premises from us of about the annual value of £400 . . . & we will be glad if you will say if you know him to be in a good & responsible position to meet the responsibility of such an undertaking, & if you can recommend him as a safe & advisable tenant." C. answered: "I have much pleasure in replying affirmatively." On this

B. was accepted as tenant, but afterwards deserted the premises without paying any rent. C., when he answered the reference, was well acquainted with the antecedents of B., & knew him to be a person of no substantial means, who had twice previously failed in business similar to that which he intended to carry on on the premises in question. C., however, had no positive intention to deceive:—*Held*: C. was answerable to A. in damages for misrepresentation.—**LEDDELL v. McDUGAL** (1881), 29 W. R. 403, C. A.

*See, also*, Part III., Sect. 3, sub-sect. 4, B. (b).

## SECT. 7.—ENFORCEMENT OF LIABILITY.

### SUB-SECT. 1.—PLEADING.

*See, generally*, PLEADING.

**Assignment of breaches—On bonds.**—*See BONDS*, Vol. VII., pp. 243 *et seq.*  
**Pleading Statute of Frauds.**—*See* R. S. C., Ord. 19, r. 15.

### SUB-SECT. 2.—PRACTICE AND PROCEDURE.

#### A. In General.

*See, generally*, PRACTICE.

**681. Preliminary trial of surety's liability—Action against principal & surety—R. S. C., Ord. 36, r. 7.**—Where, in an action against a principal & sureties for breaches of contract, the sureties claimed to be discharged by reason of an alteration of the terms of the contract:—*Held*: this was not a case in which an order should be made under above ord. for the trial of the question of the sureties' liability before the other questions in the action, since, in the event of the principal's liability not being established, it would become unnecessary to try that of the sureties.—**TASMANIAN MAIN LINE RY. CO. v. CLARK & PUNCHARD, ETC.** (1879), 27 W. R. 677.

**Surety in administration bond.**—*See* EXECUTORS, Vol. XXIII., pp. 220-225.

#### B. Parties.

##### (a) Who May Sue.

*See, now*, R. S. C., Ord. 16, rr. 1-3, 9, & generally PRACTICE.

**682. Guarantee not addressed to specified person—Person for whose use given.**—A guarantee for goods, addressed to one of two partners, may be declared on, as given to both, if it appear that the partner to whom it was addressed, did not carry on any separate business.

A guarantee not addressed to any one, must be declared on as given to the party to whom or for whose use it was delivered.—**WALTON v. DODSON** (1827), 3 O. & P. 162, N. P.

*Annotation*.—*Reid*, Williams v. Byrnes (1863), 1 Moo. P. C. C. N. S. 154.

**683. Stranger—Representing creditor in administration.**—**TOMLINSON v. GILL**, No. 264, ante.

### PART V. SECT. 7, SUB-SECT. 2.—A.

**m. Variance between guarantee charged & guarantee proved at trial.**—**SUTHERLAND v. McCASKILL** (1849), 5 U. C. R. 316.—CAN.

**n. —.**—K. having agreed with pltf. for the purchase of some lumber, defts. consented to guarantee his punctual payment for the same; but inadvertently K.'s agreement was

recited in the agreement signed by the sureties as bearing date Dec. 22, instead of Jan. 8. Pltf., in declaring against the sureties, stated the first agreement as bearing date Jan. 8:—*Held*: defts. should have pleaded *non est factum*, & relied at the trial upon the variance between their actual agreement & that declared on.—**WADSWORTH v. TOWNLEY** (1853), 10 U. C. R. 579.—CAN.

### PART V. SECT. 7, SUB-SECT. 2.—B. (a).

**o. Stranger.]—KENNEY v. EMPLOYERS' LIABILITY ASSURANCE CORPN.**, [1901] 1 L. R. 301.—IR.

**p. Where principal debtor a public official—Municipal council.]—EASTERN DISTRICT COUNCIL v. HUTCHINS** (1845), 1 U. C. R. 321.—CAN.

**q. —.]—Municipal Council Act,**

**Sect. 7.—Enforcement of liability: Sub-sect. 2, B. (a) & (b).]**

**684.** — *Cestui que trust.*]—GREGORY v. WILLIAMS, No. 257, *ante*.

**685.** On behalf of partnership—Persons constituting firm—Though given to one only—For benefit of all.]—An action may be maintained by the several partners of a firm, upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all.—GARRETT v. HANDLEY (1825), 4 B. & C. 664; 7 Dow. & Ry. K. B. 144; 107 E. R. 1208.

*Annotations:—*Consd. *Agacio v. Forbes* (1861), 14 Moo. P. C. C. 160. *Refd.* *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154. *Mentd.* *Alexander v. Barker* (1831), 2 Cr. & J. 133; *Higgins v. Senior* (1841), 11 L. J. Ex. 199; *Brett v. Beckwith* (1856), 5 W. R. 112.

**686.** — — — — — **Not carrying on separate business.**]—WALTON v. DODSON, No. 682, *ante*.

**687.** — *Partner suing alone—On personal promise—For benefit of firm.*]—A., a member of the firm of A. brothers of South America, went to Hong Kong to enforce a debt due by B. & Co. of that place to his firm. Upon B. & Co. being threatened with proceedings, they applied to C. & Co. for assistance. C. & Co. agreed to advance B. & Co. the money to pay their debt by remitting the amount to A. & Co., & afterwards, in pursuance of this agreement, & in consideration of A.'s not proceeding to sue B. & Co., gave an undertaking in writing, whereby C. & Co. promised to remit the amount to A.'s agent in London, at the expiration of six months, whereon A. gave B. & Co. a receipt in full for the debt due to the firm of A. & Co. C. & Co. afterwards repudiated their obligation to remit the amount to A. & Co. In these circumstances A. brought an action against C. & Co. in the Supreme Ct. at Hong Kong, & that ct. nonsuited A. on the ground that A.'s firm, being beneficially interested, should have sued, & not A. alone:—*Held*: the contract being entered into with A. personally upon his undertaking not to sue B. & Co., constituted a personal agreement; & A. was entitled to sue C. & Co. in his own name, without joining his partners as plffs. in the action.—AGACIO v. FORBES (1861), 14 Moo. P. C. C. 160; 4 L. T. 155; 9 W. R. 503; 15 E. R. 267, P. C.

**688.** Promissory note as guarantee—Original payees or survivors—Note not indorsed.]—PEASE v. HIRST, No. 1289, *post*.

**689.** Where principal debtor a public official—Officer of court—Action in name of superior official.]—An officer of the Palace Ct. entered into a bond, with sureties, to the knight marshal of that ct., conditioned for the due performance of the duties of his office; & *inter alia*, that he should take sufficient bail from all defts. arrested, & should obey the lawful orders of the ct. Having taken insufficient bail from a deft. arrested in an action in that ct., an order was made requiring him to pay the amount of debt & costs in the action, which he disobeyed:—*Held*: the knight marshal was entitled, as a trustee for plff. in the action, to recover, in an action on the bond, the full amount of the debt & costs.—LAMB v. VICE (1840), 6 M. & W. 467; 8 Dowl. 360; 9 L. J. Ex. 177; 4 Jur. 341; 151 E. R. 495.

*Annotations:—*Follid. *Pugh v. Stringfield* (1858), 4 C. B. N. S. 384. *Apld.* *Lloyd's v. Harper* (1880), 16 Ch. D. 290.

does not enable the municipal councils of districts to sue upon bonds given by collectors of assessments to the treasurer of the district after that Act was passed, but the treasurer can sue in his own name.—O'CONNOR v. CLARKENTS (1845), 1 U. C. R. 386.—CAN.

*r. Joint creditors—Whether all must join.*]—STEVENSON v. MCLEAN (1860), 10 C. P. 414.—CAN.

**691.** Assignee of guarantee.]—The assignee of replevin bond may sue in his own name.—MEYERS v. MAYBEE (1855), 10 U. C. R. 200.—CAN.

*Refd.* *Wright v. Chappell* (1869), 20 L. T. 369; *Re Flavell Murray v. Flavell* (1883), 25 Ch. D. 89.

**690.** Joint creditors—All must join.]—W. covenanted with A., B., & C., to whom he had severally mortgaged certain unfinished messuages, to complete the premises by a given day; & A., B., & C. severally covenanted with W. to make him certain periodical advances. In consideration of the arrangement thus entered into with W., D. & E. jointly & severally guaranteed to A., B., & C., that W. should duly perform his covenant with them, their joint & several liability under the guarantee not to exceed £100. Default having been made by W.:—*Held*: A., B., & C. might recover to the extent of the £100 in a joint action against D. & E., in respect of damages sustained by them, or either of them, from W.'s breach of covenant.

The ct. having already decided that one of plffs. could not sue on this guarantee alone, the interests of the three therein being joint, it seems to me to follow that the three may jointly maintain an action upon it (CROWDER, J.).—PUGH v. STRINGFIELD (1858), 1 C. B. N. S. 361; 27 L. J. C. P. 225; 6 W. R. 487; 110 E. R. 1125.

**691.** Assignee of guarantee.]—WHEATLEY v. BASTOW, No. 1479, *post*.

**692.** — — — **What constitutes assignment.**]—M. drew bills upon the B. co., & a banking co., under an agreement with M., guaranteed the acceptors, also a co., that they would supply them with funds to meet the bills. S. discounted the bills, being informed by M. of the guarantee of the banking co., but he gave no notice to the banking co. or to the acceptors. Afterwards the banking co. & the acceptors suspended payment & were wound up. M. also executed a deed of composition with his creditors:—*Held*: S. had no equity to rank as a creditor of the banking co. in respect of the guarantee.

It is said that the drawer who gets the bills discounted & has the advantage of this guarantee, by telling another that such a guarantee exists, & raising money on the faith of that, does the same thing as if he assigned the benefit of the guarantee. But it is not M., the drawer of the bill, that has the right against the bank, but it is the acceptors that have the right. The acceptors are not dealing with S. & trying to induce him to discount bills for their friends, but the drawer who gets the money says: "I have bills drawn on a good acceptor, & if you do not think that acceptor is good he is backed by somebody else." The question is, does that transfer the right which the acceptor has to somebody else? Does it make the discounter of the bill a creditor of the co. who has agreed to hold the acceptor harmless? It is clear that cannot be so (PAGE WOOD, L.J.).—*Re BARNED'S BANKING Co., Ex p. STEPHENS* (1868), 3 Ch. App. 753; 19 L. T. 198; 16 W. R. 1162, L. J.J.

*Annotation:—Apld.* *Re General Rolling Stock Co., Ex p. Alliance Bank* (1869), 4 Ch. App. 423.

**693.** — — **In name of assignor.**]—The debtors H. & co. having advanced a sum of £16,000 took from the borrowers a promissory note for that amount, & also a guarantee by which the guarantors agreed to pay to H. & co., "or the holders for value of the promissory note for the

*s. New trustees.*]—Where the payment of interest on a mtge. debt due to trustees was secured by a deed of guarantee, & new trustees were appointed in their stead under Trustee Act, 1896:—*Held*: the right of action upon the guarantee was vested in the

time being," the sum of £16,000 & interest if the note was not paid at maturity. The debtors indorsed the note, & handed it, together with the guarantee, to applt.s., their bankers, who thereupon placed £16,000 to their credit. The note was not paid at maturity: & H. & co., having become bkpt., applt.s. sought to prove as unsecured creditors for the full amount of the balance due to them without deducting the value of the guarantee:—*Held*: the transfer of the guarantee by the debtors to applt.s. did not constitute the latter "secured creditors" within Bkpcy. Act, 1883, s. 168, as being "persons holding a mtge., charge or lien on the property of debtors," & the proof ought therefore to be admitted.

It is true that the property in that contract [the guarantee] cannot pass by indorsement, but if H. & Co. handed it over, intending the benefit of the contract to be in the bankers, the property in it passed in this sense, that at common law H. & Co. would have been bound to lend their name to C. & Co. [the bankers] to enable them to sue upon it; while if H. & Co. brought an action upon it in their own name & on their own behalf, the action would have been stopped on the ground that they were bare trustees for C. & Co. (LORD ESHER, M.R.).—*Re HALLETT & Co., Ex p. COCKS, BRIDGEMAN & Co.*, [1894] 2 Q. B. 256; 63 L. J. Q. B. 676; 70 L. T. 891; 38 Sol. Jo. 386; 1 Mans. 83; 9 R. 380. C. A.

*Annotation* :—**Refd.** *Bradford Old Bank v. Sutcliffe*, [1918]  
2 K. B. 833.

*See, generally, CHOSES IN ACTION, Vol. VIII., p. 478.*

(b) *Who May be Sued.*

*See, now, R. S. C., Ord. 16, rr. 4-9, & generally*  
PRACTICE.

**Necessity for prior proceedings against principal.]**  
—See Sect. 2, *ante*.

**694. Where liability joint only**      **Death of one before action**—[**Joinder of survivors.**]—Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint & several; therefore, where four persons had opened a joint account with certain bankers, who had advanced to them money on such joint account:—**Held:** upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency. But to a bill filed by joint creditors for the purpose of obtaining relief against the assets of a deceased partner or joint contractor, the surviving partners or joint contractors must be made parties, though no decree is sought against them; such persons being necessarily interested in taking the accounts.—**THORPE v. JACKSON** (1837), 2 Y. & O. Ex. 553; 160 E. R. 515.

**Annotations:**—**Consd.** Other v. Iveson (1855), 3 Drew. 177.  
**Refd.** Jones v. Beach (1852), 2 De G. M. & G. 886; Lyth v. Ault (1852), 7 Exch. 669. **Mentd.** Slater v. Wheeler (1835), 2 Jur. 887; Beresford v. Browning, Browning v. Beresford (1875), L. It. 20 Eq. 564.

695. ——— ———.] — A. & B. desiring to borrow money of a bank, the bank refused unless

new trustees.—LOXTON v. MOIR (1914),  
18 C. L. R. 360; 31 N. S. W. W. N.  
108; 15 S. R. N. S. W. 1.—AUS.

t. Bailiff of division court—For fees on service of process.]—COOL. v. SWITZER (1800), 19 U. C. R. 199.—CAN.

**PART V. SECT. 7, SUB-SECT. 2.—**  
**B. (b).**

a. Where liability joint only—

*Joint action against principal & co-surety.*—A surety cannot sue a co-surety jointly with the principal, for the amount of a debt of the principal which the surety has been obliged to pay.—*BURNHAM v. CHOAT* (1839), 5 O. S. 736.—*CAN.*

b. Where liability joint & several  
--One of sureties alleged bankrupt--  
Effect on necessity to join.]--GARROW v.

C. would join to secure them ; C. agreed to join, & A., B. & C. drew a cheque, & the money was paid to them :—*Held* : this was a joint, & not a joint & several liability ; C. was in the nature of a surety only, & a bill against his estate, after his death, could not be supported.

Can I come to the conclusion that if an action was brought in a ct. of law against one of the three alone & a plea of abatement was put in, a ct. of law would have held such separate action maintainable? No authority is cited for this proposition. There is, it is true, the dictum which tends that way in *Thorpe v. Jackson*, No. 601, *ante*, but it is at most only a dictum & not a decision. I have no hesitation in saying I cannot take it as an authority. In the lifetime of C. then, an action must have been against the three. If he had survived the others, an action might have been sustained against him, but when he died, according to the tenor of the instrument he ceased to be liable, because the debt was joint & the obligation survived (*KINDERSELEY, V. C.*). — *OTHER v. IVESON* (1855), 3 Drew. 177; 3 Eq. Rep. 502; 24 L. J. Ch. 651; 25 L. T. O. S. 61; 1 Jur. N. S. 568; 3 W. R. 332; 61 E. R. 870.

**Annotations:**—**Mentd.** Beresford v. Browning, Browning v. Beresford (1875), L. R. 20 Eq. 561; National Soc. for the Distribution of Electricity by Secondary Generators v. Gibbs, [1899] 2 Ch. 289.

— **Liability of estate.**—See Sect. 3, sub-sect. 7, *ante*.

696. — Death after liability established — Joinder of personal representative — Power of court.]

—One of three sureties [to a bond], having died after claims against them had been established, & after a sum of money had been paid by them into ct.:—*Held*: for the purposes of the suit, a representative of the deceased surety was a necessary party; though the ct. refused to declare in the suit, as constituted, the liabilities of the sureties *inter se*.—*BERWICK-UPON-TWEED CORPN. v. MURRAY* (1857), 7 De G. M. & G. 497; 26 L. J. Ch. 201; 5 W. R. 208; 44 E. R. 194; *sub nom.* *BERWICK CORPN. v. MURRAY*, *BERWICK CORPN. v. DOBIE*, 28 L. T. O. S. 277; 3 Jur. N. S. 1, L. O.

*Annotation*:—**Mentd.** General Steam Navigation Co. v. Holt (1858), 6 C. B. N. S. 550.

697. Where liability joint & several—One of sureties bankrupt Effect on necessity to join.] -- Three obligors in a bond, the obligee brings the principal & the representative of one of the sureties before the ct., & by his bill states the third is dead insolvent; on the circumstances of this case, the objection for the want of parties overruled. Where a debt is joint & several, plff. must bring each of the debtors before the ct. Where the obligors are only sureties, it is not necessary to bring them before the ct.—*MADOX v. JACKSON* (1740), 3 Atk. 405; 26 E. R. 1034, L. C.

**Annotations:--** *Reid. Haywood v. Ovey* (1821), 6 Madd. 113.  
*Mentd. Hoare v. Contencin* (1779), 1 Bro. C. C. 27;  
*Seddon v. Connell* (1840), 10 Sim. 58; *Crescor v. Robinson*  
(1851), 14 Beav. 589.

698. ——— ——— ———.] *ANGERSTEIN v. CLARK*  
(1790), 2 Dick. 738; 3 Swan. 147, n.; 1 Ves.  
250; 21 E. R. 457, L. C.

699. — Principal debtor bankrupt — Joinder

McDONALD (1873), 20 Gr. 122.—CAN.  
c. — *Recognition.*]—On a joint  
& several recognisance, one may be  
sued alone.—ROSS v. JONES (1858),  
15 U. C. R. 598.—CAN.

d. — *Multiplicity of suits.*—  
MERCHANTS BANK v. SPARKES (1880),  
28 Qr. 108.—CAN.

c. *Whether principal debtor need be party.*—Where a principle debtor

**Sect. 7.—Enforcement of liability: Sub-sect. 2, B. (b), C. & D.]**

**of principal unnecessary.]**—A bill being filed by the obligee of a [joint & several] bond against the personal representative of a surety, who was an obligor, & one of the two principal obligors stated, that the other principal obligor was dead, that there was no personal representative of him, & that he left no assets out of which pltf.'s demand could be satisfied:—*Held*: a demurrer could not be sustained, on the ground that there was no personal representative of one of the two principal debtors before the ct.—*MUSGRAVE v. VICK* (1827), 5 L. J. O. S. Ch. 150.

**700. — Joinder of assignees unnecessary.]**—No person need be made a party to a suit against whom no relief can be had, unless such a party has a common right with pltf. A. agreed to sell to B. an estate, & before the purchase was completed, B. advanced to A. the sum of £2,000, in part of the purchase-money, which it was agreed should be returned, in case a good title should not be made out. To secure this repayment, A., with C. as his surety, entered into a joint & several promissory note to B., payable on demand. The contract not being completed, B. sued C. on the note, on which C. filed a bill, alleging that the title was good, etc., & praying an injunction:—*Held*: the assignees of A., who had become bkpt., were not necessary parties.—*MUSGRAVE v. NEWTON* (1835), 4 L. J. Ch. 223.

**701. — Joinder of all contracting parties—Whether necessary.]**—A declaration in *assumpsit* stated, that deft. & J. by a certain promise in writing, promised pltf. in the words & figures following; that is to say, etc. It then set out a joint & several guarantee, *in hæc verba*:—*Held*: on special demurrer, it was no objection to the declaration that it appeared that another contracting party was not sued.—*MORRISON v. TRENCHARD* (1842), 4 Man. & G. 709; 11 L. J. C. P. 299; 134 E. R. 202.

**702. Where liability several only—Enforcement severally.]**—A surety bond by three, for the payment of £1,000 worded, "for which payment to be well & faithfully made, we bind ourselves & each of us for himself, for the whole & entire sum of £1,000 each," is a several & not a joint & several bond, & may be enforced against the obligors severally. Tearing off the seal of one of the obligors of such a bond does not avoid it as against the others, & if the obligor against whom it is enforced, is entitled to contribution, it seems his remedy is in equity only.—*COLLINS v. PROSSER* (1823), 1 B. & C. 682; 3 Dow. & Ry. K. B. 112; 1 L. J. O. S. K. B. 212; 107 E. R. 250.

**Annotations:—***Reid*, *Servante v. James* (1829), 5 Man. & Ry. K. B. 299; *Lee v. Nixon* (1834), 1 Ad. & El. 201; *Caldwell v. Parker* (1869), 17 W. R. 955.

**703. —**—A contract, in which A. as the renter of tolls, & B. as his surety, do hereby severally promise, etc., is a several undertaking, & they cannot be sued jointly.—*LEE v. NIXON* (1834), 1 Ad. & El. 201; 3 Nev. & M. K. B. 441; 3 L. J. K. B. 160; 110 E. R. 1183.

**704. Release of principal with surety's consent—Action against surety—Necessity for joinder of principal.]**—The bill stated that pltf., with the parol consent of deft., a surety, had by deed released the principal debtor, & that having

brought an action at law against the surety, it had been held, that the surety was released. The bill prayed payment by the surety of the debt:—*Held*: on demurrer, the principal debtor was a necessary party to the suit.—*BROOKS v. STUART* (1839), 1 Beav. 512; 8 L. J. Ch. 270; 48 E. R. 1039.

**705. Action on bill of exchange—Plaintiff as indorser & subsequent indorsee—Surety intermediate indorser—Circuity of actions not arising.]**—The son of deft. bought goods of pltf., & required credit to enable him to pay. It was agreed that deft. should become surety for the price of the goods. Pltf. accordingly drew two bills of exchange on the son of deft., & indorsed them to deft., who reindorsed them to pltf. The bills having been dishonoured at maturity:—*Held*: (1) pltf. were not precluded from suing deft. on the ground of circuity of action, & they could recover the amount of the bills from deft.; (2) the agreement to become surety could be proved by parol evidence, as the action was brought not on the guarantee, but on the bill.

If the indorser of a bill of exchange subsequently becomes the indorsee, he can maintain no action against the intermediate indorsers because he would himself be liable to them by reason of his antecedent indorsement. But if the holder of the bill would not be liable to the indorser whom he is suing by reason of any previous indorsement of his own, he may enforce his claim because no circuity of action arises (*BRAMWELL, L.J.*).

It has been argued that the agreement relied upon by pltf. must be proved by a memorandum in writing because the contract is one of suretyship. The contract, however, is not within the words or the reason of Stat. Frauds. If the buyer of goods accepts a bill drawn upon him for the price by a surety who afterwards indorses it to the seller, the surety cannot refuse to pay the amount upon default of the principal debtor, because the agreement under which the bill was signed was not in writing (*BRAMWELL, L.J.*).—*WILKINSON v. UNWIN* (1881), 7 Q. B. D. 636; 50 L. J. Q. B. 338; 46 L. T. 123; 29 W. R. 458, C. A.

**Annotations:—***As to* (1) *Consid. Jenkins v. Comber* (1898), 67 L. J. Q. B. 780. *Appl. Glenie v. Bruce Smith*, [1907] 2 K. B. 507; *Re Gooch, Ex p. Judd*, [1921] 2 K. B. 593. *Reid*, *Harburg Indiarubber Comb Co. & Winter v. Martin* (1902), 71 L. J. K. B. 529. *Generally, Mentd. McDonald v. Nash*, [1924] A. C. 625.

#### C. Proceedings under Order XIV.

*See, generally, JUDGMENTS; PRACTICE.*

#### D. Evidence.

*See, generally, EVIDENCE, Vol. XXII., pp. 1 et seq.*

**706. Admission by principal debtor—How far evidence against surety—Receipt of money.]**—In a debt against the surety of a sheriff's officer, for his not paying over the levy money an indorsement on the writ by the officer to this effect, "Discharge deft. out of custody, I have received the money," is sufficient evidence to charge him with receipt of the money.—*PERCHARD & HAMERTON v. TINDALL* (1795), 1 Esp. 394, N. P.

**707. — Delivery of goods.]**—On a guarantee to pay for goods sold & delivered to a third person, what such person has said respecting the goods sold to him, is not evidence to charge

wrote a letter acknowledging the balance to be due, & granted a bill for it, which he failed to retire, & was forth of the kingdom & an action was brought against his cautioner:—*Held*: not necessary to call the

principal debtor as a party.—*ELLICE & Co. v. FINLAYSON* (1832), 10 Sh. (Ct. of Sess.) 345.—*SCOT.*

**PART V. SECT. 7, SUB-SECT. 2.—D. 1. Entries made in course of duty.]**

—In an action against sureties for a town collector for his default in paying over the sum collected by him:—*Held*: entries made by the collector on his roll in the discharge of the duties of his office of taxes paid



the person giving the guarantee; the delivery of them must be proved.—*EVANS v. BEATTIE* (1803), 5 Esp. 26, N. P.

*Annotation*.—*Reid*. Carmarthen & Cardigan Ry. v. Manchester & Milford Ry. (1873), L. R. 8 C. P. 685.

**708. Judgment against principal debtor—Not evidence against surety.**—In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, & is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.

The surety can call in the principal [on a third party notice], but the principal cannot call in the surety (*JAMES, L.J.*).—*Re KITCHIN, Ex p. YOUNG* (1881), 17 Ch. D. 668; 50 L. J. Ch. 821; 45 L. T. 90, O. A.

**709. Evidence to rectify mistake—Invoice incorrect—As to time agreed for credit.**—A. engages to guarantee the amount of goods supplied by B. to C. provided eighteen months' credit be given; if B. give credit for twelve months only, he is not entitled at the expiration of six months more, to call upon A. on his guarantee. But B. having after the commencement of the action, delivered an invoice from which it appears that credit was given for twelve months only, is at liberty to show that this was a mistake, & that in fact eighteen months' credit was given.

The claim as against a surety is *strictissimi juris*, & it is incumbent on pltf. to show that the terms of the guarantee have been strictly complied with (*LORD ELLENBOROUGH, C.J.*).—*BACON v. CHESNEY* (1816), 1 Stark. 192, N. P.

*Annotations*.—*Reid*. Goss v. Watlington (1821), 6 Moore, C. P. 355; Bonser v. Cox (1841), 4 Beav. 379; Carmarthen & Cardigan Ry. v. Manchester & Milford Ry. (1873), L. R. 8 C. P. 685.

**710. To limit liability—Of collateral terms not in writing—Contemporaneous with guarantee.**—To *assumpsit* on a guarantee, deft. pleaded, that the guarantee was given by him on certain terms, which limited the liability of deft. thereunder, & pltf. traversed this plea.—*Held*: in this state of the record, pltf. was not at liberty to object to the admissibility of evidence to prove what those terms were, on the ground that they were not shown to have been reduced into writing.—*GALLEY v. TAYLOR* (1848), 2 Car. & Kir. 551, N. P.

*Annotation*.—*Mentd.* Williams v. Byrnes (1863), 1 Moo. P. C. C. N. S. 154.

**711. To prove non-fulfilment of conditions—Incomplete appointment as collector—Under fidelity bond—Notwithstanding recital of appointment.**—Sureties in a bond given by a collector of property & income tax, under Income Tax Act, 1842 (c. 35), conditioned for the due collection & payment of the sums assessed under the Act, are not liable in respect of moneys collected by him without legal authority, that is, before he is furnished with the duplicate assessment & warrant to collect, as mentioned in sect. 172 of the statute.

The condition recited that A. "had been duly nominated & appointed a collector for the year ending," etc.; & that duplicates of the assessments had been delivered & given in charge to him, with a warrant or warrants for collecting the same." In an action against the sureties, for

A.'s default:—*Held*: they were not estopped by these recitals from showing that there had been no complete appointment of A. as collector, & the duplicate assessments & warrant to collect had not been delivered to him.—*KEPP v. WIGGETT* (1850), 10 C. B. 35; 20 L. J. C. P. 49; 16 L. T. O. S. 172; 14 Jur. 1137; 138 E. R. 15.

*Annotation*.—*Reid*. Durham Corpn. v. Fowler (1889), 23 Q. B. D. 394.

**Admissibility of extrinsic evidence—To interpret guarantee.**—*See* Part IV., *ante*

**712. Production of memorandum—Mentioned in guarantee—Necessity for.**—*Assumpsit* on the following guarantee: "You will be so good as to withdraw the promissory note; & I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole £15." A promissory note for £35, made by deft.'s son, & payable to pltf., was proved at the trial; but not the memorandum. The guarantee was proved, & a subsequent admission by deft. that he had to pay pltf. £15 due from his son:—*Held*: pltf. was not bound to produce the memorandum.

The consideration being executory, pltf. is to show that he has fulfilled it & for that purpose must of necessity prove by parol evidence that the note withdrawn by him was the thing meant by the agreement (*PARKE, J.*).—*SHORTREDE v. CREEK* (1834), 1 Ad. & El. 57; 3 Nev. & M. K. B. 806; 3 L. J. K. B. 125; 110 M. R. 129.

*Annotations*.—*Reid*. Holmes v. Mitchell (1849), 7 C. B. N. S. 361. *Mentd.* Squire v. Campbell (1836), 1 My. & Cr. 459; Bainbridge v. Wade (1840), 16 Q. B. 89; Spickernell v. Hotham (1851), 2 Eq. Rep. 1103; Fitzmaurice v. Bayley (1857), 30 L. T. O. S. 230; Allen v. Maddock (1858), 11 Moo. P. C. C. 427; Morris v. Wilson (1859), 33 L. T. O. S. 56; North Staffordshire Ry. v. Peck (1860), C. B. & E. 986; Williams v. Byrnes (1863), 1 Moo. P. C. C. N. S. 154; Baumann v. James (1868), 3 Ch. App. 508; Buxton v. Rust (1872), L. R. 7 Exch. 279; Stanley v. Dowdeswell (1874), L. R. 10 C. P. 102.

**713. Evidence in mitigation of damages—No loss suffered by plaintiff.**—Deft. was a surety by bond to pltf. for the due performance of a contract by S. according to a certain agreement. By that agreement S. was to complete the works for a certain sum, & payment was to be made to him by pltf. during the continuance of the work, by instalments, viz., three-fourths of the cost of the work certified to have been done every two months. & the remaining one-fourth one month after the whole was completed. S. applied for & received advances from pltf. exceeding in amount the value of the work done by him, for some of which advances he gave security. The work not being done at the specified time, pltf. called in another builder to complete the work, & the amount paid to him, added to the advances made to S., greatly exceeded the original contract price, but, added to the value of the work done by S., was something under the contract price. In an action against the surety on the bond, to which there was a plea of *non est factum*:—*Held*: deft. might show in reduction of damages, that the advances were made by pltf. not according to the contract, & as the work had been completed within the contract price, pltf. were only entitled to nominal damages; & it would have been improper to plead *non damnificatus*.—*WARRE v. CALVERT* (1837), 7 Ad. & El. 143; 2 Nev. & P. K. B. 126;

*DIANE v. SUTCLIFFE* (1890), 26 L. R. Ir. 332.—*IR.*

*k. Cross-examination of surety—Whether surety compellable to disclose liabilities of partnership—Of which he is member.*—A surety on a bond, who is a member of a mercantile partnership, but justifies on his own

to him were evidence against the sureties.—*WELLDAN CORPN. v. BROWN* (1883), 4 O. R. 217.—*CAN.*

*g. —.*—In an action against the sureties of a secretary-treasurer of a school district for loss sustained by his default, the entries made by the

secretary-treasurer in the books kept by him as such secretary-treasurer are admissible as evidence against the sureties.—*JORDON HILL SCHOOL DISTRICT v. GARTZ* (1915), 32 W. L. R. 202; 8 W. W. R. 658; 23 D. L. R. 739; 8 Alta. L. R. 433.—*CAN.*

*h. —.*—*ABBETLEIGH UNION GUAR-*



*Sect. 7.—Enforcement of liability: Sub-sect. 2, D. & E.; sub-sects. 3, 4, 5 & 6.]*

Will. Woll. & Dav. 528; 6 L. J. K. B. 219; 1 Jur. 450; 112 E. R. 425.

**714. — Payments made by co-surety—But not pleaded by defendant—Effect.]—LAURIE v. SCHOLEFIELD, No. 658, ante.**

#### *E. Stay of Proceedings.*

*See, also, EXECUTION, Vol. XXI., pp. 442 et seq.; PRACTICE.*

**715. Proceedings against principal debtor impossible—Due to creditor's own conduct.]—BLAKE v. WHITE, No. 1322, post.**

**716. Tender by surety—Before service of writ—Stay on payment of amount due.]—A. & B., two creditors of C., who had died intestate, filed a bill against the personal representatives of C., against D., who had joined C. in a promissory note to A. for securing payment of A.'s debt, & also against E., who had joined C. in a promissory note to B. for securing payment of B.'s debt. Before service of subpoena on D. to appear & answer, his solr. tendered the whole amount then due to A. & at the same time offered to pay to him any proper costs that were due up to that time from D.; the solr. of A. & B., having declined to accept such tender & offer, the ct. on application made to it by D., ordered the proceedings in the suit to be stayed against D. on payment by him to A. of the amount due on the promissory note given to A., by C. & D.—HOLDEN v. KYNASTON (1840), 2 Beav. 204; 9 L. J. Ch. 198; 48 E. R. 1158.**

**717. Several actions against principal & sureties—Stay against sureties—Sureties bound by result of principal action.]—The assignee of a *replevin* bond having brought actions severally against the principal & his two sureties, the ct. made a rule, that the proceedings in all the actions should be stayed upon payment of the rent due & costs; & that upon such payment not being made, the first action should be proceeded with, debts in the other two actions to be bound by the event of the first.—BARTLETT v. BARTLETT, BARTLETT v. SYMONS, BARTLETT v. JYNE (1812), 4 Man. & G. 269; 4 Scott, N. R. 779; 11 L. J. C. P. 223; 134 E. R. 110.**

#### **SUB-SECT. 3.—SET-OFF IN ACTION AGAINST CREDITOR.**

*See R. S. C., Ord. 19, r. 3, County Court Rules, Ord. 10, r. 2, & generally, SET-OFF.*

**718. Right of creditor to set-off.]—A guarantee to the amount of a certain sum of money, given for a third person, cannot be set-off.—CRAWFORD v. STIRLING (1802), 4 Esp. 207, N. P.**

*Annotations:—Folld. Morley v. Inglis (1837), 4 Bing. N. C. 58. Refd. Williams v. Flight (1842), 7 Jur. 197.*

**719. — By agreement.]—A joint creditor by simple contract may proceed against a clear residue of the assets of deceased partner, the survivor being insolvent; & may set off against**

a debt to deceased, from the survivor & himself as his surety, a debt to the survivor from deceased, which agreed to be applied in liquidation of the debt secured.—CHEETHAM v. CROOK (1825), M'Cle. & Yo. 307; 148 E. R. 429.

**720. —.]—Pltf. guaranteed debt. £1,600 advanced by debt. to J. at pltf.'s request, & also any further sums which might then or thereafter be owing from J. to debt. Debt. afterwards advanced J. £3,000, which sum, as well as the £1,600, remained due at the time pltf. sued debt. for a debt:—Held: debt. could not set off the sum due to him from pltf. under the guarantee.—MORLEY v. INGLIS (1837), 4 Bing. N. C. 58; 6 Dowl. 202; 3 Hodg. 270; 5 Scott, 314; 7 L. J. C. P. 11; 132 E. R. 711; *sub nom.* MOSLEY v. INGLIS, 1 Jur. 923.**

*Annotations:—Consd. Crampton v. Walker (1860), 3 E. & E. 321. Refd. Johnson v. Diamond (1855), 11 Exch. 73.*

**Right of surety to set off.]—See Part VI., Sect. 3, sub-sect. 2,**

#### **SUB-SECT. 4.—CREDITORS RIGHT TO COUNTER-SECURITIES.**

**721. Security given by debtor to surety.]—A bond creditor shall, in this ct. have the benefit of all counter-bonds or collateral security given by the principal to the surety; & if A. owes B. money, & he & C. are bound for it, & A. gives C. a mtge. or bond to indemnify him, B. shall have the benefit of it to recover his debt.—MAURE v. HARRISON (1692), cited in, [1892] 1 Ch. at p. 627 1 Eq. Cas. Abr. 93; 61 L. J. Ch. at p. 236; 21 E. R. 904.**

*Annotations:—Consd. Re Brickwood, Re Bracken, Ex p. Waring, Ex p. Inglis (1815), 2 Rose, 182; Re Walker, Sheffield Banking Co. v. Clayton, [1892] 1 Ch. 621.*

**722. — Debts contracted jointly with partner—Not within guarantee.]—A security for a separate demand does not extend to a joint demand—Re STARKEY, Ex p. FREEN & MORRICE (1827), 2 Gl. & J. 246.**

*Annotation:—Refd. Re Streetfield, Lawrence, Ex p. City Bank (1860), 3 L. T. 792.*

**723. —.]—The principal creditor is not entitled to the benefit of all counter bonds or collateral securities given by the principal debtor to the surety. Testator guaranteed the current account of S. & Co. with pltf. who were bankers, & S. & Co. gave a counter security to testator. S. & Co. failed, & pltf. claimed the exclusive right to the proceeds of the counter security:—Held: the claim could not be sustained.—Re WALKER, SHEFFIELD BANKING CO. v. CLAYTON, [1892] 1 Ch. 621; 61 L. J. Ch. 234; 66 L. T. 315; 40 W. R. 327; 8 T. L. R. 224; 36 Sol. Jo. 201.**

#### **SUB-SECT. 5.—CONTRIBUTION IN WINDING-UP PROCEEDINGS.**

**Relation between transferee & transferor of shares—Whether principal & surety.]—See COMPANIES, Vol. X., pp. 911, 918, Nos. 6227, 6283.**

individual property, not on his share in the partnership, is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership.—DOUGLAS v. BLACKLEY (1892), 14 P. R. 504.—CAN.

#### **PART V. SECT. 7, SUB-SECT. 2.—E.**

**1. Reference to arbitration—Without consent of surety.]—Where, after proceedings have commenced on a**

*replevin* bond, the parties to the *replevin* go to arbi. without the consent of the surety, all further proceedings against the surety will be stayed; *aliter* where the reference to arbi. takes place with his assent.—HUTT v. GILLELAND, HUTT v. KEITH (1815), 1 U. C. R. 540.—CAN.

**m. Executions against sureties—In excess of liability.]—Where several executions had been obtained against the sheriff's sureties exceeding the**

amount of their bond, which was in £125 each, they were directed to pay the amount of their respective liabilities to the sheriff to whom the executions were directed, with the costs, & then, upon application to the ct., proceedings against them were stayed.—SINCLAIR v. BABY (1857), 2 P. R. 117.—CAN.

**n. Stay of execution—Action pending before Privy Council.]—McLAREN v. STEPHENS (1883), 10 P. R. 88.—CAN.**

**Guarantee of calls—By transferor of shares.]—***See COMPANIES, Vol. IX., p. 393, No. 2486.*

**Guarantee required by rules of company—In respect of mortgage of insured ship.]—***See COMPANIES, Vol. X., p. 1080, No. 7503.*

**724. Shares taken on faith of guarantee—Given by directors—Primarily liability of directors.]—**The subscribers' agreement was executed upon the faith of a guarantee by the directors contained in a circular letter:—*Held:* the directors by whose authority the letter was sent, were primarily liable as between themselves & the shareholders who so executed the deed, & accordingly a call made ratatably on all the shareholders was discharged. Where one class is primarily & another secondarily liable, a call ought in the first instance to be made upon those primarily liable, unless it appears that such a call would be fruitless.—*Re DOVER & DEAL RY., CINQUE PORTS, THANET & COAST JUNCTION CO., MOWATT & ELLIOTT'S CASE (1853), 3 De G. M. & G. 254; 22 L. J. Ch. 578; 20 L. T. O. S. 317; 17 Jur. 350; 1 W. R. 169; 43 E. R. 100, 1 L. C. & L. J.J.; subsequent proceedings, sub nom. Re DOVER & DEAL RY., CINQUE PORTS, THANET & COAST JUNCTION CO., LONDESBOURGH'S (LORD) CASE (1851), 4 De G. M. & G. 411, L. J.J.*

*Annotation:—Reid. Re Dover, Hastings, etc. Ry., Carew's Case (1855), 7 De G. M. & G. 43.*

#### SUB-SECT. 6.—OPERATION OF STATUTES OF LIMITATION.

*See, generally, LIMITATION OF ACTIONS.*

**725. Date from which time runs—Ascertainment of all facts—On which liability depends.]—**In 1816 G. shipped goods on board a vessel chartered by him for C. & B. & co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at C. of B. & co., who were to dispose of the outward cargo there, & send the proceeds in goods or bills to B. & co. in L. who were to reimburse themselves their charges, & hold the balance at the disposal of G. In Nov. 1817, G. being in difficulties & indebted to debts. in £850, debts. & G. applied to B. & co. to pay off this debt by a further advance to G. on his consignment, & debts. gave B. & co. the following guarantee:—"Messrs. B. & Co.—You having expressed some doubts of the propriety of paying G.'s draft on you for £850 in our favour, we hereby engage, if you will pay us the same, that we will reimburse you the amount of demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & co. thereupon accepted & paid a bill for £850, drawn by G. on them in favour of debts. The vessel returned to England with a cargo in April, 1818, when C. the owner, G. having become bkpt., gave notice to the E. I. co., in whose docks she lay, not to deliver any part of the cargo without his authority; they thereupon sold the cargo, & paid the owner's demand for freight, & in consequence of conflicting

claims from G.'s assignees & from B. & co. filed an interpleader bill, & paid the balance of the proceeds into ct. Proceedings at law & equity were continued between all the above parties, under legal advice, up to the year 1837, when the result was, that B. & co. were obliged to pay C.'s costs. In 1838, B. & co. demanded of debts. the £850 due by the guarantee, with interest & their share of the expenses incurred in the law proceedings, & on their refusal to pay, brought an action against them on the guarantee:—*Held:* Stat. Limitations began to run against pltf., not from the termination of the legal proceedings in 1837, but from the return & sale of the cargo in 1818, when all the facts were ascertained upon which debts.' legal liability depended, & therefore it was a bar to the action; debts. could not be made liable under the guarantee, for the expenses incurred by pltf. in the law proceedings. —(COLVIN v. BUCKLE (1841), 8 M. & W. 680; 11 L. J. Ex. 33; 151 E. R. 1212.)

**726. — Promissory note—Date on which given.]—**C. & S. (the latter by way of guarantee) gave their joint & several promissory note for £200 to a banking co., as security for advances to be made by the bank to C. A memorandum of the same date, & signed by the same parties, accompanied the note, & purported to be a further & collateral security, for C.'s banking account:—*Held:* the note & memorandum must be construed together, & Stat. Limitations did not run from the time when the advances were first made by the bank to C., but from the time when the first balance was struck.

Notwithstanding that the instrument is a promissory note, payable on demand, which *prima facie* indicates a present existing liability, enforceable without demand, & as to which Stat. Limitations runs from the date, we think we are bound to read it & the memorandum together, in order to ascertain the true meaning & character of the transaction. It is clear that, until an advance was made by the banking co. to C., no action could have been maintained upon the note. Until then there would have been no consideration, & until there was consideration, no action would be maintainable, & Stat. Limitations only runs from the time when the cause of action accrued (POLLOCK, C.B.).—*HARTLAND v. JUKES (1863), 1 H. & C. 607; 1 New Rep. 480; 32 L. J. Ex. 162; 7 L. T. 792; 9 Jur. N. S. 180; 11 W. R. 519; 155 E. R. 1052; previous proceedings (1862), 3 F. & F. 149, N.P.*

**727. — When demand condition of liability—Date on which demand made.]—***BRADFORD OLD BANK v. SUTCLIFFE, No. 483, ante.*

**723. Payment of interest within time limited—By principal debtor—Effect as against surety.]—**A payment of interest by A. on the joint & several note of A. & B., is evidence of a promise by B., & takes the note out of Stat. Limitations, though B. was a mere surety, & the payment was made without his knowledge. A mere acknowledgment of the subsistence of the debt, unless coupled with, or amounting to evidence of, a promise to pay, is

#### PART V. SECT. 7, SUB-SECT. 6.

**a. Date from which time runs—Time at which default of debtor takes place.]—**In a written guarantee given to a co. to secure the amount of the principal's overdrawn account with the co. together with future advances & interest by the co. to him, a clause was inserted making the guarantor's liability dependent upon the making default by the principal. The principal

did not make more than six years before action was brought upon the guarantee. No demand for payment had been made upon her, but demand was made upon her exors. within six years before action.—*Held:* the clause as to default being inserted for the protection of the guarantor, Stat. Limitations did not run until after demand for payment was made upon the exors. of the principal.—*UNION BANK OF AUSTRALIA, LTD. v. BARRY (1897), 23*

*V. L. R. 505.—AUS.*

**p. —.]—***COMMERCIAL BANK OF AUSTRALIA, LTD. v. COLONIAL FINANCE MORTGAGE INVESTMENT & GUARANTEE CORP., LTD. (1906), 4 C. L. R. 57.—AUS.*

**7281. Payment of interest within time limited—By principal debtor—Effect as against surety.]—**The payment of interest by debtor within limitation does not give a fresh starting point for

**Sect. 7.—Enforcement of liability: Sub-sect. 6.**  
**Part VI. Sect. 1: Sub-sects. 1 & 2.]**

not sufficient to take a case out of the operation of stat. Limitations. A payment, made by one of two makers of a joint & several note, is quite sufficient to raise an implied joint & several promise by both to pay the amount due on the note.—*BURLEIGH v. STOTT* (1828), 8 B. & C. 361; 2 Man. & Ry. K. B. 93; 6 L. J. O. S. K. B. 232; 108 E. R. 956.

*Annotations:—*Consd. *Wyatt v. Hodson* (1832), 8 Bing. 309; *Channell v. Ditchburn* (1839), 5 M. & W. 494. *Reid. Manderston v. Robertson & Reid* (1829), 4 Man. & Ry. K. B. 440; *Pease v. Hirst* (1829), 5 Man. & Ry. K. B. 88; *Slater v. Lawson* (1830), 1 B. & Ad. 396.

**729.** ————] — *PEASE v. HIRST*, No. 1280, *post*.

**730.** ———— **Action on covenant in mortgage deed.]—***Re FRISBY, ALLISON v. FRISBY*, No. 732, *post*.

**731.** ———— **What amounts to payment.]** — A bond given by a surety to a trustee under a marriage settlement, to secure payment of the principal & interest by the husband:—*Held*: to have been kept alive by receipts for interest, given by the wife, the *cestui que trust*, & her husband, the co-obligor, although no money passed or was ever paid for such interest.

There was a part payment of interest which satisfied the statute & kept the bond alive as against debt. It was not necessary that the money should have been actually produced & passed from one to the other in order to make a payment which should satisfy the statute. If persons having dealings with each other meet & settle their accounts, settling off their mutual debts & demands, that amounts to payment & may be pleaded as such (*MARTIN, B.*).—*AMOS v. SMITH* (1862), 1 H. & C. 238; 31 L. J. Ex. 423; 7 L. T. 66; 10 W. R. 759; 158 E. R. 873.

*Annotations:—*Consd. *Mabor v. Mabor* (1867), L. R. 2 Exch. 153; *Re Dixon, Heynes v. Dixon*, [1900] 2 Ch. 561.

**732.** ———— **Mercantile Law Amendment Act, 1856 (c. 97), s. 14—Effect on Real Property Limitation Act, 1874 (c. 57).]**—A mtge.-deed was executed on Dec. 10, 1872, by E. to secure a sum of £800, & E. & M. as the surety for E. jointly &

severally covenanted to pay the aforesaid sum & interest. E. paid the interest up to Dec. 10, 1880. On Apr. 5, 1889, the mtgee. claimed to rank as creditor against the estate of the surety, who had since died, for the mtge. debt & unpaid interest:—*Held*: the claim was not barred as against the surety's estate; for assuming that Real Property Limitation Act, 1874, s. 8, applied to the case of a surety, the debt was kept alive as against him by the payment of interest by the mtgor., & the surety was not within the protection of Mercantile Law Amendment Act, 1856 (c. 97), s. 14, that sect. not referring to Real Property Limitation Act, 1833 (c. 27), nor, consequently, to the Act of 1874.—*Re FRISBY, ALLISON v. FRISBY* (1889), 43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632; 38 W. R. 65; 6 T. L. R. 40, C. A.

*Annotations:—*Consd. *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 38 W. R. 537; *Re England, Steward v. England*, [1895] 2 Ch. 820; *Barnes v. Glenon*, [1898] 2 Q. B. 223. *Reid. Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. *Mentd. Kirkland v. Peatfield*, [1903] 1 K. B. 756.

**733.** ————] — *BRADFORD OLD BANK v. SUTCLIFFE*, No. 483, *ante*.

**734. Payments on guaranteed banking account**  
**—How far effective—As bar to Statute of Limitations.]—***HARTLAND v. JUKES*, No. 726, *ante*.

**735. New promise by surety after six years—Conditional on failure of debtor's executor—Effect.]** —A. having signed, as surety for B., a joint & several promissory note made by A. & B., & being called upon after B's death for payment of the money due upon it, requested the holder to apply to B's extrix, stating, in writing, that "what she should be short he would assist to make up." The extrix, having been applied to, but not paying anything:—*Held*: A's conditional promise of payment became thereby absolute, & rendered him liable in an action brought against him on the note more than six years after its date, & after a reasonable time for payment by the extrix, had elapsed.—*HUMPHREYS v. JONES* (1845), 14 M. & W. 1; 14 L. J. Ex. 254; 9 Jur. 333; 153 E. R. 364.

**736. Forbearance to sue—No definite time limited—Lapse of reasonable time.]—***HENTON v. PADDISON*, No. 567, *ante*.

## Part VI.—Surety's Rights against Creditor.

### SECT. 1.—HOW RIGHTS ACQUIRED.

#### SUB-SECT. 1.—IN GENERAL.

**737. From terms of instrument—Extrinsic evidence inadmissible.]**—By deed of annuity, in consideration of £9,000 therein stated to be paid to L., E., M., the said L. granted to D. & H. an annuity or clear yearly rent of £1,800 for three lives, charged upon his estate; & L., E., M., & M. covenanted to pay the said annuity or yearly rent, with a proviso for repurchase by them, or any or either of them. They executed their joint & several bond & warrant of attorney to confess judgment on the bond, the judgment to be as a further security for the annuity, & to be entered forthwith against L. & E., but not against M. & M. until default of payment, & execution not to be entered on the judgment against L. & E. until the annuity should be forty days in arrear; & E., for further securing the annuity, agreed, in

the event of not becoming the purchaser of L.'s estate in twelve months, to assign, at L.'s expense, a mtge. which E. held on it, & also to procure the guarantee of a competent person for payment of the annuity:—*Held*: E. was a principal grantor of the annuity, & not a surety.

The question, whether a person is principal or surety in the grant of annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose.—*HOLLIER v. EYRE* (1840), 9 Cl. & Fin. 1; 8 E. R. 313, H. L.  
*Annotations:—*Consd. *Strong v. Foster* (1855), 17 C. B. 201; *Pooley v. Harradine* (1857), 7 E. & B. 431; *Greenough v. McClelland* (1860), 2 E. & E. 429. *Reid. Wythes v. Labouchere* (1859), 3 De G. & J. 593; *Ewin v. Lancaster* (1865), 6 B. & S. 571; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32. *Mentd. Holme v. Brumskill* (1878), 3 Q. B. D. 495.

**Guarantor of debentures.]—***See COMPANIES*, Vol. X., p. 781, No. 4886.

limitation against the surety even in the absence of a prohibition by the surety against the payment of interest by debtor on his account.—*GOPAL DAS*

*v. GOPAL BIN SONU* (1904), 1 L. R. 28 Bom. 248.—IND.

*q. Whether surety liable—Remedy*

*against principal barred.]—KISHORI KISHORI CHOWDHRAIN v. RADHA ROMUN MUNSHI* (1885), 1 L. R. 12 Cal. 330.—IND.

## SUB-SECT. 2.—WHERE CO-DEBTORS.

## 738. General rule—Knowledge of creditor.]—

(1) Where two persons give a joint promissory note for the debt of one, it is necessary, in order to give the other the rights of a surety as against the creditor, to show that he was only a surety, that the creditor knew him to be so, & that he accepted him as such.

(2) A person appearing on the face of an instrument to be a principal debtor jointly with another, cannot, at law, set up, as against third parties, that he was only a surety. *Qu.*: whether he can do so in equity.

(3) Mere forbearance or inactivity on the part of a creditor will not discharge a surety.

A., being a customer of a bank, got B. to join him in a promissory note to the bank, & sent the note to the bank, intimating that he had got B. to join him in it; but the note was not entered in A.'s account. After it became due, A. had a balance at the bank larger than the amount of the note. In an action on the note by the bank against B., he pleaded, by way of equitable defence, that he was only surety, & was accepted as such by the bank, that the bank gave A. time for the payment of the note, & forbore to enforce payment, & the bank might have obtained payment from A. if they had not given him time:—*Held*: even if B. could say in equity that he was surety, the plea was not proved; it did not appear that he was accepted as surety; there was no evidence that time had been given to A. so as to discharge B. & the bank did not, by refraining from appropriating A.'s balance to the payment of the note, discharge B. from his liability on it.—*STRONG v. FOSTER* (1855), 17 C. B. 201; 25 L. J. C. P. 106; 26 L. T. O. S. 62, 106; 4 W. R. 151; 139 E. R. 1047.

*Annotations*:—*As to* (1) *Consd.* Pooley v. Harradine (1857), 7 E. & B. 431. *Refd.* Wright v. Sanders (1857), 29 L. T. O. S. 175; York City & County Banking Co. v. Bainbridge (1880), 43 L. T. 732. *As to* (3) *Consd.* Pooley v. Harradine (1857), 7 E. & B. 431; Bailey v. Edwards (1864), 4 B. & S. 761. *Refd.* Frazer v. Jordan (1858), 8 E. & B. 303; Mutual Loan Fund Assocn. v. Sudlow (1858), 5 C. B. N. S. 449; Greenough v. McClelland (1860) 6 Jur. N. S. 772; Ewin v. Lancaster (1865), 6 B. & S. 571.

739. Suretyship not apparent on face of instrument—Joint bond—Release of one co-debtor.]—Where three persons entered into a joint bond, & it did not appear, either on the bond or condition, that two of them were sureties for the other:—*Held*: a release given by the obligee to the representative of one of the deceased obligors was no answer to an action against the surviving obligors.—*ASHBEE v. PIDDUCK* (1836), 1 M. & W. 564; 2 Gale, 116; Tyr. & Gr. 1016; 5 L. J. Ex. 251; 150 E. R. 559.

*Annotation*:—*Mentd.* Husband v. Davis (1851), 10 C. B. 645.

740. — Notice of suretyship to creditor—Necessity for.]—*STRONG v. FOSTER*, No. 738, *ante*.

741. — Effect of.]—Action on a promissory note. Plea on equitable grounds, that deft. made the notes jointly with J. for J.'s accommodation & as surety for J.; & that the notes were delivered to pltf. & taken by him on an agreement between them that deft. should be liable as surety only, & with notice that he was surety only; & that afterwards pltf., without deft.'s consent, gave time to J., but for which he might have obtained payment:—*Held*: though the absolute written contract between deft. &

pltf. contained in the note could not be varied by parol in equity any more than at law, yet an equity arose from the relation of surety & principal between deft. & J., & the notice thereof to pltf. at the time he took the note; & therefore the plea was good.

*Qu.*: whether the equity would have existed if the notice had been after the taking of the notes, but before the giving of time.

The surety on paying the debt has always a right to require the creditor to sue or allow him to sue the principal in his, the creditor's name (*COLERIDGE, J.*).—*POOLEY v. HARRADINE* (1857), 7 E. & B. 431; 26 L. J. Q. B. 156; 28 L. T. O. S. 367; 3 Jur. N. S. 488; 5 W. R. 405; 119 E. R. 1307.

*Annotations*:—*Follid.* Taylor v. Burgess (1859), 5 H. & N. 1. *Apld.* Greenough v. McClelland (1860), 2 E. & E. 421, 429. *Follid.* Bailey v. Edwards (1864), 4 B. & S. 761. *Consd.* Ewin v. Lancaster (1865), 6 B. & S. 571; Rouse v. Bradford Banking Co., [1894] 2 Ch. 32. *Refd.* Mutual Loan Fund Assocn. v. Sudlow (1858), 5 Jur. N. S. 338; Rayner v. Fussey (1859), 28 L. J. Ex. 132; *Re* Davies & Troughton, *Ex p.* Clennell, etc. (Trustees of Hackney Permanent Benefit Bldg. Soc.) (1861), 4 L. T. 60; Lawrence v. Walmsley (1862), 5 L. T. 798; Rogers v. Hadley (1863), 2 H. & C. 227; Price v. Kirkham (1864), 3 H. & C. 437; Oriental Financial Corpn. v. Overend, Gurney (1871), 7 Ch. App. 145, n.; Phillips v. Foxall (1872), L. R. 7 Q. B. 666. *Swire v. Redman* (1876), 1 Q. B. D. 536. *Leicester-shire Banking Co. v. Hawkins* (1900), 16 T. L. R. 317. *Mentd.* Wake v. Harrop (1862), 7 L. T. 96.

742. — — — — — Acceptance by creditor unnecessary.]—(1) Notice to a creditor when his debt is contracted that the relation of principal & surety exists between his co-debtors is sufficient to affect him with the consequences of that relation without any further acceptance of it on his part.

(2) But it is not a consequence of that relation that the creditor, without any inquiry on the part of the surety, should acquaint him with every circumstance affecting the credit of the debtor, or of any matter unconnected with the transaction in which he is about to engage which may render it hazardous, the principles applicable to insurances not applying to such a case.

(3) A customer, being desirous of obtaining an advance from his bankers on the credit of a surety employs solrs. for that purpose, who are also the ordinary solrs. of the bankers, but are not employed by them in the transaction in question. The solrs., however, give information to the bankers as to the sufficiency of the surety, & debit them with the costs of preparing the instrument of suretyship:—*Held*: they could not be regarded as having acted for the bankers from the beginning, so as to effect the bankers with notice of any concealment or misrepresentation on the part of the customer towards the surety.

(4) Repayment of a sum given by bankers to a customer for the purpose of constituting a Parliamentary qualification, on an understanding that it was to be returned:—*Held*: not a payment on his general account so as to discharge a surety.—*WYTHES v. LABOUCHERE* (1859), 3 De G. & J. 593; 33 L. T. O. S. 30; 5 Jur. N. S. 499; 7 W. R. 271; 44 E. R. 1397, L.C.

*Annotations*:—*As to* (2) *Distd.* London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Refd.* National Provincial Bank of England v. Gnanusk, [1913] 3 K. B. 335. *Generally, Mentd.* Dresser v. Norwood (1863), 14 C. B. N. S. 574.

743. — — — — —]—If one maker of a promissory note signs as surety only for the other, & the payee has notice of this when he takes the note as security for money advanced to the

J. embezzled £25. On Sept. 25 J. confessed his crime, & on Oct. 8 he absconded. On Oct. 11 the co. gave information to S. :—*Held* : the co. had failed to intimate timely to S. the criminal conduct of J., & were barred from claiming against S. under the bond of guarantee.—**SADDON v. LONDON, EDINBURGH & GLASGOW ASSURANCE CO. (1902), 5 F. (Cl. of Sess.) 182.—SCOT.**

such contract," which they had agreed to do upon M. & plff. entering into the above bond "for the due payment to them of the price agreed upon for such flour" & the bond was conditioned to be void if M. duly delivered to B. & C. all bills authorised to be drawn by M. on the Paymaster-General; & if M. & plff. should, within a period specified, pay to B. & C. all moneys due to them from M. "for the flour so supplied as aforesaid." It appeared as the result of evidence that at the time when plff. executed the bond, M. & the agent of B. & C. being present, he asked the agent whether there were any trade debts owing from M. to B. & C., & the agent said "No." Upon the faith of this representation he executed the bond. At this time there was a trade debt owing from M. to B. & C., but the usual credit allowed for repayment had not expired:—*Held*: plff. was entitled to be relieved against the bond, on the ground of misrepresentation. B. & C. admitted that they never did, & never intended to supply M. with flour of the same quality as that specified in the conditions of the Govt. contract, of which conditions they said they were ignorant; but inasmuch as they had bound plff. to make payment to them of the price agreed upon for "such flour" as would enable M. to carry out the contract, & they admitted they did not furnish M. with such flour, plff. was entitled on this ground also to have his execution of the bond cancelled.

A surety is bound only to the letter of his engagement. If that engagement is altered in a single line, no matter whether it be altered for the benefit of the surety, or whether the alteration be innocently made, the surety is entitled to be relieved from the engagement. *BLEIST v. BROWN* (1862), 4 De G. F. & J. 367; 6 L. T. 620; 8 Jur. N. S. 602; 10 W. R. 569; 45 E. R. 1225, L. C.

760. — — — — — *BATTEN, CARNE & CARNE'S BANKING Co. v. REED* (1902), *Times*, Apr. 14, C. A.

761. Parties to action—Where no right of contribution—Co-surety not necessary party.]—*PENDELBURY v. WALKER*, No. 1052, *post*.

762. — Where right of contribution—Co-sureties & principal debtor necessary parties.]—One of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, & prayed an account of the payments of the bond:—*Held*: the principal debtor & the co-surety were necessary parties, notwithstanding Ord. 32 of Aug. 1841. *ALLAN v. HOULDEN* (1843), 6 Beav. 118; 12 L. J. Ch. 181; 49 E. R. 782.

*Annotation*: *Mentd. Price v. Mayo* (1873), 28 L. T. 552.

### SECT. 3.—ON DEMAND OF PAYMENT.

#### SUB-SECT. 1.—IN GENERAL.

763. Right to raise defence on equitable grounds.]—Indorsees of bills of exchange as a security for a floating balance due on the accounts between them & the drawer had notice that the acceptor was a surety for the drawer. They afterwards entered into an agreement with the latter that the existing debt should be liquidated by the drawer building for them certain ships, & should, in the meantime, be secured by a policy of assurance:—*Held*: (1) time was thus given to the principal debtor, & the surety was released in equity, if not at law also; (2) a creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to a portion of the debt, without reserving

the creditor's rights against the surety, & yet hold the surety liable for that portion; (3) whether the acceptor could or could not use, by way of defence to an action by the holders of the bills, the giving of time by them to the drawer, he was not bound to do so, but might, at the risk of costs, defend the action on other grounds, & also institute a suit for equitable relief & an injunction to restrain the proceedings at law, though if the matter had been pleaded at law, & the ct. of law had adjudicated on the plea, the case might have been different.—*DAVIES v. STAINBANK* (1855), 6 De G. M. & G. 679; cited in 7 E. & B. at p. 437; 43 E. R. 1397, L. J.

*Annotations*:—*As to* (1) *Consd. Pooley v. Harradine* (1857), 7 E. & B. 431; *Greenough v. Merrett* (1860), 2 E. & E. 429. *Expld. Oriental Financial Corp. v. Gwynne* (1871), 7 Ch. App. 143, n. 18 *to* (2) *Consd. Harradine* (1857), 7 E. & B. 431. *Refd. Schofield v. Templer* (1859), 28 L. J. Ch. 152; *Wake v. Harrow* (1862), 1 H. & C. 202; *Dunnean, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Rouse v. Bradford Banking Co.*, [1891] 2 Ch. 32; *Leicestershire Banking Co. v. Hawkins* (1900), 16 T. L. R. 317. *As to* (3) *Refd. Strong v. Foster* (1855), 17 C. B. 201; *Pooley v. Harradine* (1857), 7 E. & B. 431. *Thornton v. McKewan* (1862), 1 New Rep. 16.

764. Plea of fraudulent connivance between debtor & creditor.] A plea by a surety that a judgment was obtained against his principal by fraud, viz. by plff. in that suit fraudulently procuring deft. to confess, & by deft. falsely & fraudulently confessing the action, without averring more, is bad.

The parties to a replevin suit referred to arbitr. the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them, when awarded, from the rent, & agreed to suspend proceedings in replevin pending the reference. After award made: *Held*: the sureties in the replevin bond were not thereby discharged.—*MOORE v. BOWMAKER* (1816), 7 Taunt. 97; 2 Marsh. 392; 129 E. R. 39; *subsequent proceedings, sub nom. BOWMAKER v. MOORE*, 3 Price, 214; (1819), 7 Price, 223, Ex. Ch.

*Annotations*:—*Consd. Archer v. Hale* (1828), 4 Bing. 464; *The Harriett* (1842), 1 Wm. Rob. 182. *Refd. Michael v. Myers* (1843), 6 Man. & G. 702.

765. — — — — — An injunction having been obtained to restrain proceedings in an action on a bond in which plff. had joined as a surety, on the ground of misrepresentation on the part of the obligee, & a deviation by him, with the concurrence of the principal obligor, from the terms of the contract on which the bond was founded, & it appearing on the evidence that there was reason to suppose that there had been such misrepresentation & deviation, although the evidence was not conclusive on the point: the ct. refused on motion to dissolve the injunction, or to put plff. on the terms of bringing the money into ct.—*ALLAN v. INMAN* (1843), 7 Jur. 433; *previous proceedings*, 7 Jur. 28.

766. Right to re-open accounts.]—In the winding up of cos., where the surety for a defaulting liquidator becomes liable upon his bond, it is not the practice to give notice to the surety of the taking of the accounts as against the liquidator; but if the surety becomes aware of the taking of the accounts & applies for leave to attend, such leave will be granted at his own expense.

H. was appointed liquidator in a winding up. The G. Society became his sureties for £3,000, & for that purpose entered into a bond, which provided that the certificate of the chief clerk should be conclusive evidence as between all parties that the bond had been forfeited to the amount stated in the certificate. On the bkpey.

**Sect. 3.—On demand of payment: Sub-sects. 1, 2 & 3.]**

of H. a fresh liquidator was appointed in his place. The accounts of H. which were carried in & vouched without any notice having been given to the society, showed a probable deficit of £4,500. The society, on receiving notice of the date fixed for the final passing of the accounts, attended & asked to have them re-opened in their presence. The ct. allowed the society to have the accounts re-opened, on the terms that they should pay into ct. the whole of the £3,000 for which they were liable, together with £100, for the costs of such re-opening, & should undertake to pay interest on the amount to be found due from them, & pay the costs of the application.—*Re BIRMINGHAM BREWING, MALTING & DISTILLING CO., LTD.* (1883), 52 L. J. Ch. 358; 48 L. T. 632; 31 W. R. 415.

**Right to benefit of composition of debts by principal debtor.]—See CONTRACT, Vol. XII., p. 493, Nos. 4022-4024.**

**Defence that time given to debtor.]—See Part IX., Sect. 2, sub-sect. 4, *post*.**

**SUB-SECT. 2.—SET-OFF.**

**Set-off generally, see SET-OFF.**

**767. What may be set off—Debt due to debtor from creditor—On other transactions.]—Where A. joins as surety for B.'s debt, the mere circumstance of a balance, to the amount of the debt, being owing from the creditor to B. in other transactions, is no discharge to A. from his suretyship.—*HARRISON v. NETTLESHIP* (1833), 2 My. & K. 423; 3 L. J. Ch. 86; 39 E. R. 1005.**

**Annotations:—***Reid. Thornton v. McKewan* (1862), 1 Hem. & M. 525. *Mentd. Re James, Ex p. Mudie* (1842), 12 L. J. Rey. 25; *Cluck v. Cromer* (1848), 2 Ph. 477.

**768. — Set off available to foreign debtor by foreign law.]—If a bill of exchange is drawn in one country & payable in another, & the bill is dishonoured, the drawer is liable, according to the *lex loci contractus*, & not the law of the country where the bill was made payable, but where a bill is drawn generally, the liabilities of the drawer, acceptor, & indorsers, are governed by the laws of the countries in which the drawing, acceptance, & indorsement respectively take place. The principle of compensation in the civil law, adopted by the Dutch-Roman Law, applies to bills of exchange, & a debt due by a debtor to a creditor is extinguished by a liquid debt of the same amount due from the creditor to the debtor.**

A., resident in Demerara, drew a bill of exchange in favour of B., also resident in Demerara, payable in London, upon C., resident in Scotland, & C. accepted the same, making it payable in London. B. indorsed the bill to D., who shortly afterwards became bkpt. When C.'s acceptance became due, he held two bills of exchange accepted by D., which were dishonoured & protested for non-payment. D.'s assignees did not proceed against C., but brought an action in Demerara against A. & B., the drawer & indorser, who pleaded a right of set-off to the extent of the two bills accepted by D., which the Supreme Ct. disallowed, & found for plffs. :—*Held*: (1) the bill having been drawn in Demerara, the Dutch-Roman Law, in force in that colony, must govern the case, & by that law, the bill accepted by C. was compensated

or extinguished, *pro tanto*, by the bills accepted by D.; (2) a surety was entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; (3) the drawer & indorser were to be deemed sureties for the acceptor, & entitled to plead this right of set-off.—*ALLEN v. KEMBLE* (1848), 6 Moo. P. C. C. 314; 13 Jur. 287; 13 E. R. 704, P. C.

**Annotations:—***As to* (1) *Expld. Ronquette v. Overmann* (1875), L. R. 10 Q. B. 525. *Reid. Gibbs v. Fremont* (1853), 9 Exch. 25; *Branley v. S. E. Ry.* (1862), 12 C. B. N. S. 63; *Hirschfeld v. Smith* (1866), 35 L. J. C. P. 177; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Horne v. Ronquette* (1878), 3 Q. B. D. 514; *Casanova v. Meier* (1885), 1 T. L. R. 213; *Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522; *Alcock v. Smith*, [1892] 1 Ch. 238. *As to* (2) & (3) *Reid. Ronquette v. Overmann* (1875), L. R. 10 Q. B. 525. *Generally, Mentd. Sharples v. Rickard* (1837), 2 H. & N. 57; *Sheppard v. Bennett* (1870), L. R. 3 A. & E. 167.

**769. — —.]—In an action against a surety to recover a part of a debt, by the first & second counts plffs. declared as indorsees of a bill of exchange drawn by them, & accepted by H., indorsed by plffs. to deft., & by him to plffs.; the third & fourth counts were upon another bill of exchange; & the fifth count was upon a deed whereby deft. bound himself to secure payment by H. of his two acceptances. The counts upon the two bills averred that plffs. indorsed the bills to deft. without consideration, in order that they might be indorsed by deft. to plffs. for the purpose of deft. becoming surety for the payment of the bills by the acceptor, H., to plff. As to a sum of £4,600, part of the money so alleged to have been secured by the bills & deed, deft., to the five counts, pleaded, on equitable grounds, that the two bills which were guaranteed by deft. had been given for the balance of the purchase-money for certain stations in New South Wales, previously purchased by H. from plffs., under an agreement which provided, that in case of any dispute between the vendors & the purchaser as to any matter connected with the sale, such dispute should not annul the sale, but should be referred to arbn. in the manner therein stated; & the plea further stated, that a dispute had arisen as to the extent of land comprised in the stations, that H. had appointed one S. as his arbitrator, that plffs. neglected to appoint an arbitrator, & that S. made his award concerning the dispute, & thereby awarded that plffs. should pay to H. £4,600, in satisfaction of his claim. The plea also stated, that H., before the commencement of the suit, claimed & offered to deduct & set-off the sum of £4,600 against an equal amount in price:—*Held*: (1) the plea constituted a good equitable defence to the action, as, from the nature & terms of the contract set forth in the plea, the compensation admitted to have been awarded was an abatement of the price of the stations, & reduced *pro tanto* the amount of the purchase-money then unpaid, & as in equity deft. might have claimed the benefit of the amount of compensation awarded as a deduction, he was entitled to put this forward as a defence, on equitable grounds, to so much of the cause of action as was covered by that amount; (2) in considering the validity of the equitable plea with respect to parties, it was necessary to bear in mind, that H. was not a necessary party to the action, as a ct. of equity could, without making H. a party, grant an unconditional injunction restraining plffs. from suing out execution**

**PART VI. SECT. 3, SUB-SECT. 2.**

**t. What may be set off—Debt due to debtor from creditor.]—A surety may set-off what is due by plff. to the**

**principal.—CAPE OF GOOD HOPE BANK (LIQUIDATORS) v. FORDE & Co.** (1890), 8 S. C. 30.—S. AF.

**a. — Fidelity guarantee—Volun-**

**tary payments by employee.]—A guarantor under a fidelity policy is not entitled to set off against the loss, for which he is liable to the assured, payments voluntarily made**



upon a judgment, so far as related to the sum of £4,606, to which the plea applied.—*MURPHY v. GLASS* (1869), L. R. 2 P. C. 408; 6 Moo. P. C. C. N. S. 1; 20 L. T. 461; 17 W. R. 592; 16 E. R. 627, P. C.

770. — — —.]—*BECHERVAISE v. LEWIS*, No. 901, *post*.

771. — — —.]—*ALCOY & GANDIA RAILWAY & HARBOUR CO., LTD. v. GREENHILL*, No. 1016, *post*.

772. — — —.]—*Dividends received by creditor from debtor's estate.*—*THORNTON v. M'KEWAN*, No. 623, *ante*.

773. — — —.]—*Debt due from creditor to co-surety—Assigned to both sureties.*—Action on a covenant to pay all liabilities which pltf. might incur under a deed of assignment made between pltf. & other parties. Deft. pleaded that the covenant was the joint & several covenant of himself & W., & that before action pltf. was indebted to W. in an amount exceeding pltf.'s claim against deft.; & that W. had assigned pltf.'s debt to himself & deft. in equal shares as tenants in common. As to one-half of pltf.'s claim, deft. claimed to set off one-half of the debt so assigned, & as to the other half, deft. said that he was entitled to be exonerated by his co-surety W., & to call upon him to contribute in equal shares to the payment of pltf.'s claim, & was entitled to set off the share remaining vested in W. against this part of pltf.'s claim:—*Held*: the defence was no answer to pltf.'s claim.—*BOWYEAR v. PAWSON* (1881), 6 Q. B. D. 540; 50 L. J. Q. B. 495; 29 W. R. 661, D. C.

774. Whether debtor necessary party.]—*MURPHY v. GLASS*, No. 769, *ante*.

See, also, Part V., Sect. 7, sub-sect. 3, *ante*.

### SUB-SECT. 3.—MARSHALLING SECURITIES.

Marshalling of assets, generally, see *EQUITY*, Vol. XX., pp. 499–503, Nos. 2298–2328.

775. Right to compel resort to other fund.—Not available to surety.]—A. being indebted to B. lodges several securities for money with him, as collateral securities for that debt. A. afterwards borrows a further sum of money of B. for which C. becomes his surety. A. becomes bkpt., & B. calls upon C. to pay the second debt. The securities in the hands of B. being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in reduction of the second debt.—*PRAED v. GARDINER* (1788), 2 Cox, Eq. Cas. 86; 30 E. R. 40, L. C.

Annotation:—*Expld.* *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1.

776. — — —.]—Discretion of the Lord Chancellor to stay a dividend in bkpey. for the general benefit of the creditors, not exerted, to increase the dividend by throwing joint creditors in favour of creditors of the survivors only; the equity of joint creditors against the surplus of the separate estate, though the debt survives at law, being open to equitable circumstances; upon the state of the accounts, or subsequent dealing with the survivors; which may discharge the assets; & the equitable arrangement, confining creditors to

one of two funds, being admitted only in favour of creditors of the same debtor, except upon some special equity; as in the case of drawer & acceptor, or principal & surety.—*Ex p. KENDALL* (1811), 17 Ves. 514; 34 E. R. 199; *sub nom. Re DAWES* *Ex p. KENDAL*, 1 Rose, 71, L. C.

Annotations:—*Consd.* *Devaynes v. Noble* (1816), 1 Mer. 529; *Thorpe v. Jackson* (1837), 2 Y. & C. Ex. 553; *Kendall v. Hamilton* (1879), 4 App. Cas. 504. *Refd.* *Devaynes v. Noble* (1831), 2 Russ. & M. 495; *Wilkinson v. Henderson* (1833), 2 L. J. Ch. 190; *Winter v. Innes* (1838), 4 My. & Cr. 101; *Brown v. Gordon* (1852), 16 Beav. 302; *Lyth v. Ault* (1852), 7 Exch. 669; *Lodge v. Prichard* (1863), 1 De G. J. & Sm. 610; *Re Stratton*, *Ex p. Salting* (1883), 49 L. T. 691.

777. — — —.]—*Re WESTZINTHUS*, No. 891, *post*.

778. — — —.]—A firm in Ceylon employed a firm in England as their agents & factors, the course of business being that the Ceylon firm consigned cargoes to the English firm for sale on their account, & drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, & bills accepted by the English firm against them, the English firm pledged the coffee, together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent & executed a creditors' deed under Bkpey. Act, 1861 (c. 131), & then T. sold the coffee, which produced more than sufficient to cover the bills drawn against it, & enough of the other securities to satisfy his debt:—*Held*: the Ceylon firm were entitled, as against the English firm in liquidation, to have the remaining securities in T.'s hands marshalled, & to have a lien thereon for the balance due to them upon the coffee transaction.—*Re HOLLAND*, *Ex p. ALSTON* (1868), 4 Ch. App. 168; 19 L. T. 542; 17 W. R. 266, L. C. & L. J.

Annotation:—*Apld.* *Re Stratton*, *Ex p. Salting* (1883), 25 Ch. D. 148.

779. — — —.]—II., was surety to an insurance co. for a loan secured on policies on the life of the debtor. The office held another policy as security for another loan from the same debtor. The debtor became bkpt., & the co. sued II. II. paid part of the debt:—*Held*: on the falling in of the policies, II. was entitled to have the securities marshalled so as to be paid in full including the costs of defending the action.—*HEYMAN v. DUBOIS* (1871), L. R. 13 Eq. 158; 41 L. J. Ch. 224; 25 L. T. 558.

780. — — —.]—(1) A partnership firm wrongfully pledged to their bankers to secure a debt of the firm, the delivery warrants of some brandy which had been left in their custody in the ordinary course of business by the owner. One of the partners in the firm had no knowledge of the fraud. The debt due by the firm to the bankers was also secured by a separate guarantee of the innocent partner. The firm filed a liquidation petition & the bankers sold the brandy & applied the proceeds of sale in part payment of their debt. The owner of the brandy knew nothing of the pledge until the stoppage of the firm. The separate estate of the innocent partner was sufficient to pay all his separate creditors in full (including the balance remaining due to the bankers) & to leave a surplus: *Held*: the owner of the brandy was entitled to have the bankers'

by the person whose fidelity is guaranteed, to or for the use of the assured.—*R. v. SHAW* (1901), 27 V. L. R. 70.—*AUS*.

### PART VI. SECT. 3, SUB-SECT. 3.

775 i. Right to compel resort to other

fund.—Not available to surety.]—Where a mtge. is given by the principal debtor & his surety over two properties, separately owned by the principal & surety, to secure the debt of the principal, & the latter subsequently gives a second mtge. to a fourth party over his land only, the surety is

entitled to have the securities marshalled, so as to enable the debt to be paid out of the property of the principal debtor prior to resort to the property of the surety.—*NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD. v. LOACH* (1912), 31 N. Z. L. R. 292.—*N.Z.*



**Sect. 3.—On demand of payment: Sub-sect. 3. Sect. 4: Sub-sects. 1 & 2, A. & B. (a), (b) & (c) i.]**

securities marshalled &, to the extent of the value of the brandy to have the benefit of the guarantee & to prove against the separate estate of the innocent partner.

(2) Suretyship arises out of contract, not from tort (FRY, L.J.).—*Re STRATTON, Ex p. SALTING* (1883), 25 Ch. D. 148; 53 L. J. Ch. 415; 49 L. T. 694; 32 W. R. 450, C. A.

**SECT. 4.—AFTER PAYMENT.**

**SUB-SECT. 1.—RECOVERY OF MONEY IMPROPERLY PAID.**

**781. Money paid in ignorance of facts.]** Pltf. was co-surety with K. in a bond given by B. to the guardians of a union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into, B. was a member of a banking firm into which the moneys of the union were afterwards paid, & drawn out by the guardians by cheques in their name. The firm became bkpt., & B. having ceased to be treasurer the guardians demanded of pltf., as such surety, the balance due from B. the late treasurer. Pltf., in ignorance of the facts, paid the money:—*Held*: (1) the sureties were not liable on the bond, & pltf., having paid the money in ignorance of the facts, was entitled to recover it back; (2) K., the co-surety, could not be joined in the action.—*MILLS v. ALDERBURY UNION* (1849), 3 Exch. 590; 18 L. J. Ex. 252; 12 L. T. O. S. 454; 13 J. P. 621; 154 E. R. 980.

*Annotation*:—As to (1) *Reid*. *Montefiore v. Lloyd* (1863), 15 C. B. N. S. 203.

**Money paid under mistake of law.]—See MISTAKE.**

**SUB-SECT. 2.—SUBROGATION.**

**A. In General.**

**782. Right to stand in creditor's place—As to all rights & remedies.]** *STIRLING v. FORRESTER*, No. 1033, *post*.

**783. — — — —.]**—It is a principle of equity, that a surety paying a debt shall be entitled to all the rights & remedies which the principal creditor had, so as to work out his indemnity by payment. He is entitled to every remedy within the reach of the creditor, & may compel the creditor to render all those rights & remedies available.

If the surety had not paid the debt even, but upon a bill filed against the principal creditor he offered to pay it, & stated the fact of the debtor having gone abroad, & that without the relief

of equity he could have no other remedy for his debt, he might compel the principal creditor even to sue out a fiat so as to work out his payment & indemnity (SIR (L. ROSE).—*Re ROGERS, Ex p. ROGERS* (1835), 4 Deac. & Ch. 623; 2 Mont. & A. 153; 4 L. J. Bcy. 19.

**784. — — — —.]**—Deft. only contends that after having made these payments, or, at the time of making them, he is entitled to have the policy handed over to him, which was assigned to pltf. as a security for the debt due to them from the principal debtor, for whom he was surety, alleging that pltf. had refused to hand it over to him, although he offered, on receiving it, to pay the sums which he owed them, still offering to pay these same, & to indemnify pltf. . . . As a surety, having done all that is incumbent upon him in the fulfilment of his engagement, he would be entitled, as against the debtor for whom he was surety, to stand in the shoes of the creditor, & to have an assignment of any security which the satisfied creditor held for the debt guaranteed. But no authority was cited to show what precise relief a ct. of equity would have given to deft., if judgment had been obtained against him in this action; &, at all events, he would be entitled to no relief against the judgment, unless he filed a bill against the now pltf. & the principal debtor, & paid into ct. or undertook to pay the sums which he admits he owes to pltf. on the judgment. He could only ask for a temporary or conditional injunction against suing out execution on the judgment, not for a perpetual or absolute injunction (LORD CAMPBELL, C.J.).—*WODEHOUSE v. FAREBROTHER* (1855), 5 E. & B. 277; 3 C. L. R. 1353; 25 L. J. Q. B. 18; 25 L. T. O. S. 197; 1 Jur. N. S. 998; 119 E. R. 485.

*Annotations*:—*Reid*. *Elliott v. Mason* (1857), 26 L. J. Ex. 175. *Mentd*. *Wakley v. Froggett* (1863), 12 W. R. 86; *Jeffs v. Day* (1866), L. R. 1 Q. B. 372.

**785. — — — —.]**—D. & P., under a covenant in a mtge. deed, paid the premiums on a life policy forming part of the security, as sureties. By a contemporaneous instrument, to which they were not parties, the equity of redemption was assigned in trust for the benefit of the creditors of the mtgor., & D. signed the trust deed as a creditor. The mtge. was paid off, & the policy was sold by the trustee of the creditors' deed, under a power contained therein. A creditors' suit being instituted:—*Held*: the creditors were not entitled to take the money produced by the sale of the policy, without making payment in satisfaction of the premiums paid by D. & P.—*AYLWIN v. WITTY* (1861), 30 L. J. Ch. 860; 9 W. R. 720.

*Annotations*:—*Reid*. *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Falcke v. Scottish Imperial Insee.* (1886), 34 Ch. D. 234.

**786. — — — —.]**—Against persons claiming under him.]—A surety who pays off a debt for which he

McEWAN (1872), 3 V. R. (Law.) 52.—AUS.

**782 ii. — — — —.]**—COCKBURN v. GILLESPIE (1865), 11 Gr. 465.—CAN.

**782 iii. — — — —.]**—SCOTT v. KNOX (1838), 2 Jo. Ex. I. 778.—IR.

**b. — — — —.]**—Whether applicable to security under R. S. C. 1906, c. 29, s. 88.—A guarantor to a bank, which also holds a security acquired under Bank Act, R. S. C. 1906, c. 29, s. 88, for the debt guaranteed, is not subrogated to the rights of the bank in the security, on payment of the debt by him.—*Re VICTOR VARNISH CO., CLARE'S CLAIM* (1908), 16 O. L. R. 338; 11 O. W. R. 717.—CAN.

**c. Security given for whole debt—Surety entitled to proportionate part.]**—A surety for part of a debt is entitled

**PART VI. SECT. 4, SUB-SECT. 1.**

**781 i. Money paid in ignorance of facts.]**—A surety paying the debt of his principal after arrangements made between the creditor & the principal, which would have had the effect of discharging the surety, cannot recover the money so paid.—*GEARY v. GORE BANK* (1856), 6 Gr. 536.—CAN.

**781 ii. — — — —.]**—Pltf. were sureties for the payment of moneys due to deft. bank. Acceptances held by deft. as collateral security for one of the amounts were realised upon & appropriated to a different indebtedness without pltf.' consent. Pltf. in ignorance of this fact, paid a balance demanded by deft.:—*Held*: pltf. were not estopped from recovering by not having demanded an account

before making the payment, or by the fact that they asked & received further time.—*BLACK v. BANK OF NOVA SCOTIA* (1889), 21 N. S. R. 448.—CAN.

**781 iii. — — — —.]**—UNITED STATES FIDELITY & GUARANTEE CO. v. UNION BANK (1917), 39 O. L. R. 338; 36 D. L. R. 721; 12 O. W. N. 141.—CAN.

**PART VI. SECT. 4, SUB-SECT. 2.—A.**

**782 i. Right to stand in creditor's place—As to all rights & remedies.]**—A co-debtor who has paid the damages & costs in respect of which judgment has been recovered against himself & the other co-debtors, is entitled to an assignment of the judgment to enable him to sue his co-debtors for their several contributions.—*EMBLING v.*

became answerable is entitled to all the equities which the creditor could have enforced, & that, not merely against the principal debtor, but also against all persons claiming under him.

A. mortgaged his estate to C., & B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D., who had notice of the first mtge. The first mtge. was subsequently paid off, partly by B., the surety, but D. got a transfer of the legal estate.—*Held*: the surety had still priority over D. for the amount paid by him under the first mtge., as surety for A.—*DREW v. LOCKETT* (1863), 32 Beav. 499; 8 L. T. 782; 9 Jur. N. S. 786; 11 W. R. 843; 55 E. R. 196.

*Annotation*:—*Reid*. *Forbes v. Jackson* (1882), 19 Ch. D. 615.

787. — — — — —.]—*RAMSKILL v. EDWARDS*, No. 1035, *post*.

788. — — — — —.]—Where a principal creditor has proved for the debt against the estate of one surety, & has subsequently obtained payment of the debt in full from the two remaining sureties, the latter are entitled to the benefit of the proof for the whole amount of the debts, subject to the qualification that they cannot recover more than the just proportion payable by the third surety.—*Re PARKER, MORGAN v. HILL*, [1891] 3 Ch. 400; 61 L. J. Ch. 6; 71 L. T. 557; 43 W. R. 1; 38 Sol. Jo. 691; 7 R. 590, C. A.

789. Right of insurer to be subrogated to insured.]—Insurer after satisfaction stands in place of the assured as to the goods, salvage, & restitution in proportion for what he paid.—*RANDAL v. COCKRAN* (1718), 1 Ves. Sen. 98; 27 E. R. 916, L. C.

*Annotations*:—*Reid*. *Morgan v. Price* (1819), 4 Exch. 615; *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639; *Stringer v. English & Scottish Marine Insce.* (1870), 10 B. & S. 770; *Stearns v. Village Main Reef Gold Mining Co.* (1905), 21 T. L. R. 236. *Ment*. *Yates v. Whyte* (1838), 4 Bng. N. C. 272; *White v. Dobinson* (1811), 11 Sim. 273; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Rankin v. Potter* (1873), L. R. 6 H. L. 83; *Simpson v. Thomson* (1877), 3 App. Cas. 279; *Midland Insce. v. Smith* (1881), 6 Q. B. D. 561; *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333; *Castellain v. Preston* (1883), 11 Q. B. D. 389; *Arrow Shipping Co. v. Tyne Improvement Comrs.*, *The Crystal*, [1891] A. C. 508; *Edwards v. Motor Union Insce.*, [1922] 2 K. B. 219.

790. — — — — —.]—Pltf., the holder of a debenture in a co. which matured for payment on Nov. 4, 1895, effected a policy of insurance with defts., which guaranteed to pltf. the due payment of the principal money secured by the debenture, if the debtors should make default for more than three calendar months in payment of any principal money due under the debenture. Subsequently, by a special resolution of the debenture holders, which was neither assented to nor dissented from by pltf., the date for payment of the debentures of the co. was postponed. Pltf.'s debenture was not paid off on Nov. 4, 1895, nor in three calendar months after that date:—*Held*: assuming the special resolution to be valid, the contract was nevertheless one of insurance against the default of the co. to pay the amount of the debenture on the original date; there had been a default by the co. to pay money due under the debenture within the meaning of the policy; & pltf. was therefore entitled to

recover the amount of the policy from defts., who were entitled on payment to be subrogated to pltf.'s rights as modified by the special resolution.—*FINLAY v. MEXICAN INVESTMENT CORPN.*, [1897] 1 Q. B. 517; 66 L. J. Q. B. 151; 76 L. T. 257, 13 T. L. R. 63.

*Annotations*:—*Consd.* *Parr's Bank v. Albert Mines Syndicate* (1900), 5 Com. Cas. 116; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insce. Co.'s Case*, [1914] 2 Ch. 617. *Reid*. *Seaton v. Heath, Seaton v. Burnand*, [1899] 1 Q. B. 782; *Shaw v. Itayee*, [1911] 1 Ch. 138.

*See, generally, INSURANCE.*

## B. Right to Securities held by Creditor.

### (a) Origin of Right.

791. Duty of principal to indemnify.]—*YONGE v. REYNELL*, No. 805, *post*.

792. — — — — —.]—*DUNCAN, FOX & Co. v. NORTH & SOUTH WALES BANK*, No. 810, *post*.

### (b) When Right arises.

793. On payment of debt.]—*EWART v. LATTA*, No. 748, *ante*.

794. — — — — —.]—R. & Co. consigned goods to H. for sale, drew bills on him which they indorsed to B., to whom they handed the bills of lading as a security, & wrote to H. asking him to accept the bills as against the goods. H. gave an acceptance: "Accepted, payable at the I. Bank on the delivery up of the bills of lading." At the time when the bills became payable the affairs of H. were in course of liquidation by arrangement:—*Held*: (1) the conditional acceptance made the security of B. virtually a security on property of H.; (2) B. could not prove against the estate of H. without deducting the value of the security.

The case appears to me clearly distinguishable from the case of a surety, because a surety is not entitled to the securities which the principal creditor holds until he pays the debt (*MELLISH, L.J.*).—*Re HOWE, Ex p. BRETT* (1871), 6 Ch. App. 838; 40 L. J. Bcy. 51; 25 L. T. 252; 19 W. R. 1101, L. J.

*Annotation*:—*As to (1) Reid. Re Baumann, Ex p. Oriental Bank Corp.* (1874), 30 L. T. 803.

795. At time of becoming surety.]—*DIXON v. STEEL*, No. 754, *ante*.

### (c) In Respect of What Securities—Mercantile Law Amendment Act, 1856, s. 5.

#### i. All Securities, whether Satisfied or not.

*See Mercantile Law Amendment Act, 1856* (c. 97), s. 5.

796. Right of surety to all securities in hands of creditor.]—One surety forced the other surety to contribute to the payment of the money & the bond assigned over.—*MORGAN v. SEYMOUR* (1838), 1 Rep. Ch. 120; 21 E. R. 525.

*Annotation*:—*Reid*. *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

797. — — — — —.]—The principal in a bond being arrested gave bail, & judgment was had against the bail. On a bill by the sureties, who had been sued on the original bond & paid the money, decreed the judgment against the bail to be assigned to

793 iv. — — — — —.]—*Re KIRKWOOD'S ESTATE* (1878), 1 L. R. Ir. 108.—IR.

793 v. — — — — —.]—*Re DAVIDSON'S ESTATE*, [1894] 1 L. R. 56.—IR.

793 vi. — — — — —.]—*EWART v. LATTA* (1865), 37 Sc. Jur. 418.—SCOT.

793 vii. — — — — —.]—*FARTHING v. PIETERSEN & Co.*, [1912] C. P. D. 215.—S. AF.

on payment of that part to a proportionate part of the securities held by the creditor for the whole debt, although under such securities a limited sum only may be recoverable.—*WARD v. NATIONAL BANK OF NEW ZEALAND* (1889), 8 N. Z. L. R. 10.—N.Z.

## PART VI. SECT. 4, SUB-SECT. 2.—B. (b).

793 i. On payment of debt.]—A surety J.—VOL. XXVI.

on paying off a secured debt is entitled to any securities the principal creditor may have got therefor.—*JONES v. HILL* (1893), 14 N. S. W. L. R. (E.) 303.—AUS.

793 ii. — — — — —.]—*GOVERDHANDAS GO-KULNAS TEJPAL v. BANK OF BENGAL* (1890), 1 L. R. 15 Bom. 48.—IND.

793 iii. — — — — —.]—*MCNEALE v. READ* (1857), 7 L. Ch. R. 231.—IR.

*Sect. 4.—After payment: Sub-sect. 2, B. (c) i.]*

them, in order to reimburse them what they had paid with interest & costs.—*PARSONS & COLE v. BRIDDOCK* (1708), 2 Vern. 608; 23 E. R. 997, L. C. Annotations:—*Consd. Wright v. Morley, Morley v. St. Alban* (1805), 11 Ves. 12. *Refd. Hodgson v. Shaw* (1834), 3 My. & K. 183; *Newton v. Chorlton* (1853), 2 Drew. 333. *Mentd. Hearn v. Wells* (1844), 1 Coll. 323; *Nethorpe v. Holgate* (1844), 1 Coll. 203; *Watts v. Hyde* (1846), 2 Coll. 368; *Hayward v. Purssey* (1849), 3 De G. & Sm. 399.

798. —.]—Where there is a principal & surety pays off the debt, he is entitled to have an assignment of the security, to enable him to obtain satisfaction for what he has paid above his own share.—*Ex p. CRISP* (1744), 1 Atk. 133; 26 E. R. 87, L. C.

Annotations:—*Mentd. Re Oyston, Ex p. Flintum* (1786), 2 Bro. C. C. 120; *Ex p. Detastet* (1810), 17 Ves. 247; *Re Mackenzle, Ex p. Bolton, Ex p. Swanzy* (1816), Buck, 7.

799. —.]—*O'CARROLL'S CASE*, No. 964, *post*.

800. —.]—*GAYNER v. ROYNER* (1777), cited 2 Madd. at p. 437; 56 E. R. 396.

Annotations:—*Consd. Robinson v. Wilson* (1814), 2 Madd. 434. *Refd. Hodgson v. Shaw* (1834), 3 My. & K. 183.

801. —.]—Assignment by a husband of part of his wife's equitable interest, viz., dividends of stock in trust for her, for valuable consideration, enforced upon the bill of a surety for the husband, to be indemnified against past & future payments; the assignment extending only to £100 a year, out of £200. The remaining dividends under a bill, on behalf of the wife, paid to her; the husband having after the assignment gone abroad, without making any provision for her.

As the creditor is entitled to all securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor (*GRANT, M.R.*).—*WRIGHT v. MORLEY, MORLEY v. ST. ALBAN* (1805), 11 Ves. 12; 32 E. R. 992.

Annotations:—*Refd. Copis v. Middleton* (1823), Turn. & R. 224; *Hodgson v. Shaw* (1834), 3 My. & K. 183; *Newton v. Chorlton* (1853), 2 Drew. 333; *Stringer v. English & Scottish Marine Insc.* (1869), L. lt. 4 Q. B. 676; *Re Walker, Sheffield Banking Co. v. Clayton*, [1892] 1 Ch. 621; *Re Parker, Morgan v. Hill*, [1894] 3 Ch. 400. *Mentd. Duncan v. Duncan* (1815), 19 Ves. 394; *Beresford v. Hobson* (1816), 1 Madd. 362; *Purdew v. Jackson* (1824), 1 Russ. 1; *Stanton v. Hall* (1831), 2 Russ. & M. 175; *Re Wyatt, Ex p. Thompson* (1836), 1 Deac. 90; *Coster v. Coster* (1839), 9 Sim. 697; *Sturges v. Champneys* (1839), 9 L. J. Ch. 10; *Wilkinson v. Charlesworth* (1847), 10 Beav. 324; *Scott v. Spashett* (1851), 3 Mac. & G. 599; *Tidd v. Lister, Basall v. Lister* (1853), 3 De G. M. & G. 857; *Barrow v. Barrow* (1854), 18 Beav. 529; *City Bank v. Luckie* (1869), 5 Ch. App. 774, n.; *Taunton v. Morris* (1878), 8 Ch. D. 453.

802. —.]—*Semble*: a surety who pays off a specialty debt is to be considered as a specialty creditor of his principal.—*ROBINSON v. WILSON* (1814), 2 Madd. 434; 56 E. R. 395.

Annotations:—*Refd. Copis v. Middleton* (1823), Turn. & R. 224; *Hodgson v. Shaw* (1834), 3 My. & K. 183.

803. —.]—A creditor had taken both a bond & a mtge. from his debtor; & a surety having joined in the bond, & being afterwards compelled to pay it:—*Held*: he was clearly entitled to have the mtge. assigned to him.—*PLUMBE v. SANDYS* (1818), 2 Coop. temp. Cott. 523; 47 E. R. 1284.

804. —.]—*HODGSON v. SHAW*, No. 862, *post*.

805. —.]—(1) In a suit by A. against B. & C. a conveyance of an estate by A. to B. was declared void & set aside for fraud, except as to an intermediate mtge. of the estate made by B. to D. to secure a sum of money lent by D. to B., & for which C. had joined B. as his surety in a bond & covenant to D.; & the decree also directed B. to redeem the estate & procure its reconveyance to A., & if he did not do so, gave A. the right to redeem, & to use the name of B. for that purpose,

& to recover from B. the money which A. should pay to D. for such reconveyance; & the bill was dismissed against C. A. afterwards procured an assignment of D.'s mtge. to a trustee, & in the name of the mtgees. brought an action against C. on his covenant & bond:—*Held*: if A. had redeemed D. the debt would have gone as against C.; C. as the surety of B. would, on payment of the mtge. debt, be entitled to the benefit of the security held by D., such security not having been disturbed by the decree; the charge of participation by C., in the fraud, whereby B. had been enabled to create the mtge. on the estate, was not a ground for depriving C. of such right; & C. was, therefore, in a suit for an injunction to restrain A. from suing him on the bond & covenant, entitled to such relief.

(2) The circumstance of the dismissal, as against C. of the bill brought by A. against B. & C., which prayed that the mtge. debt might be paid by B. & C., was material to the case, though it was not alone conclusive, as it might well be that there might be no equity to compel C. to pay the debt, though C. might have no equity to be relieved from his legal liability to pay it.

(3) *Semble*: the right of a surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety.—*YONGE v. REYNELL* (1852), 9 Hare, 809; 68 E. R. 744.

Annotation:—*As to* (3) *Refd. Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1.

806. —.]—A person appointed in a cause to be receiver of the rents of testator's estate was entitled to some shares of that estate by descent. & had acquired others by purchase. By deed he gave to his sureties by way of indemnity a security on the descended shares, expressly excluding the purchased shares, but without any expression of an intention to exonerate them from such liability as they might by law be subject to. The receiver became bkpt., being considerably indebted to the estate; & the assignees sold his purchased shares. On further directions, it was declared that the descended & the purchased shares were liable to make good to the other part-owners under the will so much of the balance due from the receiver as the sureties were not liable for, & from this declaration there was no appeal:—*Held*: the sureties had for the sums paid by them the same lien, on the receiver's shares as the other part-owners would have had, & they had not by taking the security on the descended shares lost this right as against the purchased shares.—*BRANDON v. BRANDON* (1859), 3 De G. & J. 524; 28 L. J. Ch. 147; 32 L. T. O. S. 363; 5 Jur. N. S. 256; 7 W. R. 250; 44 E. R. 1371, L. JJ.

807. —.]—E. made two promissory notes in the United States for 3,000 dollars each, in the name of "A. B. & Co. At that time B. & A. carried on business as bankers in the United States, in the name of "A. & Co." The notes came into the possession of the bank, & were indorsed over by another of the partners to deft. C., who presented them at maturity & they were dishonoured. Afterwards B. conveyed to C. certain real property in the State of New York to secure the repayment of the sum of 6,000 dollars. It was thereby declared that the grant was intended as a security for the repayment of 6,000 dollars & interest, with a power of sale, & the deed was delivered to C. B. came to England, where he was sued by D., to whom C. had indorsed the notes over. B. pleaded to the action, traversing the allegations, & a commission was sent out to

examine witnesses. Meanwhile B. was arrested by D. & was bailed by plffs. Verdict was recovered in the action, & a judgment entered up against B. for £1,631. B. absconded & plffs. paid £1,631 into ct., as one of the terms of an injunction:—*Held*: plffs. were entitled to the benefit of the security held by C.—*GODDARD v. WHITE* (1860), 2 Giff. 449; 3 L. T. 313; 6 Jur. N. S. 1364; 66 E. R. 188.

808. —.]—*BECHERVAISE v. LEWIS*, No. 901, *post*.

809. *Securities acquired after guarantee given.*—The contract of suretyship entitles the surety to require that his position shall not be altered by any arrangement between the creditor & the principal debtor from that in which he stood at the time of the contract; & it therefore entitles him absolutely to the benefit of all the securities for the debt which the creditor held at the time of the contract; it also entitles the surety, at any time, to require that the creditor shall enforce against the principal debtor not only all his remedies, & all the securities for the debt which he has at the time of the contract, but also any securities for the debt which the creditor may have acquired subsequently to the contract, & which he holds at the time that the surety requires him to proceed.

As a person paying off a debt for which he is liable is entitled in equity to stand in the place of the creditor, & to have the benefit of the securities held by the creditor for such debt; so the surety, on paying off the debt of the principal debtor, is entitled to require from the creditor the benefit not only of the securities for the debt which the creditor had at the time of the contract of suretyship, but also of all the securities which he holds at the time he is paid off. But there is no implied duty in the contract of suretyship which requires the creditor to retain, for the benefit of the surety, securities for the debt which he might subsequently receive from the principal debtor, & which, whilst the creditor holds them, the surety does not call upon him to enforce; & a creditor, who, after the contract of suretyship, having taken a further security from the principal debtor, subsequently parts with that security, does not thereby, either wholly or *pro tanto*, release the surety.—*NEWTON v. CHORLTON* (1853), 10 Hare, 646; 2 Drew. 333; 1 W. R. 266; 68 E. R. 1087.

*Annotations*:—*Consd.* *Pearl v. Deacon* (1857), 24 Beav. 186; *Pledge v. Buss* (1860), John. 663; *Campbell v. Rothwell* (1877), 47 L. J. Q. B. 144; *Forbes v. Jackson* (1882), 19 Ch. D. 615; *Nicholas v. Ridley*, [1904] 1 Ch. 192. *Reid*. *Strong v. Foster* (1855), 4 W. R. 151; *Watts v. Shuttleworth* (1860), 5 H. & N. 235; *Polak v. Everett* (1876), 24 W. R. 365; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Lowes v. Maughan & Fearon* (1884), Cab. & El. 340.

810. —.]—(1) A creditor holding a mtge. for a guaranteed debt is bound to hold it for the benefit of the surety, so as to enable him, on paying the debt, to take the security in its original condition unimpaired. Therefore, where a creditor held a mtge. for a debt for which pltf. was surety, & after the bkpcy. of the principal debtor without notice to the surety released the assignees & the bkpt.'s estate in consideration of the conveyance to him of the equity of redemption:—*Held*: the surety was discharged, & it was not enough for the creditor to allow in account the dividends released, & to give a new charge on the mortgaged premises.

(2) In order to entitle a surety to relief on the ground of misrepresentation or concealment at the time of the contract, he must make out a case amounting to fraud.

(3) The rights of a surety with respect to securities extend to securities taken after the contract of suretyship.—*PLEDGE v. BUSS* (1860), John. 633; 6 Jur. N. S. 605; 70 E. R. 585.

*Annotations*:—*As to* (2) *Reid*. *Davies v. London & Provincial Marine Insce.* (1878), 38 L. T. 478; *As to* (3) *Consd.* *Campbell v. Rothwell* (1877), 47 L. J. Q. B. 144. *Reid*. *Forbes v. Jackson* (1882), 19 Ch. D. 615.

811. —.]—A surety is entitled to the benefit of any security which the creditor has received for the debt, though he has received it after the contract of suretyship; & therefore, where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security.—*CAMPBELL v. ROTHWELL* (1877), 47 L. J. Q. B. 141; 38 L. T. 33.

812. —.]—*FORBES v. JACKSON*, No. 836, *post*.

813. *Surety ignorant of securities.*—*MAYHEW v. CRICKETT*, No. 1565, *post*.

814. —.]—A debtor deposited a policy with his creditor as a security. Afterwards the debtor, with a surety who did not know of the deposit, covenanted with the creditor for payment of the debt, & contemporaneously the debtor executed a deed of counter-security to the surety, neither deed referring to the deposit of the policy. Subsequently the debtor assigned the policy to the creditor as a security:—*Held*: the surety, on paying the debt, was entitled to the policy.—*LAKE v. BRUTTON* (1856), 8 De G. M. & G. 440; 25 L. J. Ch. 812; 27 L. T. O. S. 291; 2 Jur. N. S. 839; 44 E. R. 460, L. J. J.

*Annotations*:—*Reid*. *Campbell v. Rothwell* (1877), 47 L. J. Q. B. 144; *Forbes v. Jackson* (1882), 19 Ch. D. 615.

815. —.]—(1) Pltf. was surety, upon a promissory note, to defts., for a sum lent by them to their tenant; & defts. also took a mtge. of the tenant's furniture for the same debt. They afterwards, under a distress, took the same furniture for arrears of rent:—*Held*: as regarded pltf., the surety, the produce of the furniture was first applicable to the payment of the promissory note, & the landlords could not, as against the surety, apply it in payment of the rent.

(2) A surety is entitled to the benefit of all securities taken by the creditor, whether he has notice of them or not.—*PEARL v. DEACON* (1857), 24 Beav. 186; 26 L. J. Ch. 761; 29 L. T. O. S. 289; 3 Jur. N. S. 879; 5 W. R. 702; 53 E. R. 328; *on appeal*, 1 De G. & J. 461, L. J. J.

*Annotations*:—*As to* (1) *Apld.* *Coates v. Coates* (1861), Beav. 249. *Reid*. *Murphy v. Glush* (1869), L. R. 2 P. C. 408; *Kinnaird v. Webster* (1878), 10 Ch. D. 139; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Itz Sherry, London & County Banking Co. v. Terry* (1884), 25 Ch. D. 692; *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 506; *Nicholas v. Ridley*, [1904] 1 Ch. 192. *As to* (2) *Reid*. *Watts v. Shuttleworth* (1860), 5 H. & N. 235; *Campbell v. Rothwell* (1877), 47 L. J. Q. B. 144; *Forbes v. Jackson* (1882), 19 Ch. D. 615.

816. —.]—The acceptor of a bill of exchange knows that, by his acceptance he does an act which will make him liable to indemnify any indorser of it who may afterwards pay it. The indorser is a surety for the payment to the holder & having paid it, is entitled to the benefit of any securities to cover it deposited with the holder by the acceptor. He is so entitled whether at the time of his indorsement he knew or did not know of the deposit of those securities; the surety's right in this respect in no way depends on contract, but is the result of the equity of indemnification attendant on the suretyship.

S., one of the partners of R. & Sons, in Dec. 1874, deposited with the N. & S. W. Bank the title deeds of two of his own freehold properties

*Sect. 4.—After payment: Sub-sect. 2, B. (c) i., ii. & iii., C., D. & E. (a) & (b).*

& signed a memorandum acknowledging them to be deposited as securities for what the N. & S. W. Bank might advance to the firm in the way of discounts. In Nov. 1875, D. & co. sold to R. & Sons a cargo of corn to be paid for in cash. Cash was paid only for part. R. & Sons offered a bill of exchange for the rest, which was declined. D. & co. were customers of the N. & S. W. Bank. R. & Sons said if D. & co. would inquire of those bankers they would find it would be all right with the R. bills. The bank manager refused to discount the bill without the indorsement of D. & co., but said that he believed D. & co. would incur no more than a nominal liability, by putting their names on the bill. D. & co. thereupon consented to take the bill, indorsed it in the ordinary way & it was discounted by the bank & carried to their credit. In Jan. 1876, R. & Sons stopped payment. The bill became due in Feb. & was dishonoured. D. & co. who then became acquainted with the fact that securities had been deposited with the bankers to cover advances on R. & Sons' bills brought an action against the N. & S. W. Bank to have the benefit so far as they would go of the securities deposited in Dec. 1874, claiming to be securities to the bankers for what was due upon the bill:—*Held*: D. & co. were sureties on the bill & as such they were entitled to the benefit of these securities.—*DUNCAN, FOX & Co. v. NORTH & SOUTH WALES BANK* (1880), 6 App. Cas. 1; 50 L. J. Ch. 355; 43 L. T. 706; 29 W. R. 703, H. L.

*Annotations*:—*Reid*, *Forbes v. Jackson* (1882), 19 Ch. D. 615; *Aga Ahmed Isphahany v. Crisp* (1891), 8 T. L. R. 132; *Nicholas v. Ridley*, [1904] 1 Ch. 192; *Jowitt v. Union Cold Storage Co.*, [1913] 3 K. B. 1.

*817.* —.—]—It was clear from *Forbes v. Jackson*, No. 830, *post*, that the obligation of the creditor was the same whether the surety knew of the existence of a security at the time he entered into the contract of suretyship or not. The surety was entitled to the benefit of any security existing at the time of the contract of suretyship or subsequently given (*MATHEW, J.*).—*LICESTERSHIRE BANKING CO., LTD. v. HAWKINS* (1900), 10 T. L. R. 317, D. C.

*See, also, BILLS OF EXCHANGE*, Vol. VI., pp. 413, 414, Nos. 2677–2683.

## ii. Satisfied Securities.

*See Mercantile Law Amendment Act, 1856 (c. 97), s. 5.*

*818. Application of Mercantile Law Amendment Act, 1856 (c. 97), s. 5—Contract entered into before Act.*—The above sect. is applicable to contracts made before it passed.—*LOCKHART v. REILLY, REILLY v. LOCKHART, ELLIS v. ELLIS, ELLIS v. LEE* (1857), as reported in 1 De G. & J. 461; 44 E. R. 803, L. C.

*Annotations*:—*Reid*, *Re Cochran's Estate, De Wolf v. Lindsell* (1868), L. R. 5 Eq. 209. *Mentid*, *Power v. O'Connor* (1871), 19 W. R. 923; *Wilson v. Thomson* (1875), L. R. 20 Eq. 459; *Bahin v. Hughes* (1886), 31 Ch. D. 390; *Re Partington, Partington v. Allen* (1887), 57 L. T. 654; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536; *Head v. Gould*, [1898] 2 Ch. 260; *Re Linsley, Cattley v. West*, [1904] 2 Ch. 785; *The Millwall*, [1905] P. 155.

*819.* —.—]—*Breach after.*—*Re COCHRAN'S ESTATE, DE WOLF v. LINDSELL*, No. 806, *post*.

*820.* —.—]—*Enforcement of right—By motion.*—Advantage cannot be taken of the above sect. upon motion.—*PHILLIPS v. DICKSON* (1860), 8

C. B. N. S. 391; 29 L. J. C. P. 223; 2 L. T. 185; 6 Jur. N. S. 401; 8 W. R. 390; 141 E. R. ....

*Annotation*:—*Reid*, *The Englishman & The Australia*, [1895] P. 212.

*821.* —.—]—*Measure of damages.*—In an action for damages for wrongfully refusing to assign a judgment debt, *pltf.* is, *prima facie*, entitled to recover as damages the value of specific assets which would have been available for execution under the judgment, if assigned, & it is not incumbent on him, in the first instance, to show that there were no other assets available.—*ODDY v. HALLETT* (1885), Cab. & El. 532.

*822.* —.—]—*Assignment of judgment.*—A., who was jointly liable with nine other persons, having been taken under a *ca. sa.*, paid the entire debt:—*Held*: he was entitled, by virtue of the above sect., to an assignment of the judgment; & in an action against the judgment creditor to enforce such assignment, a plea that the judgment had been satisfied by payment by A., after he had been taken in execution under it, was no answer.—*BATCHELOR v. LAWRENCE* (1861), 9 C. B. N. S. 543; 30 L. J. C. P. 39; 3 L. T. 508; 6 Jur. N. S. 1306; 9 W. R. 373; 142 E. R. 214.

*Annotation*:—*Mentid*, *Kayley v. Hothersall*, [1925] 1 K. B. 607.

*823.* —.—]—*Actual assignment not obtained.*—The right of a co-surety under the above Act, who has satisfied a judgment obtained by the creditor against the debtor & his sureties, to stand in the place of the judgment creditor, is not affected by the circumstance that such surety has not obtained actual assignment of the judgment.—*Re M'MYN, LIGHTBOWN v. M'MYN* (1886), 33 Ch. D. 575; 55 L. J. Ch. 845; 55 L. T. 834; 35 W. R. 179.

*Annotation*:—*Consd.* *Re Churchill, Manisty v. Churchill* (1888), 39 Ch. D. 174.

*824.* —.—]—D. & H., who were partners' covenanted to be jointly & severally liable to P. for payment of a debt by instalments. The earlier instalments were paid out of the partnership assets, & later ones by D., after judgment for them had been recovered. D. demanded from P. that, in order to enforce his right to contribution against H., the judgments should be delivered to him as provided by the above sect.; but H. informed P. that D.'s right to contribution depended on the equitable rights between D. & himself in respect of a partnership action then pending between them; upon which P. declined to hand over the judgments. D. then brought an action against P. claiming (a) delivery of the judgments; (b) damages for non-delivery; (c) a declaration that by reason of the refusal to assign the judgments D. was released from all liability in respect of any future instalments:—*Held*: (1) the above sect. might be subject to the equitable relationship between the parties, & although P. had committed a breach of a statutory obligation in refusing to assign the judgments, yet, as D. could not have levied execution upon them without the consent of the judge in the partnership action, & without taking into account the inter-partnership rights of himself & H., he had suffered no actual damage; (2) D. was not released from liability in respect of future instalments, inasmuch as there had been no alteration of the original conditions as to the liability of the parties; & the failure to assign the judgments would have only operated to release him if & so far as the delay in handing over might have made them less valuable.—*DALE v. POWELL, POWELL v. DALE & HOOD* (1911), 105 L. T. 291.

*Annotation*:—*As to* (1) *Apprvd. & Foldd.* *Kayley v. Hothersall*, [1925] 1 K. ....

**825. — Right of distress not security within the Act.]**—On the dissolution of a partnership between H. & R., H. assigned to R. all his interest in two houses belonging to the partnership held under sub-leases from C. & D., & R. covenanted to pay the rents & observe the covenants & keep H. indemnified against them. R.'s exors. sold the houses to B., & B. to a co. which went into liquidation. The landlords C. & D. thereupon sued H. for the rent, & he paid it for the whole of the year 1882. D. also made a large demand against H. for breaches of covenants to repair, but H. made no payment. On Mar. 15, 1883, D. assigned his reversion to H., & in May H. acquired C.'s reversion. In June, 1883, H. bought the leasehold interest in both houses from the liquidators of the co. & covenanted thenceforth to pay the rent & observe the covenants. H. sought to prove against the estate of R. for the sums paid for rent, for the rent payable at Lady Day, 1883, on D.'s house & for the amount of the dilapidations in that house:—*Held*: (1) the right of H. under R.'s covenant of indemnity to prove for the rents which he had paid, was not taken away by his covenant in the assignment by the liquidators, which could not be extended to rents already due & paid; (2) this right was not defeated on the ground that the right of R.'s representatives, if they paid rent, to recover it from the owner of the lease for the time being, was interfered with by the assignment from the liquidators to H., for that this assignment could not take away any right of action which R.'s exors. might have against the persons entitled to the houses at the end of 1882, & an assignor who pays rent has no lien on the term & so cannot be prejudiced by its subsequent assignment; (3) the right was not defeated on the ground that H. on paying the rent became entitled to a right of distress from the reversioners which he had destroyed by taking an assignment of the leases & had therefore discharged the estate of R., by releasing a remedy to the benefit of which R. as a surety was entitled, for a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the above sect.—*Re RUSSELL, RUSSELL v. SHOOLBRED* (1885), 20 Ch. D. 254; 53 L. T. 365, C. A.

**Right to benefit of creditor's proof in bankruptcy.]** See Part V., Sect. 3, sub-sect. 8, B., *ante*.

### iii. Guarantee for Part of Debt.

**826. Securities given for another part of debt—At different time.]**—A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt.—*WADE v. COOPE* (1827), 2 Sim. 155; 57 E. R. 747.

*Annotation*:—*Consd. Newton v. Chorlton* (1853), 2 Drew. 333.

Appl. gave a guarantee to resp. bank to secure all moneys which should at any time be due to them on the general balance of a customer's account. The customer became bkpt., & a general balance of £1,000 became due to resps. In an action against applt. for the recovery of that amount, it was proved that after the guarantee was given the customer had obtained a succession of advances from resps., giving them

securities against each advance & receiving them back on repaying such advance:—*Held*: the first & every other deposit of securities by the customer was a special & exceptional transaction, to be regarded apart from & independent of the guarantee or of the guaranteed account, & the amount of the advance against which the deposit was made being repaid, the customer was entitled to have the securities back without applt. being consulted in the matter.—*WILKINSON v. LONDON & COUNTY BANKING CO.* (1884), 1 T. L. R. 63, H. L.

**Right to marshal securities.]** See Sect. 3, sub-sect. 3, *ante*.

**828. Security given for whole debt—Surety entitled to proportionate part.]**—A person who becomes surety for a limited amount of a debt has, on paying the amount for which he is liable, all the rights of a creditor, in respect of that amount, & is entitled to share in the security held by the principal debtor for the whole debt.—*GOODWIN v. GRAY* (1874), 22 W. R. 312.

### C. In case of Crown Debtor.

**829. Right to stand in place of Crown.]**—*R. v. ROBINSON* (1855), 1 H. & N. 275, n.; 25 L. T. O.S. 86, 148; 156 E. R. 1207.

**830. —.]**—Where the surety of a Crown debtor has paid the debt of his principal, an order that he shall be placed in the situation of the Crown, & a writ of extent be put in force in his behalf, is not absolute in the first instance, though notice of motion has been served on the principal & the Crown, & no one appears to oppose the application.—*R. v. SALTER* (1856), 1 H. & N. 274; 156 E. R. 1207.

**Extents generally.]**—See CROWN PRACTICE, Vol. XVI., pp. 221 *et seq.*

### D. Right to Dividend on Bankruptcy of Principal Debtor.

See Part V., Sect. 3, sub-sect. 8, B., *ante*.

### E. Rights in connection with Mortgages.

#### (a) In General.

Mortgages generally, see MORTGAGE.

**831. Right to equitable charge on mortgaged estate—For money paid.]**—*ALLEN v. DE LISLE*, No. 982, *post*.

**832. —.]**—(1) A surety for a mtgor., who pays part of the mtge., is entitled, as against the mtgor., to a charge on the estate.

(2) A surety who covenants for payment of the mtge. money is not a necessary party to a foreclosure suit, if he has paid nothing.—*GEDYE v. MATSON* (1858), 25 Beav. 310; 53 E. R. 655.

**Right to transfer of securities.]**—See Sub-sect. 2, B., *ante*.

#### (b) Tacking.

Tacking of mortgages generally, see MORTGAGE.

**833. Right of creditor to tack against surety—Further advances.]**—A mtge. was effected for £300, upon certain property, & the three ptfs. became sureties for securing the repayment. The mtgee. lent a further sum of £100 upon the same property, unknown to the sureties. The mtgor. failed to repay the sum advanced, & the sureties were

### PART VI. SECT. 4, SUB-SECT. 2.—C.

**829 i. Right to stand in place of Crown.]**—A Crown bond is in the nature of a recognisance, & a surety having paid the debt, is entitled to the benefit of all securities against both

his principal & his co-surety.—*H. v. DENNIS, R. v. BAILEY* (1833), *Hayes & Jo.* 194.—*IR.*

### PART VI. SECT. 4, SUB-SECT. 2.—E. (a).

**831 i. Right to equitable charge on**

*mortgaged estate—For money paid.]*—*Re DAYTON'S ESTATE*, [1891] 1 I. R. 58.—*IR.*

**831 ii. —.]**—*KENNEDY v. CAMPBELL*, [1899] 1 I. R. 59.—*IR.*



**Sect. 4.—After payment: Sub-sect. 2, E. (b), (c), (d) & (e), & F.]**

compelled to pay the £300. The mtgee. then refused to give up his security unless the further sum of £100 was paid:—*Held*: the mtgee. was justified in lending the further sum, & the sureties must pay £100 more before they could stand in the place of the mtgee.—*WILLIAMS v. OWEN* (1843), 13 Sim. 597; 13 L. J. Ch. 105; 7 Jur. 1145; 60 E. R. 232.

**Annotations**:—*Consd. Newton v. Chorlton* (1853), 2 Drew. 333. *Apd. Farebrother v. Wodehouse* (1856), 23 Beav. 18. *Consd. Dawson v. Bank of Whitehaven* (1877), 4 Ch. D. 639. *Dtd. & N.F. Forbes v. Jackson* (1882), 19 Ch. D. 615. *Refd. Drew v. Lockett* (1863), 32 Beav. 499; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

**834.** ————]—A. mortgaged his freehold & copyhold estates & some drainage bonds, & by the same deed, his daughters mortgaged their freehold & copyhold estates to B. to secure £6,000 lent by B. to A., & the deed declared that, without prejudice to any of the rights or remedies of B., his heirs, exors., etc., as between A., his heirs, exors., etc., on the one hand, & the daughters, & their heirs, exors., etc., on the other hand, A., his heirs, exors., etc., should be primarily liable to the payment of the £6,000, & that his freehold & copyhold estates therein comprised should be primarily liable to answer & make good the £6,000. Six years afterwards, A. mortgaged his freehold & copyhold estates comprised in the prior mtge., & also the drainage bonds, to B., to secure £700 lent to him by B.:—*Held*: B. was not entitled as against A.'s daughters, to tack his second mtge. to the first, but the daughters were entitled to redeem the first mtge. on payment of the £6,000.—*BOWKER v. BULL* (1850), 1 Sim. N. S. 29; 20 L. J. Ch. 47; 16 L. T. O. S. 503; 15 Jur. 4; 61 E. R. 11.

**Annotations**:—*Consd. Farebrother v. Wodehouse* (1856), 23 Beav. 18; *Dawson v. Bank of Whitehaven* (1877), 4 Ch. D. 639. *Refd. Drew v. Lockett* (1863), 32 Beav. 499.

**835.** ————]—A wife, married before the Dower Act, 1833 (c. 105), joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt. By the mtge. deed the equity of redemption was reserved to the husband:—*Held*: (1) the wife's right to dower was extinguished in equity as well as at law, & she had no right to redeem the estate; (2) as she had pledged no estate recognised by a ct. of equity, & had undertaken no personal liability on behalf of her husband, she had no right in the character of a surety for his debt to have the value of her dower made good after his death out of the surplus proceeds of sale of the property which had been during his life sold by the mtgee. under a power of sale contained in the mtge. deed.—*DAWSON v. BANK OF WHITEHAVEN* (1877), 6 Ch. D. 218; 46 L. J. Ch. 884; 37 L. T. 64; 26 W. R. 34, C. A.

**Annotation**:—*As to* (1) *Refd. Meek v. Chamberlain* (1881), 8 Q. B. D. 31.

**836.** ————]—In Dec. 1854, S. assigned certain premises & a policy of assurance to secure the repayment of a sum of £200 advanced to him by W. & interest. The proviso for redemption was that on payment of the money W. would re-assign the premises & policy unto S. his exors., administrators, or assigns, or as he or they should direct. F. by the same indenture, as surety, covenanted for himself only with W. that while the £200 or any part should remain owing he would pay the interest & premiums & he also assigned a policy on his own life, & covenanted to pay the premiums. W. at four different periods between May, 1856, & May, 1866, advanced moneys

amounting to £530 to S. on the security of the same premises. S. made default on the payment of interest. W. died in 1878, & his exors. made a demand upon F. for all arrears, which he paid, & he also paid the premiums on the policy of S.:—*Held*: F. was entitled to have a transfer of all — securities on paying what was due upon the mtge. of Dec. 1854.—*FORBES v. JACKSON* (1882), 19 Ch. D. 615; 51 L. J. Ch. 690; 48 L. T. 722; 30 W. R. 652.

**Annotations**:—*Consd. Leicestershire Banking Co. v. Hawkins* (1900), 16 T. L. R. 317. *Refd. Lowes v. Maughan & Fearon* (1884), Cab. & Fl. 340; *Nicholas v. Ridley*, [1904] 1 Ch. 192.

**837.** ———— **Surety really principal debtor.]**

—R. was tenant for life of real estate subject to a first mtge. to S. & to a second mtge., which included additional property, to N., both created by R.'s predecessors in title. Subsequently N. paid off the first mtge. & took a transfer of it, R., the tenant for life, who had been keeping down the interest on both mtges., joining by covenanting with N. for payment of the first mtge. debt. with a proviso that, as between R., his heirs, etc., estate & effects on the one part, & the first mortgaged premises & the owner or owners for the time being thereof on the other part, the said premises should be the primary fund for payment of the first mtge. debt, & that R.'s covenant should be "only a collateral security" for such payment, but that, notwithstanding N., his exors., etc., might resort to either means for enforcing payment in preference to such other means.

R. & N. being both dead, a mtgee.'s action was brought by N.'s representatives against R.'s representatives, claiming payment of the first mtge. debt pursuant to R.'s covenant, & also the right to tack the second mtge. to the first. Defts. contended that R. had covenanted as a surety, & that, therefore, on payment by them of the first mtge. debt they would be entitled to stand in the place of plffs., the first mtgees., & to have an assignment of the securities for that debt:—*Held*: upon the construction of the transfer & of R.'s covenant therein R. was a principal debtor & not a surety, & consequently, upon the authority of *Duncan, Fox & Co. v. North & South Wales Bank*, No. 816, *ante*, & *Newton v. Chorlton*, No. 809, *ante*, neither he nor his representatives could claim the rights of a surety as against either N. or his representatives.—*NICHOLAS v. RIDLEY*, [1904] 1 Ch. 192; 73 L. J. Ch. 145; 89 L. T. 653; 52 W. R. 226; 48 Sol. Jo. 155, C. A.

**838. Right of surety to tack.—Costs of unsuccessful defence.]**—Mtge. of two funds to A. with a covenant by a surety. Second mtge. of one of the funds to B. B.'s fund having been exhausted in part payment of A.'s debt, & A.'s mtge. having been transferred to the surety on payment by him of the balance:—*Held*: (1) B. had a right to marshal the securities as against the surety; (2) the surety could not tack as against B. the costs of a defence to an action on his covenant from which B. derived no benefit, but he might charge as against B. all costs incurred for the common benefit of the persons interested in the estate after the first mtge. (3) *Semble*: as against the original mtgor. the surety might have tacked to his security all costs not improperly incurred as surety.—*SOUTH v. BLOXAM* (1865), 2 Hem. & M. 457; 5 New Rep. 506; 34 L. J. Ch. 369; 12 L. T. 204; 11 Jur. N. S. 319; 71 E. R. 541.

**Annotations**:—*As to* (1) *Consd. Dixon v. Steel*, [1901] 2 Ch. 602. *As to* (2) *Refd. Re Toogood's Legacy Trusts* (1889), 61 L. T. 19; *Dixon v. Steel*, [1901] 2 Ch. 602.

*See Law of Property Act, 1925 (c. 20), s. 94.*

## (c) Consolidation.

Consolidation of mortgages generally, *see* MORTGAGE.

**839. Right of mortgagee to consolidate.]**—Where two properties are mortgaged by A. to B for distinct sums, & C. is surety for one only, the right of B., to retain all the securities until repaid both debts, overrides the right of C. to have the benefit of the securities for that debt for which he is surety.

*Defts.* lent A. B., at the same time, two sums of £2,000 & £3,000 on distinct securities, & pltf. was surety for the first sum:—*Held*: pltf., on paying the £2,000, was not entitled to have a transfer of the securities held for that sum, until *defts.* had also been paid the £3,000.—*FAREBROTHER v. WOODHOUSE* (1856), 23 Beav. 18; 20 L. J. Ch. 81; 28 L. T. O. S. 94; 2 Jur. N. S. 1178; 5 W. R. 12; 53 E. R. 7; *on appeal* (1857), 26 L. J. Ch. 240, L. J.J.

*Annotations*:—*Consd.* *Forbes v. Jackson* (1882), 19 Ch. D. 615; *Nicholas v. Ridley*, [1904] 1 Ch. 192. *Reid*. *Pearl v. Dracoon* (1857), 3 Jur. N. S. 479; *Drew v. Lockett* (1863), 32 Beav. 499; *Re Jeffery's Policy* (1872), 20 W. R. 857.

**840. —.]**—*DREW v. LOCKETT*, No. 786, *ante*.  
*See* Law of Property Act, 1925 (c. 20), s. 93.

## (d) Time allowed for Redemption.

Mortgage generally, *see* MORTGAGE.

**841. One period of six months allowed—To mortgagor & surety.]**—Where there were two *defts.* to a foreclosure action the mtgor. & a second mtgee. who had joined in pltf.'s security to postpone his previously prior right, & as surety for the pltf.:—*Held*: only one period of six months should be allowed for redemption by both *defts.*—*SMITH v. OLDING* (1884), 25 Ch. D. 462; 54 L. J. Ch. 250; 50 L. T. 357; 32 W. R. 386.

*Annotation*:—*Reid*. *Mutua Life Assoc. Soc. v. Langley* (1884), 26 Ch. D. 686.

## (e) Whether necessary Party to Foreclosure Action.

Mortgage generally, *see* MORTGAGE.

**842. Surety giving collateral security.]**—To a bill of foreclosure against the principal mtgor., the mtgor. of another estate, as a collateral security, is a necessary party.—*STOKES v. CLENDON* (1790), 3 Swan. 150, n.; 36 E. R. 812.

*Annotation*:—*Fold*. *Gee v. Liddell*, [1913] 2 Ch. 62.

**843. —.]**—A co-mtgor. by way of collateral security, as distinguished from a mere surety by covenant, is a necessary party to foreclosure proceedings brought against the principal mtgor. by a prior mtgee. of the principal mtgor.'s share in the mortgaged property.

A., B., & C. were entitled as tenants in common in equal shares to the residuary estate of a testator. In 1881 A. mortgaged his share to X. In 1882 A., B., & C. joined in a mtge. to Y. to secure an advance to B. B. alone covenanted to repay the money; but A., B., & C. assigned their respective shares in the estate to the mtgee., subject to a proviso for redemption by the three or any of them. The mtge. deed provided that as between A., B., & C. the respective premises mortgaged by them each should be primarily liable to the payment of a specified portion of the mtge. debt, & that each should accordingly contribute in those proportions towards the payment of the debt, & indemnify the others against payment of the portion in respect of which he was to be primarily liable. In 1884 X. obtained a foreclosure order absolute in proceedings against A. to which B.

& C. were not parties:—*Held*: B. & C. were necessary parties to the foreclosure proceedings & not having been made parties were not bound by them, though they were binding on A.; & the persons entitled to their share were accordingly entitled to contribution from A.'s share in respect of the mtge. of 1882.—*GEE v. LIDDELL*, [1913] 2 Ch. 62; 82 L. J. Ch. 370; 108 L. T. 913.

**844. Surety by covenant—Where nothing paid.]**—A. having a general power of appointment over an estate in the event of his surviving his father, joined with B. & C. his sureties, in a covenant to pay an annuity to pltf., & A. covenanted that if he should survive his father, he would create a term in the estate, for securing the annuity. A.'s father died; & A. granted other annuities to pltf., but did not create the term. He afterwards vested the estate in trustees for the benefit of such of his creditors as should execute the conveyance. Several of the creditors executed it, & one of them, on behalf of himself & the others, filed a bill to have the trusts of the deed carried into execution. After a decree had been made in that suit, pltf. filed his bill against A., the trustees, & pltf. in that suit, praying for an account of what was due to him in respect of his securities, that the priorities of himself & the other incumbrancers might be declared, that he might redeem the securities which should appear to be prior to his own, & might have the benefit of the decree as to that part of his demand, for which he should not be entitled to priority over the trust deed:—*Held*: on demurrer, the sureties were not, but all the creditors who had executed the deed, were necessary parties.—*NEWTON v. EGMONT (EARL)* (1831), 1 Sim. 574; 58 E. R. 215.

*Annotations*:—*Mentd.* *Cooker v. Egmont* (1833), 6 Sim. 311; *Mortimer v. Fraser* (1837), 2 My. & Cr. 173.

**845. —.]**—*JEDYE v. MATSON*, No. 832, *ante*.

## F. Waiver of Right of Subrogation.

**846. Express waiver in guarantee.]**—Merchants procured accommodation from bankers on entering with sureties into a covenant to pay the floating balance due from time to time up to a certain limited amount, subject to a proviso that in the event of the merchants' bkpcy., & in the event of the amount due exceeding at that time the fixed limit, any dividends received under the bkpcy. should be applied exclusively in payment of the excess, without the sureties being entitled to any part of the dividends until the whole of such excess was paid. Some of the sureties took from one of the principal debtors a counter security & indemnity in respect of their liability under the covenant, but without the bankers having notice of the transaction. The merchants became bkpt., being indebted to the bankers beyond the limit fixed, & the bankers received dividends on the whole debt & recovered the amount secured by the deed from the sureties, two of whom were reimbursed by means of their counter-security out of the separate estate of one of the bkpts.:—*Held*: the bankers were entitled to retain all the dividends received by them on account of their debt.—*Re FERNANDES, Ex p. HOPE* (1844), 3 Mont. D. & De G. 720; 8 Jur. 1128.

*Annotations*:—*Appl.* *Midland Banking Co. v. Chambers* (1869), 4 Ch. App. 398. *Consd.* *Re Rees, Ex p. National Provincial Bank of England* (1881), 17 Ch. D. 98.

**847. —.]**—To a count for money paid, *deft.* pleaded his bkpcy. & certificate, & that the money was paid after the fiat on account of a debt due

## PART VI. SECT. 4, SUB-SECT. 2.—F.

**846 I. Express waiver in guarantee.]**—*Re GILLESPIE* (1887), 19 L. R. Ir. 198.—*IR.*



**Sect. 4.—After payment: Sub-sect. 2, F. Part VII.****Sect. 1.]**

from deft. to a banking co., & for which pltf. was liable. Replication, that the liability arose from pltf.'s, before the fiat, signing a guarantee for deft. at his request, whereby, in consideration of the co. making advances to deft. on account, pltf. guaranteed the sum advanced, so that his liability did not exceed £250; & that, in the event of deft.'s bkpcy., & the debt to the banking co. exceeding £250, the co. might elect which part of the account might be secured by the guarantee, & might prove the whole of the money due on any securities against deft.'s estate, & apply all the dividends in consideration of the debt beyond the £250, & that pltf. should only be entitled to the benefit of any proof or dividend after the co. might recover the full amount guaranteed from pltf.; that large advances were made by the banking co., & that they proved the whole sums due to them, & forced pltf. to pay the £250 for which he was security to the bankers of the bkpt.:—*Held*: pltf.'s debt was barred by 6 Geo. 4, c. 16, ss. 52, 121.

Pltf. was, at the date of the fiat, the surety, or person liable for the debt of the bkpt., & though he did not prove, he would have been barred, & the effect of that agreement, as stated in the replication, was no more than that pltf. being entitled to prove, or stand in the place of the banking co., *quoad* the £250 gave up that benefit to the co., & deft. was nevertheless fully entitled to be discharged from it by his certificate (PARKER, B.).—*EARLE v. OLIVER* (1848), 2 Exch. 71; 10 L. T. O. S. 463; 154 E. R. 410.

*Annotation*: *Mentd. Flight v. Reed* (1863), 1 H. & C. 703.

**848.** —.—]—In a continuing limited guarantee there was a proviso that, if the creditors received a dividend from any estate of the principal debtor, it should not be taken in discharge of the guarantee, but that the creditors should be entitled to recover on the guarantee to the full extent of the limit notwithstanding. On the bkpcy. of the principal debtors the creditors proved, & before receiving any dividend, obtained payment from the guarantors to the extent of the limit:—*Held*: the guarantors were not entitled to stand in the place of the creditors as to so much of the proof as was equal to their payment.—*Re PORTER, Ex p. MILES* (1848), De G. 623.

*Annotation*: *Consd. Midland Banking Co. v. Chambers* (1868), L. R. 7 Eq. 179.

**849.** —.—]—A bank permitted a customer to overdraw his account upon having a guarantee from a surety to the extent of £300, which guarantee provided that all dividends, compositions & payments secured on account of the customer should be applied as payments in gross, & that the guarantee should apply to & secure any ultimate balance that should remain due to the bank. The customer gave the surety a mtge. on part of his estate by way of indemnity. Afterwards the customer compounded with his creditors by a deed which provided for the administration of the assets as in bkpcy. His banking account was overdrawn £410. The mtge. was realised & the surety paid the bank the £300 secured by it:—*Held*: the bank was not restricted to proof for the balance of £110, but was entitled to receive dividends on the whole £410, not receiving on the whole, including the £300, more than 20s. in the pound.—*MIDLAND BANKING CO. v. CHAMBERS* (1869), 4 Ch. App. 398; 38 L. J. Ch. 478; 20 L. T. 346; 17 W. R. 598, L. J.J.

*Annotations*:—*Apd. Re Melton, Milk v. Towers*, [1918] Ch. 37. *Reid. Gray v. Seckham* (1872), 7 Ch. App. 680.

**850.** —.—]—A bank held the guarantee of B. for their debtor's account, whereby it was provided that "the guarantee should extend to the repayment of all moneys which should at any time be due from the debtor to the bank, & should be a continuing guarantee to the extent of £800 . . ." & "that the guarantee should not be considered as wholly or partially satisfied by the payment or liquidation at any time or times thereafter of any sums for the time being due, but should extend to & be a security for every & all future sum or sums of money at any time due to the bank thereon notwithstanding any such payment or liquidation"; & "that all dividends, compositions, & payments should be taken or applied as payments in gross, & that the guarantee should apply to secure any ultimate balance due to the bank." The debtor having filed a petition for liquidation, B. paid £800, the amount of his guarantee, to the bank. Upon a question whether the bank or B. was entitled to prove for the £800:—*Held*: B. having by the guarantee contracted himself out of his original right, in favour of the bank, the latter was entitled to prove for the whole amount of their debt, including the £800 paid by B.—*Re SELLERS, Ex p. MIDLAND BANKING CO.* (1878), 38 L. T. 395.

**851.** —.—]—A customer gave to his bankers, as a security for the balance which might from time to time be due from him to them, the joint & several bond for £1,000 of himself & a surety, the liability of the surety being expressly limited to £500. There was a proviso in the bond that any dividends received by the bankers in the bkpcy. of the customer should not, so far as concerned the surety, go in discharge of his liability; but the bankers should notwithstanding be entitled to recover on the bond against the surety to the full extent of £500, or so much thereof as should, together with the dividends, amount to 20s. in the pound on the debt due by the customer to the bankers. The customer filed a liquidation petition, & the bankers proved for the debt due to them. Afterwards the surety paid the bankers £500, & he then proved in the liquidation for £500:—*Held*: the bankers were entitled to retain their proof for the full amount.—*Re REES, Ex p. NATIONAL PROVINCIAL BANK OF ENGLAND* (1881), 17 Ch. D. 98; 41 L. T. 325; 29 W. R. 796, C. A.

**852. Waiver implied from conduct From course of business.**—Where two firms deal together, one making payments for & accepting bills for the accommodation of the other & receiving cash & bills from the accommodated firm by way of payment of & security for the outlay & liabilities made & incurred, the question how the proceeds of the bills so remitted are to be applied must depend on the contract of the parties express or implied. In a case where in the absence of express contract the course of dealing might have led to the presumption that the agreement between the parties was that the proceeds of each bill as it was paid should be applied as far as it would go in discharge of the cash balance, this presumption was not held to extend to the event of bkpcy., or to establish any agreement which prevented the party who was in the position of a surety from insisting against bkpt. principal on the same rights on which he might have insisted in the absence of contract.—*Re BULMER, Ex p. JOHNSON* (1853), 3 De G. M. & G. 218; 22 L. J. Bcy. 65; 21 L. T. O. S. 109; 1 W. R. 341; 43 E. R. 86, L. C.

*Annotation*:—*Mentd. Re Foster & Hinings, Ex p. Diokin* (1875), 24 W. R. 221.

**853. — Acceptance of indemnity from debtor.]**—A life estate & a reversionary term having been mortgaged together, the reversioner, who was the principal debtor, settled other lands upon trusts giving to the owner of the life estate, the surety, a more complete indemnity than he would have been entitled to under the ordinary rules of

equity :—*Held* : the owner of the life estate could not, to recoup himself the interest which he had paid on the mtge. debt, claim the benefit, both of the indemnity deed & of the mtge. of the reversionary term held by the creditor.—*COOPER v. JENKINS* (1863), 32 Beav. 337; 1 New Rep. 383; 55 E. R. 132.

## Part VII.—Surety's Rights against Principal Debtor.

### SECT. 1.—NATURE OF RIGHTS.

#### **854. Distinguished from rights of creditor—Surety for one partner—Right to sue other partner.]**

—(1) By deed it was agreed that a lender should advance money to a railway contractor; the contractor by way of security assigned the benefit of his contract & the materials employed by him & covenanted to repay all advances within six months; & the lender was to receive interest & one-tenth of the net profits made by the contractor :—*Held* : on the construction of the whole deed & of the correspondence before the parties this deed was a device, & the lender was a partner with the contractor, & must indemnify a person who had a claim against the contractor arising out of a guarantee given in connection with the contract.

Sureties have a right of indemnity & if a surety could prove that by reason of the non-payment of the debt he had suffered damage beyond the principal & interest which he had been compelled to pay, he would be entitled to recover that damage from the principal debtor. Therefore more can be recovered by the surety under the contract of indemnity than could be recovered by the creditor (*STIRLING, J.*).

Where the original contract was a bond—a specialty debt—yet the right of the surety to an indemnity was in the nature of a simple contract debt, & consequently that the surety was barred in a shorter time than the creditor would have been. That state of the law has been put an end to by the provisions of the Mercantile Law Amendment Act (*STIRLING, J.*).

(2) The rights of a surety against his principal are not exactly the same as those of the creditor; & therefore although a creditor who has recovered judgment against one partner cannot sue another partner that rule does not take away the rights of a surety for one partner as against another partner.

—*BADELEY v. CONSOLIDATED BANK* (1880), 31 Ch. D. 536; 55 L. T. 635; 35 W. R. 106; 3 T. L. R. 60; *on appeal* (1888), 38 Ch. D. 238, C. A.

*Annotations* :—As to (1) *Reid. v. Whiteley, Ex p. Smith* (1892), 66 L. T. 291; *Davis v. Davis*, [1894] 1 Ch. 393. As to (2) *Reid. Gray v. Stone & Funnell* (1893), 69 L. T. 282; *Re Anglessey, De Galve v. Gardner*, [1903] 2 Ch. 727. *Generally, Reid. Davis v. Freethy* (1890), 24 Q. B. D. 519; *Cole v. Eley*, [1894] 2 Q. B. 180; *King v. Whitchelov* (1895), 64 L. J. Q. B. 801; *Norton v. Yates*, [1906] 1 K. B. 112; *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693; *Re Beard, Ex p. Trustee*, [1915] H. B. R. 191.

**855. Whether simple or specialty contract rights—Debt not satisfied by surety.]**—A married woman, entitled to property under a settlement to her separate use, concurred with her husband in raising money upon mtge. of it, by a deed which expressed that the money was borrowed by & paid to herself & her husband, but contained a

covenant by the husband for repayment :—*Held* : the presumption was, that the money was received by the husband, but this presumption might be rebutted by extrinsic evidence. In the absence of such evidence, the wife was only a surety for the husband, & was, after his death, entitled as against his other creditors, to all the rights incident to that relation, & therefore had a right to have the debt paid off, as a specialty debt, out of the husband's assets. If the mtge. was of the wife's freehold estate not settled to her separate use, she was still a surety, & had all the rights of a surety, except perhaps as against her husband's other creditors.

*Qu.* : whether, in this last case, if her estate has paid off the mtge. she had only a right to be repaid out of her husband's assets, after all his other creditors by simple contract.—*HUDSON v. CAR-MICHAEL* (1851), Kay, 613; 2 Eq. Rep. 1077; 23 L. J. Ch. 893; 23 L. T. O. S. 168; 18 Jur. 851; 2 W. R. 503; 69 E. R. 260.

*Annotations* :—*Consd. Paget v. Paget*, [1898] 1 Ch. 470. *Appl. Hall v. Hall*, [1911] 1 Ch. 487. *Reid. Ferguson v. Gibson* (1872), L. R. 14 Eq. 379; *Dixon v. Steel* (1901), 70 L. J. Ch. 794. *Mentd. Barton v. Willis*, [1899] 2 Ch. 578.

**856. — Executor's right of retainer.]**—Testator died leaving a deficient estate, his wife & daughter being extrices. The wife having real estate settled on her for life, with a general power of appointment had appointed it as collateral security for a mtge. debt of testator. This debt had not been paid at the date of the decree :—*Held* : the right of the widow as surety to be indemnified created a simple contract debt only, & did not entitle her to retain as against specialty creditors.

By force of the Mercantile Law Amendment Act, 1856 (c. 97), s. 5, a surety paying off a specialty debt becomes a specialty creditor of the principal debtor. This was not done . . . in the result, therefore, she is a simple contract creditor only. It follows that the widow's debt must be treated, in distributing the assets, as a simple contract debt (*SIR JOHN WICKENS, V.-C.*).—*FERGUSON v. GIBSON* (1872), L. R. 14 Eq. 379; 11 L. J. Ch. 610.

*Annotations* :—*Consd. Illidge, Davidson v. Illidge* (1884), 27 Ch. D. 478; *Re Giles, Jones v. Pennecfather*, [1896] 1 Ch. 956; *Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595. *Reid. v. Mitchell, Fiedlove v. Mitchell*, [1913] 1 Ch. 201.

**857. — Debt satisfied by surety.]**—Where two persons execute a bond, the one as principal the other as surety, & no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal.—*COPIS v. MIDDLETON* (1823), Turn. & R. 224; 2 L. J. O. S. Ch. 82; 37 E. R. 1083, L. O.

*Annotations* :—*Folld. Robinson v. Larkins* (1824), 2 L. J. O. S. Ch. 81; *Simpkins v. Poulett* (1824), 2

*d. General rule.]*—A surety entering into a recognisance is entitled to all the legal remedies against the principal which he parties in the case would have.—*O'CONNOR v. MALONE* (1852), 4 Ir. Jur. 205.—*IR.*

**Sect. 1.—Nature of rights. Sect. 2: Sub-sects. 1 & 2, A.]**

L. J. O. S. Ch. 81. *Consd. Dowbiggin v. Bourne & Cawthorne* (1830), *Yon.* 111. *Folld. Tyler v. Romney* (1833), 3 L. J. Ch. 131. *Consd. Hodgson v. Shaw* (1834), 3 My. & K. 183. *Distd. Hudson v. Carmichael* (1854), Kay, 613. *Consd. Batchellor v. Lawrence* (1861), 9 C. B. N. S. 543; *Re Parker, Morgan v. Hill* (1894), 64 L. J. Ch. 6. *Reid. Jones v. Davids* (1828), 4 Russ. 277; *Dowbiggin v. Bourne* (1837), 2 Y. & C. Ex. 462; *Newton v. Chorlton* (1853), 1 W. R. 266; *Dawson v. Lawes* (1854), Kay, 280; *L. v. Robinson* (1855), 1 H. & N. 275; *Lake v. Brutton* (1856), 2 Jur. N. S. 839; *Lockhart v. Reilly* (1857), 1 De G. & J. 464; *Willes v. Greenhill* (1861), 30 L. J. Ch. 808; *Boyd v. Brooks* (1865), 34 L. J. Ch. 605; *South v. Bloxam* (1865), 2 Hem. & M. 457; *Badeley v. Consolidated Bank* (1886), 34 Ch. D. 536; *Dixon v. Steel*, [1901] 2 Ch. 602.

858. ———.]—If a surety in a bond, without any counter security to himself, pays off the bond for his principal, he is merely a simple contract creditor, & not a specialty creditor, of the principal debtor.—*SIMPKINS v. POULETT* (1824), 2 L. J. O. S. Ch. 81.

*Annotation:—Folld. Robinson v. Larkins* (1824), 2 L. J. O. S. Ch. 81.

859. ———.]—*ROBINSON v. LARKINS* (1824), 2 L. J. O. S. Ch. 81.

860. ———.]—Pltf. joined testator as surety in a bond, which he paid after the death of testator, taking an assignment of the bond: he is only a simple contract creditor of testator.—*JONES v. DAVIDS* (1828), 4 Russ. 277; 38 E. R. 810.

*Annotation:—Consd. Batchellor v. Lawrence* (1861), 9 C. B. N. S. 543.

861. ———.]—A specialty creditor by bond, under a decree for the administration of a testator's assets, established his claim before the master, & afterwards obtained payment of his debt, in equal moieties, from the two sureties in the bond, one of whom was the exor. of the principal debtor.

The exor. only a simple contract creditor of testator, in respect of the moiety which he had paid.—*TYLER v. ROMNEY* (LORD) (1833), 3 L. J. Ch. 131.

862. ———.]—A. & B. executed a joint & several bond, to secure a sum of money with interest to W.; subsequently to the deaths of A. & W., the exors of W. obtained from B., as principal, & from C. as surety, another bond to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond, but after C.'s death the second bond was paid off out of C.'s estate, & his representatives thereupon procured the original bond to be assigned to them:—*Held*: on a suit to administer the estate of A., C.'s representatives were entitled, by virtue of the assignment, to rank as specialty creditors of A.'s estate, in respect of the payments made by C. or his estate on the second bond, to the extent of the penalty in the assigned bond.—*HODGSON v. SHAW* (1834), 3 My. & K. 183; 3 L. J. Ch. 190; 40 E. R. 70, L. C.

863. ———.]—*HUDSON v. CARMICHAEL*, No. 855, *ante*.

864. ———.]—**Executor's right of retainer.**—A surety having paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, & if made exor., to retain it out of the assets of the principal against all other creditors of equal degree.—*Re Brooks, Boyd v. Brooks* (1865), 5 New Rep. 258; 34 L. J. Ch. 605; 12 L. T. 38; 13 W. R. 419, L. C.

*Annotation:—Reid. Re Orme, Evans v. Maxwell* (1883), 50 L. T. 51.

865. ———.]—A., being entitled for life to certain leasehold property with remainder

to B. mortgaged same to secure £800, B. joining in the mtge. so as to bind her estate in remainder; & A. covenanted with B. to pay all moneys secured by the mtge. & to keep indemnified the estate & interest of B. in the premises against all such moneys; & further in case B. should at any time thereafter pay any money for the redemption of the premises, forthwith to repay such money with interest. A. died intestate in 1893 without having paid the mtge. debt & administration was granted to B., who duly paid the interest:—*Held*: in a creditor's action for the administration of A.'s estate, B. was at law a specialty creditor in respect of the whole debt & was entitled to retain the assets of the intestate in her hands to answer the debt.—*Re ALLEN, ADCOCK v. EVANS*, [1896] 2 Ch. 345; 65 L. J. Ch. 760; 75 L. T. 136; 44 W. R. 644; 40 Sol. Jo. 583.

*Annotation:—Consd. Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595.

**Executor's right of retainer.**—*See EXECUTORS*, Vol. XXIII., pp. 371 *et seq.*

866. ———.]—**Mercantile Law Amendment Act, 1856 (c. 97), s. 5.**—Above sect. applies to a contract entered into before the passing of the Act, provided a breach of it has taken place, & payment has been made by the surety after the passing of the Act. In 1854, W., as surety, joined in a bond with C. The Act was passed in July, 1856. In Dec. 1856, the condition of the bond was broken & W. paid the amount due on the bond in Jan. & Apr. 1857:—*Held*: W. was entitled to rank as a specialty creditor of C.—*Re COCHRAN'S ESTATE, DE WOLF v. LINDSELL* (1868), L. R. 5 Eq. 209; 37 L. J. Ch. 293; 17 L. T. 487; 32 J. P. 342; 16 W. R. 324.

— **Priority as between specialty & simple contract creditors in administration of estate.**—*See EXECUTORS*, Vol. XXIII., pp. 354, 355.

— **Effect of limitation of action.**—*See LIMITATION OF ACTIONS.*

## SECT. 2.—RIGHT TO INDEMNITY.

### SUB-SECT. 1.—EXPRESS INDEMNITY.

867. **Grant of lease—Surety purchaser for valuable consideration.**—*SCOT v. BELL* (1672), 2 Lev. 70; 3 Keb. 82; 83 E. R. 454

*Annotations:—Mentd. Blount v. Doughty* (1747), 3 Atk. 481; *Roe v. Hamerton v. Mitton* (1767), 2 Wils. 356; *Butterfield v. Heath* (1852), 15 Beav. 408.

868. **Mortgage—Deposit of title-deeds—Surety no right to formal mortgage—Memorandum of terms.**—Title-deeds were deposited by deft. with pltf. as an indemnity against contingent payments, but there was no agreement to execute a formal mtge. Before pltf. had made any payment he filed a bill to have a formal mtge. executed

*Held*: he was not entitled thereto, but only to a memorandum, signed by deft., specifying the terms of the deposit.—*SPORLE v. WHAYMAN* (1855), 20 Beav. 607; 24 L. J. Ch. 789; 52 E. R. 738.

869. **Secret agreement—Indemnity of surety by bankrupt debtor—No preference to surety.**—*WOOD v. BARKER*, No. 152, *ante*.

870. ———.]—**Goods deposited with surety—Right of creditors to goods.**—The creditors of a debtor resolved to accept a composition payable in three instalments, the third instalment being guaranteed by a surety. Before the resolution was passed, the debtor had agreed with the surety to indemnify him against any liability which he might incur under his guarantee by depositing goods with him. This agreement was not made

known to the creditors. After the resolutions were registered, the surety accepted bills of exchange for the amount of the third instalment of the composition, & certain goods were deposited with him by the debtor. The debtor paid the first instalment, but failed to pay the second, & thereupon he filed a liquidation petition. Afterwards the surety paid the third instalment:—*Held*: the agreement with the surety was valid, & he was entitled to retain the goods as against the trustee under the liquidation.—*Re ROBINSON, Ex p. BURRELL* (1876), 1 Ch. D. 537; 45 L. J. Bcy. 68; 34 L. T. 198; 24 W. R. 353, C. A.

*Annotations*.—*Reid*. *Re Simons, Ex p. Allard* (1881), 18 Ch. D. 505. *Mentd*. *Re Kearley & Clayton's Contract* (1878), 7 Ch. D. 615.

**871. Deed of assignment—Extent of indemnity.**—W. & S. by deed assigned to J. all moneys to which they might become entitled from a certain rly. co., upon trust to secure the due payment of the sum of £5,000 advanced by J. “& also of all other sums which might thereafter become due from W. & S. to J. whether in respect of principal, interest, discount, commissions, or otherwise howsoever.” The £5,000 mentioned in the deed was paid off, but J. was afterwards compelled to pay £5,000 under a guarantee for W. & S. Appls., as execution creditors, afterwards attached a sum of money due from the rly. co. to W. & S. J. had given notice of the assignment to the rly. co.:—*Held*: the deed of assignment included not only advances made by J. to W. & S. but also money paid by him under his guarantee for them, & was not affected by subsequent letters offering additional security for the guarantee.—*DUMBELL v. ISLE OF MAN RY. CO.* (1880), 42 L. T. 745, P. C.

**Bill of sale.**—*See BILLS OF SALE*, Vol. VII., pp. 56–58, Nos. 303, 304, 313, 314, 315.

**Bonds.**—*See BONDS*, Vol. VII., pp. 189, 190, 204, 205, Nos. 293–296, 464–475.

**Principal debtor a bankrupt.**—*See* Sect. 3, sub-sect. 1; Sect. 4, sub-sect. 4; & generally, Part XI., post.

## SUB-SECT. 2.—IMPLIED INDEMNITY.

### A. In General.

**872. Surety entitled to indemnification.**—*TOUSSAINT v. MARTINANT*, No. 948, post.

**873.** —[—Where a person becomes bail above for another, he is entitled to recover all the expenses he has been put to by reason of it, & may therefore recover his expenses in sending after the principal to take him, in order to render him; but not expenses of a suit improperly defended on such account.

The relation of principal & bail is this: the principal engages to indemnify the bail from all expenses fairly arising from his situation as bail (*LORD ELLENBOROUGH, C.J.*).—*FISHER v. FALLOWS* (1804), 5 Esp. 171.

**874.** —[—An heir buying up incumbrances on the descended estates is entitled, as against the creditors of the estate, to no more than he actually paid.

In 1772, a husband & wife mortgaged their respective estates for securing a debt of the husband. The husband died in 1776, & in 1782 the produce of his estate was brought into ct., & accumulated. The wife died in 1805, & in 1832, the husband's mtge. creditor, neglecting to

prosecute his claim against the husband's assets, obtained payment out of the produce of the wife's estate. In 1840, the heir of the husband petitioned for payment out of ct. of the accumulated fund arising from the husband's estate, & a reference was made to ascertain the incumbrances thereon. An unpaid judgment creditor of the wife carried in a claim, which having been disallowed, as founded on a mere equity, he in 1841, filed a bill against the heir of the husband & the representative of the wife, to establish his claim against the fund:—*Held*: (1) the husband's debt having been paid out of the wife's estate, her estate had a right to be recouped out of the estate of the husband; (2) pltf.'s claim was not barred by Stat. Limitations.—*LANCASTER v. EVORS* (1846), 10 Beav. 154; 16 L. J. Ch. 8; 50 E. R. 541.

*Annotation*.—*Reid*. *Drow v. Lockett* (1863), 32 Beav. 499.

**875.** —[—The Scottish real estate of a wife, whose domicile at the date of the marriage was Scottish, while that of her husband was English, is entitled to be exonerated from his debt, which had been charged upon it by way of security, although he has obtained a divorce by reason of her adultery.

Every obligation in the nature of suretyship is an accommodation to the principal debtor, but cannot be considered a donation. It is of the essence of suretyship that the principal debtor is bound to relieve the surety, & although the obligation of the surety may be given in kindness & as an accommodation, it is an abuse of language to call it a donation (*STUART, V.-C.*).—*DRUMMOND v. DRUMMOND* (1808), 37 L. J. Ch. 811; 18 L. T. 896; 17 W. R. 6.

**876.** —[—If one person has requested another to do an act which will cost him money, that is, which will expose him to a legal liability to pay money, the law will imply a promise on the part of the person making the request to indemnify the other for the expenditure to which he has been subjected (*BRETT, M.R.*).—*LEIGH v. DICKESON* (1884), 15 Q. B. D. 60; 54 L. J. Q. B. 18; 52 L. T. 790; 33 W. R. 538, C. A.

*Annotations*.—*Reid*. *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161. *Mentd*. *Re Jones Farrington v. Forrester* [1893] 2 C. 461; *Re Cook's Mortgage*, *Lawledge v. Tyndall* (1896), 65 L. J. Ch. 654; *Hill v. Hickin*, [1897] 2 Ch. 579; *Kenrick v. Mountstevens* (1899), 48 W. R. 141; *Re Coulson's Trusts*, *Prichard v. Coulson* (1907), 97 L. T. 751.

**877.** —[—*BADELEY v. CONSOLIDATED BANK*, No. 854, ante.

**878.** —[—A father deposited with a bank a sum of £2,400, money of his own, as a continuing security for any amount which might from time to time be owing to the bank by a firm in which two of his sons were the only partners. Interest on the deposit was from time to time paid by the bank to the father. By his will the father gave legacies & shares of residue to the two sons. At the date of his death the sons owed £8,858 to the bank, & the sons were afterwards adjudicated bankrupts. The bank proved in the bkpy. for the whole £8,858. No dividend having yet been paid in the bkpy., but it being admitted to be improbable that the estate would realise enough to pay the bank in full, & that the bank would ultimately appropriate the deposit of £2,400 towards the payment of the firm's debt:—*Held*: the trustees of the father's will were not entitled to retain the legacies & shares thereby bequeathed to the sons against the liability of the father's estate as surety to the bank, but that the trustee

## PART VII. SECT. 2, SUB-SECT. 2.—A.

**8721. Surety entitled to indemnification.**—Where a corp'n. raised money

upon an accommodation note of an individual promising to protect the note or to repay, relief was given

against the corp'n. upon a breach of the promise.—*BURNHAM v. PETERBOROUGH* (1860), 8 Gr. 366.—CAN.

**Sect. 2.—Right of indemnity: Sub-sect. 2, A., B. & C.; sub-sects. 3 & 4.**

in the bkpcy. was entitled to receive those legacies & shares.

It seems to me the exors. would have been then in a position to say to the sons that, although they were not indebted in any particular amount to their father in respect of this transaction, they were bound to indemnify his estate against all liability by reason of his having become surety for them at their request (NORTH, J.).—*Re BINNS, LEE v. BINNS*, [1896] 2 Ch. 584; 65 L. J. Ch. 830; 75 L. T. 99; 40 Sol. Jo. 654.

**Annotations:—***Overd. Re Melton, Milk v. Towers*, [1918] 1 Ch. 37. *Reid. Re Mitchell, Freilove v. Mitchell*, [1913] 1 Ch. 201.

**879. —**].—After testator's death, a legatee of a one-fourth reversionary share in a residuary fund, on whose behalf testator had given a continuing guarantee fully securing his banking account, but limiting testator's liability to a specified amount, mortgaged his reversionary share to the bank to secure his account & subsequently became bkpt. The bank as principal creditors valued their security & proved for the whole balance of their overdraft, on which they received under 10s. in the pound, & had no chance of obtaining full payment. The exors. as sureties were then compelled to pay the sum of £313, the full amount for which they were liable under the guarantee. The bank, with the concurrence of the legatee's trustee in bkpcy., subsequently sold the reversionary share to an assignee. On the reversion falling in & the estate becoming divisible:—*Held*: the £313 must be brought into hotchpot by the assignee on the ground that it did not form part of the assignor's estate at the time of his bkpcy.

I think it is quite clear that the trustees had a right to be indemnified against any claim which they might ultimately have to satisfy as a result of the guarantee (WARRINGTON, L.J.).

*Re Binns, Lee v. Binns*, No. 878, *ante*, *overd.*—*Re MELTON, MILK v. TOWERS*, [1918] 1 Ch. 37; 87 L. J. Ch. 18; 117 L. T. 679; 34 T. L. R. 20, C. A.

**880. Principal debtor must know of guarantee.]**—*OGLE v. HAY* (1910), *Times*, Mar. 7.

**Where principal debtor a bankrupt.]—***See Sect. 3, sub-sect. 1; Sect. 4, sub-sect. 4, & generally, Part XI., post.*

**Death of principal debtor—Surety also personal representative.]—***See EXECUTORS*, Vol. XXIII., pp. 377, 378.

**Right of action after satisfaction of debt.]** *See Sect. 4, sub-sect. 3, post.*

### *B. Mortgage by Surety for Debt of Principal Debtor.*

**881. Right to have estate exonerated—By principal debtor—Liability of debtor on mortgage covenant.]—**If one borrow money for another on a mtge. of his estate, he may file a bill against him to pay off the mtge. money, & so may every surety against his principal, & shall not be put to his *indebitatus assumpsit*. The covenant in the mtge.

to pay the money will bind him, for it is properly his debt & his covenant, & the mtgor. is only a nominal person.—*LEE v. ROOK* (1730), Mos. 318; 25 E. R. 415.

**Annotation:—***Reid. Antrobus v. Davidson* (1817), 3 Mer. 569.

**882. ——— Son surety for father.]—**Father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received & applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father.—*PEIRS v. PEIRS* (1750), 1 Ves. Sen. 521; 27 E. R. 1180, L. C.

**883. ——— Wife surety for husband—Although wife divorced.]—***DRUMMOND v. DRUMMOND*, No. 875, *ante*.

### *C. Bills of Exchange.*

*See BILLS OF EXCHANGE*, Vol. VI., pp. 128, 129, 301, 464, Nos. 856–863, 2004–2006, 2961, 2962.

### SUB-SECT. 3.—WHEN NOT ENFORCEABLE.

**884. Subject of guarantee illegal—Fraud on creditors—Composition deed.]—**Pltf. having guaranteed the responsibility of debt. to A., the latter refuses to join in a deed of composition, releasing debt., till pltf. has undertaken to pay him the full amount of his debt, pltf. having paid to A. the difference between the composition & his debt, draws a bill on debt., which the latter accepts, in order to reimburse himself. Pltf. cannot recover on this bill against debt.

This was nothing more than a circuitous mode of securing to A. the full amount of his debt the whole of which eventually was paid out of the funds of debt. (LORD ELLENBOROUGH, C.J.).—*BRYANT v. CHRISTIE* (1816), 1 Stark. 329, N. P.

**885. ——— Company borrowing ultra vires—Bond by company to director.]—**A railway co. were empowered by their special Act to raise a capital of £555,000 & to raise by mtge. any further sum not exceeding £185,000; but no part of such further sum was to be raised until the whole of the capital had been subscribed for & one half paid up. Part only of the capital was subscribed for; but the co., being in want of money, determined to borrow £10,000 to enable them to pay debts due to the contractor, engineer, solrs., & for land, & also to meet a claim made by C. for travelling expenses & loss of time. The directors applied to their bankers, & obtained the sum required on the security of the joint & several promissory note of C. the then chairman of the co., & of B., one of the directors. B. having been compelled to pay the money, brought an action against C. for contribution. The board of directors resolved that, "in order to discharge the liability of the chairman in the action of B. against him, the secretary be authorised to seal Lloyd's bonds to the extent of," etc. Bonds were accordingly sealed with the common seal of the co., by each of which the co. "acknowledge that they stand indebted to C. in the sum of £1,000 for

### PART VII. SECT. 2, SUB-SECT. 2.—B.

**a. Right to have estate exonerated—Mortgage by executor—Debt due by testator.]—**A testator devised his land to his son, whom he appointed an exor. The devisee paid testator's debts exceeding the personal estate, leaving one debt unpaid, & gave a mtge. on the land devised to secure an

amount exceeding the debt:—*Held*: the debt due by testator was to be applied towards the discharge of the sum for which the devisee had become surety.—*GOLDSMITH v. GOLDSMITH* (1870), 17 Gr. 213.—CAN.

**f. Conveyance by surety of property mortgaged—Right of surety to recover from principal debtor.]—**Debt., owing

C., procured K. to give his note to C. for \$400, & got pltf. to give K. a mtge. by way of indemnity. K. having paid the money called upon pltf., who, being unable to pay, gave K. an absolute deed of the land, which K. accepted in satisfaction:—*Held*: the \$400 might be recovered by pltf. from debt.—*LARK v. CHIPMAN* (1866), 26 U. C. R. 170.—CAN.

money due & owing from the co. to C.; & the co., for themselves, their successors & assigns, hereby covenant with C., his exors. & administrators, to pay to him, his exors., administrators or assigns, the sum of £1,000, etc." These bonds were delivered to C. & he assigned them to one D. to secure money advanced by him, & with which money the action brought by B. against C. was settled. Subsequently, the directors resolved that the bonds should be redeemed, & that the expenses incurred by the chairman should be paid by the co. out of the first moneys in their hands. In an action brought by C. upon one of these bonds:—*Held*: taking into consideration Railway Regulation Act, 1844 (c. 85), Cos. Act, 1845 (c. 16), & the special Act, the bond was illegal, & he could not recover.—*CHAMBERS v. MANCHESTER & MILFORD RY. CO.* (1864), 5 B. & S. 588; 4 New Rep. 425; 33 L. J. Q. B. 268; 10 L. T. 715; 10 Jur. N. S. 700; 12 W. R. 980; 122 E. R. 951.

*Annotations*:—*Consd.* *Re Cork & Youghal Ry.* (1869), 4 Ch. App. 748; *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478; *Garrard v. James*, [1925] Ch. 616. *Reid*. Landowners West of England & South Wales Land Drainage & Inclosure Co. v. Ashford (1880), 16 Ch. D. 411; *Re Wrexham Mold & Connah's Quay Ry.*, [1899] 1 Ch. 410; *Wauthier v. Wilson* (1911), 27 T. L. R. 582. *Mentd.* *Rashdall v. Ford* (1866), L. R. 2 Eq. 750; *Taylor v. Chichester & Midhurst Ry.* (1867), L. R. 2 Exch. 356; *Fountain v. Carmarthen Ry.* (1868), L. R. 5 Eq. 316; *Webb v. Herno Bay Comrs.* (1870), L. R. 5 Q. B. 612; *R. v. Reed* (1880), 5 Q. B. D. 483; *Wenlock v. River Doe Co.* (1885), 10 App. Cas. 354; *Wenlock v. River Doe Co.* (1887), 36 Ch. D. 674; *Re Manchester, Middleton & District Tram. Co.*, [1893] 2 Ch. 638; *Payne v. Cork Co.*, [1900] 1 Ch. 308.

**886. Against person agreeing to indemnify principal.**—A. mortgaged an estate, his sole property to C., by an indenture in which B. joined A. in charging an estate, their joint property, as a further security; & A. & B. gave their joint bond for payment of the sum advanced. A. afterwards, by deed, to which B. was no party, sold the estate, his sole property, to D., who covenanted with A. to pay C. the sum advanced on mtge. to A., & to indemnify A. & B. from the payment of it. B. was called on by C. for payment of the principal & interest of the money lent on mtge., which B. accordingly paid:—*Held*: B. was not entitled to recover this sum from D. in an action against him for money paid to his use.—(*CRAIG v. TRITTON* (1818), 8 Taunt. 365; 2 Moore, C. P. 411; 129 E. R. 423.

**Indemnity given to bail.**—See Part XII., Sect. 3,

#### SUB-SECT. 4.—ABANDONMENT OF RIGHT.

**887. Contract to abandon must be proved.**—A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, & this right will not be held to be abandoned unless a contract to abandon it is proved. Therefore, where one of the creditors who acceded to a composition deed was also a residuary legatee of a surety for the compounding debtors to another creditor, & one of the compounding debtors happened to be the surety's exor.:—*Held*: the residuary legatee's accession must be taken to have been in respect of his direct debt only, & did not preclude him from insisting on the surety's estate being indemnified by the debtors.—(*CLOSE v. CLOSE* (1853), 4 De G. M. & G. 176; 43 E. R. 474, L. J.).

**888. — Intention not sufficient.**—Appl. became surety on behalf of resp. who died during

the pendency of the action, for an advance made by a bank, resp. undertaking by letter to hold applt. harmless. Both parties forgot the existence of this indemnity, & by an agreement made between them & the bank the debt was discharged by equal payments by each of them. Applt., subsequently discovering the letter of indemnity, brought an action at law against resp. to enforce it. Resp. then, by a suit in equity, prayed for a declaration that the indemnity had been discharged, & for an injunction against the continuance of the action:—*Held*: applt. was entitled to enforce the indemnity under the doctrine laid down in *Jorden v. Money* (1854), 5 H. L. Cas. 185.—(*CHADWICK v. MANNING*, [1896] A. C. 231; 65 L. J. P. C. 42.

*Annotation*:—*Mentd.* *Cresswell v. Jeffreys, Same v. Same* (1912), 28 T. L. R. 413.

### SECT. 3.—RIGHTS BEFORE SATISFACTION OF DEBT OF SURETY.

#### SUB-SECT. 1.—IN GENERAL.

**889. Surety not devoid of rights.**—*DIXON v. STEEL*, No. 754, *ante*.

**890. Stoppage of goods in transitu—Insolvency of principal debtor.**—B. a trader in London ordered goods to be shipped to him by D. & co., his correspondents at Dantzic, who were to draw for the amount on F. at Hamburg, who had agreed to accept the bills upon receiving commission on the amount, & the bills of lading & invoices were to be transmitted by D. & co. from Dantzic to F. at Hamburg, who was to forward them to B. in London; & F. accordingly accepted the bills of exchange drawn upon him, & on the receipt of the bills of lading transmitted same, which were made out to the order of the shippers & not indorsed, to B. in London, who received them, together with the invoices & letter of advice, five days after an act of bkcy. committed by him. F. also became bkpt. & the bills of exchange drawn on him by D. & co. were obliged to be taken up & paid by themselves:—*Held*: F. had no right to stop the goods *in transitu*, being no more than a surety for the price, & not vendor or consignee.—(*STEFFKEN v. WRAY* (1805), 6 East, 371; 2 Smith, K. B. 480; 102 E. R. 1328.

**891. — Effect of attempted stoppage.**—W. shipped at Leghorn twenty-three casks of oil, on account & by the order of L. at Liverpool, & transmitted to him a bill of lading. Before the arrival of the oil, L. indorsed the bill of lading, & deposited it with H., who advanced money on it, having previously advanced money on other goods, the property of L. deposited with him. On the arrival of the oil, L. having previously become bkpt., & W. not having been paid for it, W.'s agents claimed it of the master of the ship; but the latter delivered it to H., who afterwards sold the goods of L. as well as the oil of W. The net proceeds of the goods belonging to L. were sufficient to satisfy the debt due from L. to H. H. paid himself his debt, & deposited the net proceeds of W.'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between W. & the assignees of L. were referred. The arbitrator having stated the above facts on his award for the opinion of this ct.:—*Held*: (1) W. the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of L., because the property in & the right to the possession was then vested in H., the indorsee of the

& creditor did not exist between L. co. & petitioners, & petitioners could not get an order for the winding-up of the co. as creditors under Cos. Act, 1862 (c. 89), s. 82.—*Re LAW COURTS CHAMBERS CO., LTD.* (1889), 61 L. T. 669.

bill of lading for value ; & further W. had not, by reason of such claim, any legal right to the possession of the goods after H.'s lien was satisfied ; but in a ct. of equity, such transfer to H. would be treated as a pledge or mtge. only, & therefore W., by his attempted stoppage *in transitu*, acquired a right to the goods in equity, subject to H.'s lien against the assignees of L. ; (2) W., by means of his goods, had become surety to H. for L.'s debt, & had a clear equity to oblige H. to pay his debt out of L.'s own goods deposited with him in case of such surety ; & all the goods both of W. & L. having been sold, W. might insist on the proceeds of L.'s goods being appropriated to the payment of the debt ; & therefore, W. was entitled to have all the proceeds of the oil paid over to him.—*Re WESTZINTHIUS* (1833), 5 B. & Ad. 817 ; 2 Nev. & M. K. B. 644 ; 3 L. J. K. B. 56 ; 110 E. R. 992.

**Annotations.** As to 1) **Consed.** Spalding v. Ruding (1843), 6 Beas. 370. **Appld.** Komp v. Falk (1882), 7 App. Cas. 673. **Reid.** Phillips v. Huth (1840), 6 M. & W. 572; **Ther.** Marie Joseph (1866), Brown, & Lush. 441; **Meyer-**stein v. Barber (1866), L. R. 2 C P. 38; **Rodger** v. Comp-  
toir d'Escompte de Paris (1860), 21 L. T. 33; **Sewell** v.  
**Purdick** (1884), 10 App. Cas. 74. **Generally.** **Mentd.**  
**Broadbent** v. Barlow (1861), 3 De G. F. & J. 570.

*See, generally,* SALE OF GOODS.

892. Action for account—Against agent of debtor—Debtor abroad.]—If A., a merchant in England, guarantee the payment of all purchases made by B., a factor in England, for C., a merchant abroad, subject to the approval of X., an agent of C., A., being simply the paymaster or guarantor for C., can maintain no bill for an account against B. unless he state a case  
B. & X.—DARTHEZ v. LEE  
5: 5 L. J. Ex. Eq. 73; 160 E. R. 289.

893. Debtor becoming surety—Assignment of debtor's mortgage to creditor—Right as surety to enforce payment—When creditor may interfere.]—One assigning a mtge. in order to secure his own debt is in the situation of a surety; & may insist upon proceedings for the recovery of the money due, unless his creditor, the assignee, will relieve him from all claim beyond what the mtge. may produce.—*GURNEY v. SEPPINGS* (1846), 2 Ph. 40; 1 Coop. temp. Cott. 12; 15 L. J. Ch. 385; 7 L. T. O. S. 817; 47 E. R. 719, L. C.

**Right to prove for debt—Bankruptcy of principal debtor.**—*See Sect. 4, sub-sect. 4, Part XI., post.*

**894. Petition to wind up company—Surety for company's mortgage debt.]**—P. co. mortgaged property belonging to them, certain of the directors, of whom C. was one, being parties to the mtgdeed, & covenanting with the mtgdees. that P. co. would pay the debt & interest. P. co. afterwards conveyed the equity of redemption in the mortgaged property to L. co., who covenanted with P. co. that they would pay the mtgde. debt & indemnify P. co. in respect thereof. Neither C. nor any of the sureties were parties to the conveyance. P. co. had been dissolved. C. was dead, & his exors. had been called on to pay, & had paid, considerable sums under C.'s covenant in the mtgde. They contended that they were creditors of L. co. in respect of the moneys they had paid, & on that co. not complying with their demand for payment, presented a petition to wind-up that co. :—*Held*: the relation of debtor

895. — [Surety a paid up shareholder.] — A creditor of a mining co. made repeated applications for payment through the year 1881, & on Dec. 21 obtained a payment on account, & being unable to obtain more, he, on Dec. 28 issued a writ. On Jan. 4, 1882, a paid-up shareholder in the co., who was under considerable liability as a surety for the co., presented a petition to wind it up, setting out a balance sheet which showed that the assets greatly exceeded the liabilities, but not alleging as a fact that they did so, stating that the co. was unable to pay its debts, & that it was just & equitable that it should be wound up. On Jan. 6 the creditor recovered final judgment without notice of the winding-up petition, & on the following day issued execution. On Jan. 14 the petition came on to be heard & was supported by creditors, & a winding-up order was made. The creditor then applied for leave to go on with the execution:—*Held*: the petition could not be treated as a petition collusively presented on behalf of a solvent co. for the purpose of defeating the execution, for that the balance sheet could not be treated as proving the co. to be solvent, & the petitioner, though not legally a creditor, was virtually such, & by amending the petition by joining one of the supporting creditors it might have been made a creditor's petition; & consequently leave to proceed with the execution ought not to be given.—*Re VRON COLLETRY CO.* (1882), 20 Ch. D. 442; 51 L. J. Ch. 389; 30 W. R. 388, C. A.

**Annotations:**—**Mentd.** *Re North Carolina Estate Co.* (1889), 5 T. L. R. 328; *Armorduct Manufacturing Co. v. General Incandescent Co.*, [1911] 2 K. B. 143.

—.]—See, *generally*, COMPANIES, Vol. X.  
pp. 829 *et seq.*

**Set-off.]—***See* Sect. 5, sub-sect. 3, *post.*

Writ ne exeat regno.]—See EQUITY, Vol. XX., pp. 541 *et seq.*

**Right to sign judgment against debtor—On third party notice.]—See No. 1013, *post*.**

**SUB-SECT. 2.—RIGHT TO EXONERATION FROM LIABILITY.**

### A. In General.

896. No right at common law—Until payment of surety.]—*Re MITCHELL, FREELove v. MITCHELL*, No. 915, *post*.

897. —————.]—An exor., how is surety for an unpaid debt of his testator, cannot exercise his right of retainer in respect of his liability as surety unless he pays the debt, & then only to the extent of the assets actually in his hands at the time he pays it. But an opportunity may be given him to pay the debt, if he has assets in his hands, in order that he may set up his right of retainer. After the usual judgment in a creditors' action to administer the estate of a testator a receiver was appointed. The estate proved to be insolvent. One of the exors., who was surety for an unpaid debt of £3,000 of testator's, claimed that his right to indemnity out of the estate created an equitable debt which entitled him to

**PART VII. SECT. 8, SUB-SECT. 2.--A.**

**g. General rule.]—LEE v. ELLIS**  
(1896), 27 O. R. 608.—**CAN.**

#### b. ———.) — When there is an

actual accrued debt, & the surety is liable & admits liability for the amount guaranteed, he has a right to compel the principal debtor to relieve him from his liability, by paying off the

debt.—MATHEWS v. SAURIN (1893),  
31 L. R. Ir. 181.—IR.

k. —.—.—DOIG v. LAWRIE (1903),  
5 F. (Ct. of Sess.) 295.—SCOT.



retain in respect of it certain legal assets which constituted the greater part of the outstanding personal estate of the testator:—*Held*: as the exor. had not paid the debt for which he was surety, there was no debt in respect of which he could exercise his right of retainer. The claim was therefore disallowed.

The right to indemnity which the surety has against the principal debtor does not arise at law until the surety has discharged his debt (*NEVILLE, J.*).—*Re BEAVAN, DAVIES, BANKS & Co. v. BEAVAN*, [1913] 2 Ch. 595; 83 L. J. (Ch. 109; 109 L. T. 538; 58 Sol. Jo. 31.

*Annotation*:—*Mentd. Re Harris, Davis v. Harris*, [1914] 2 Ch. 395.

**898. Right in equity—No proceedings taken against surety.**—A. is bound for B. & has a counter-bond. Equity will compel B. to pay the debt, though A. is not sued.—*RANELAUGH (EARL) v. HAYES* (1883), 1 Vern. 189; 2 Cas. in Ch. 146; 23 E. R. 405.

*Annotations*:—*Consd. Lloyd v. Dimmack* (1877), 7 Ch. D. 398; *Hughes-Hallatt v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561. *Fold. Ascherson v. Tredgegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401. *Distd. Morrison v. Barking Chemicals Co.*, [1919] 2 Ch. 325. *Refd. Antrobus v. Davidson* (1817), 3 Mor. 569. *Mentd. Brough v. Oddy* (1820), 8 L. J. O. S. Ch. 23.

**899.** —.]—*NISBET v. SMITH*, No. 1305, *post*.

**900.** —.]—*ANTROBUS v. DAVIDSON*, No. 444, *ante*.

**901.** — — On obligation becoming absolute.]—In an action by the payee of a joint & several promissory note against one who, to the knowledge of the payee, joined in it as a surety only, it is competent to the surety, by way of equitable defence, to plead a special plea, of a set-off due from the payee to the principal, arising out of same transaction out of which the liability of the surety arose.

A surety has a right as against the creditor when he has paid the debt to have for reimbursement the benefit of all securities which the creditor holds against the principal (*per CUR.*).

The surety has another right, viz. that as soon as his obligation to pay is become absolute he has a right in equity to be exonerated by his principal (*per CUR.*).—*BECHERVAISE v. LEWIS* (1872), L. R. 7 C. P. 372; 41 L. J. C. P. 161; 26 L. T. 848; 20 W. R. 726.

*Annotations*:—*Apld. Alcoy & Gandia Ry. & Harbour Co. v. Greenhill* (1897), 76 L. T. 542. *Refd. Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

**902.** —.]—(1) Where there is an actual accrued debt secured by a guarantee & one of several co-sureties is liable, & admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him from his liability by paying off the debt. This equitable relief is not limited to cases where the creditor has refused to sue the principal debtor.

(2) *Scmble*: neither the creditor nor the co-sureties need be parties.—*ASCHERSON v. TREDEGAR DRY DOCK & WHARF CO., LTD.*, [1909] 2 Ch. 401; 78 L. J. Ch. 697; 101 L. T. 519; 16 Mans. 318.

*Annotations*:—*As to* (1) *Consd. Mitchell, Freelove v. Mitchell*, [1913] 1 Ch. 201. *Distd. Morrison v. Barking Chemicals Co.*, [1919] 2 Ch. 325; *Bradford v. Gammon*, [1925] 1 Ch. 132. *Refd. Mills v. United Counties Bank*, [1911] 1 Ch. 669.

**903.** —.]—*Re MITCHELL, FREELOVE v. MITCHELL*, No. 915, *post*.

**904. Under contract for payment—Between surety & debtor—Bankruptcy of debtor—Before day for payment.**—If A. be bound with B. as a surety for the payment of a sum certain, & take an absolute bond from B. payable the day before the original bond will become due, & B. become a bkpt. before the day of payment, A. may prove

this debt under the commission, & B.'s certificate will be a bar to an action by A. on the counter-bond, though A. do not pay the original bond till after B. has committed an act of bkpcy.—*MARTIN v. COURT* (1788), 2 Term Rep. 640; 100 E. R. 344. *Annotations*:—*Consd. Young v. Taylor* (1818), 8 Taunt. 315. *Mentd. Buckler v. Buttivant* (1802), 3 East, 72.

**905.** — — Contract not merely one of indemnity—Covenant to pay annuity.]—A. being principal & B. surety in an annuity bond to C., A. gave B. a bond conditioned to pay the annuity to C., & to indemnify B. from any claims of C.:—*Held*: this was not a mere indemnity bond, & B. therefore might put it in suit as soon as A. made default in payment of the annuity, without proving that he had been actually damaged.—*PENNY v. FOY* (1828), 8 B. & C. 11; 2 Man. & Ry. K. B. 181; 6 L. J. O. S. K. B. 230; 108 E. R. 947.

**906.** — — Contract one of indemnity only —Whether surety must first be damaged.]—*PENNY v. FOY*, No. 905, *ante*.

**907.** — — — — —.]—A surety on a bond to secure a money debt, was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the exors., who said they had no funds in hand, & that they were unable under the will to raise the money by sale of any portion of testator's estate, except under a decree of the ct.:—*Held*: (1) the surety, though he had not actually paid anything, was entitled to maintain a bill against the exors. for administration, payment of the debt, & indemnity; (2) it was not necessary that the bill should be filed on behalf of all the creditors.—*WOOLDRIDGE v. NORRIS* (1868), L. R. 6 Eq. 410; 37 L. J. Ch. 640; 19 L. T. 144; 16 W. R. 965.

*Annotations*:—*As to* (1) *Distd. Hughes-Hallatt v. Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561. *Consd. Hobbs v. Wayet* (1857), 36 Ch. D. 255. *Apld. Ascherson v. Tredgegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401. *Refd. Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Mills v. United Counties Bank*, [1911] 1 Ch. 669. *As to* (2) *Consd. Worraker v. Pryor* (1876), 2 Ch. D. 109. *Refd. Cooper v. Blissett* (1876), 1 Ch. D. 691.

**908.** — — Recovery of damages — In breach of contract.]—Pltf. & deft. being joint makers of a promissory note, deft. as principal & pltf. as his surety, deft. covenanted with pltf. to pay the amount to the payee of the note on a given day, but made default. In an action on this covenant:—*Held*: pltf. was entitled, though he had not paid the note, to recover the full amount of it by way of damages.—*LOOSEMORE v. RADFORD* (1842), 9 M. & W. 657; 1 Dowl. N. S. 881; 11 L. J. Ex. 284; 152 E. R. 277. *Annotations*:—*Fold. Robinson v. Robinson* (1854), 24 L. T. O. S. 112. *Refd. Mears v. Green* (1846), 6 L. T. O. S. 413. *Mentd. Crook v. Latley* (1847), 9 L. T. O. S. 102; *Worsell v. School for Indigent Blind* (1882), 8 Q. B. D. 357.

**909.** — — — — —.]—Pltf. & deft., being partners, executed a deed of dissolution of partnership, whereby deft. covenanted to pay & satisfy the debts of the firm within eighteen months, & to indemnify pltf. against all costs, losses, damages, claims, or demands, which he might incur or be liable to in respect of those debts. Dft. not having paid a creditor of the firm within eighteen months, pltf. was called upon to pay, & did pay part in cash, & gave promissory notes for the residue. In an action by him upon the deft.'s covenant, commenced during the currency of the notes:—*Held*: the measure of damages was the whole amount of the



**Sect. 3.—Rights before satisfaction of debt by surety :**  
*Sub-sect. 2, A., B., C. & D. Sect. 4: Sub-*  
*sects. 1 & 2, A.]*

creditor's demand, including that for which the promissory notes were given.—*ROBINSON v. ROBINSON* (1854), 24 L. T. O. S. 112.

**Rights on contracts of indemnity.]—See Part XII., Sect. 6, *post*.**

### *B. When Right Arises.*

**910. Principal debtor entitled to enforce rights —In respect of joint liability.]—**The right of a surety to sue for his discharge does not arise until the principal is in a condition to enforce his rights in respect of their joint liability, & then only in cases where the principal or creditor refuses to sue the debtor.—*PADWICK v. STANLEY* (1852), 9 Hare, 627; 22 L. J. Ch. 184; 19 L. T. O. S. 293; 16 Jur. 586; 68 E. R. 661.

*Annotations:—*Consd. *Ascherson v. Tredegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401. *Mentd.* *Makepeace v. Rogers* (1865), 4 De G. J. & Sm. 649.

**911. Refusal by creditor to sue debtor.]—***PADWICK v. STANLEY*, No. 910, *ante*.

**912. —.]—***ASCHERSON v. TREDEGAR DRY DOCK & WHARF CO., LTD.*, No. 902, *ante*.

**913. Actual accrual of liability—Not merely apprehended.]—**A trustee held shares in a co. on trust for an adult *cestui que trust*. He had applied for them at the request of the *cestui que trust*, who paid the money due to the co. on the application & allotment. The trustee executed a transfer of the shares to the *cestui que trust*, & the latter sent it to the co. for registration, but the directors refused to register it, & when an order was made to wind up the co. the name of the trustee remained on the co.'s register as the holder of the shares. No further call had been made on them. The trustee brought an action against the *cestui que trust*, claiming an indemnity against liability on the shares. There was no evidence to show whether calls were likely to be made in the winding up:—*Held*: the action was a mere *quia timet* one & it was premature & could not be maintained.—*HUGHES-HALLETT v. INDIAN MAMMOTH GOLD MINES CO.* (1882), 22 Ch. D. 561; 52 L. J. Ch. 418; 48 L. T. 107; 31 W. R. 285.

*Annotations:—*Distd. *Hobbs v. Wayer* (1887), 36 Ch. D. 256; *Ascherson v. Tredegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401. *Refd.* *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514; *Hardoon v. Bellios*, [1901] A. C. 118. *Mentd.* *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337.

**914. — Admission of liability by co-surety.]—***ASCHERSON v. TREDEGAR DRY DOCK & WHARF CO., LTD.*, No. 902, *ante*.

**915. —.]—**A surety's equitable right to be indemnified by the principal debtor does not create any debt before the surety has been called on to pay anything under his guarantee:—*Held*: a release of "all debts" to a principal debtor by the surety's will did not affect the right of the exors. to come on the principal debtor's beneficial interest under the will for indemnity against claims made under the guarantee by the creditor after testator's death.

Until the surety is called upon to pay & does pay something under his guarantee there is no debt or right in law at all; until then a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the creditor (*PARKER, J.*).—*Re MITCHELL, FREELOVE v. MITCHELL*, [1913] 1 Ch. 201; 82 L. J. Ch. 121; 108 L. T. 34; *sub nom.* *Re MITCHELL, TRUELOVE v. MITCHELL*, 57 Sol. Jo. 213.

*Annotation:—*Re *Beavan, Davies, Banks v. Beavan* (1913), 83 L. J. Ch. 109.

**916. —.]—**Pltf. gave to a bank a guarantee to secure, to the extent of £5,000, the ultimate balance that might be found to be due from deft. co. to the bank on the result of the current transactions between them. The guarantee was contemplated as continuing until terminated either by the bank's closing the account & demanding from the surety the amount due from him or by the surety's giving the bank three months' notice to determine it & by the ascertainment of the amount due at the end of the three months. Becoming apprehensive about his liability, pltf., without having given the bank notice to determine the guarantee, asked deft. co. to relieve him from his liability, but as nothing satisfactory was done to relieve him he brought an action against deft. co. to compel them to give him immediate relief or indemnity against any existing or apprehended liability to the bank under the guarantee. At the time of the action deft. co. was indebted to the bank in a sum not exceeding £5,000:—*Held*: as there was no accrued or definite liability on the part of the surety until the contemplated termination of the guarantee & ascertainment of liability, the action failed.—*MORRISON v. BARKING CHEMICALS CO., LTD.*, [1919] 2 Ch. 325; 88 L. J. Ch. 314; 122 L. T. 423; 35 T. L. R. 196; 63 Sol. Jo. 302.

*Annotation:—*Consd. *Bradford v. Gammon*, [1925] 1 Ch. 132.

**917. — Not merely contingent liability.]—**A surety is not entitled to come to the ct. to obtain relief against his principal debtor by way of indemnity unless there is an accrued liability on the surety which can be enforced by the ct. A mere contingent liability is not enough to justify an action.—*Re LEDGARD, ATTENBOROUGH v. LEDGARD* (1922), 66 Sol. Jo. 405.

**918. —.]—**Under a written instrument of partnership entered into in Feb., 1920, between five co-partners for the development & ultimate resale of a freehold estate which they had purchased it was provided that, upon the death of any of the partners before the estate had been completely sold the share or interest of the one so dying should be purchased by the others in equal shares at a price to be fixed by arb'n. in case of difference, & the legal personal representatives of deceased partner were to be "indemnified" by the surviving partners from all future claims, liabilities, & demands, in respect of the estate. One of the partners died on Oct. 4, 1921, & the greater part of the freehold estate was still unsold. At the date of the partner's death the partnership account at a bank was largely overdrawn. The overdraft was secured by the guarantee of each partner. The exact amount of the overdraft was subsequently ascertained by the bank to be £17,126 16s. 2d., & the manager informed the exor. of deceased partner of this, & of the liability of the partnership syndicate & testator's estate, but no demand for payment was ever made.

In an action by pltf. as legal personal representative of deceased partner against his four co-partners as defts. claiming specific performance of the partnership agreement & requiring a proper discharge & release from all the liabilities of the partnership, particularly in respect of the overdraft at the bank:—*Held*: the ordinary covenant contained in the agreement to indemnify the estate of a deceased partner did not entitle pltf. to insist upon the immediate payment of debts for which no demand had been made. The obligation to make good the indemnity by payment & the right to enforce the covenant arose when the demand for payment was made & not

before. Therefore, *pltf.* was not entitled to what would be in substance an order on *defts.* to repay all that was owing to the bank, & the action failed.—*BRADFORD v. GAMMON*, [1925] 1 Ch. 132; 94 L. J. Ch. 193; 132 L. T. 342; 69 Sol. Jo. 100.

#### C. Parties to Action.

919. Joinder of creditors & co-sureties.]—*WOOLDRIDGE v. NORRIS*, No. 907, *ante*.

920. —.]—*ASCHERSON v. TREDEGAR DRY DOCK & WHARF CO., LTD.*, No. 902, *ante*.

#### D. How Enforced.

921. Setting aside sum of money.]—*NISBET v. SMITH*, No. 1365, *post*.

922. —.]—It is quite plain that in this *ct.* any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity (*JESSEL, M.R.*).—*LACEY v. HILL, CROWLEY'S CLAIM* (1874), 1 L. R. 18 Eq. 182; 43 L. J. Ch. 551; 22 W. R. 586; *sub nom.* *LACY v. HILL, CROWLEY'S CLAIM*, 30 L. T. 484.

*Annotations*:—*Refd.* *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705; *British Union & National Insur. v. Rawson*, [1916] 2 Ch. 476. *Mentd.* *Thackor v. Hardy* (1878), 39 L. T. 595; *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370; *Williams Torrey v. Knight, The Lord of the Isles*, [1894] P. 342; *Re Paine, Ex p. Read* (1896), 66 L. J. Q. B. 71; *Ellis v. P'ond*, [1898] 1 Q. B. 426; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insec., Co.'s Case*, [1914] 2 Ch. 617.

923. Declaration by court—Indemnity refused by debtor.]—Certain moneys belonging to A. were invested in shares in a banking co. in the joint names of A. & B. the ultimate trust being for the estate of A. who predeceased B. The co. went into liquidation & calls would be made upon the shareholders, on the list of whom the *exor.* of B. would be put:—*Held*: the *exor.* of B. was entitled to be indemnified by the estate of A. & might bring an action for & obtain a declaration of indemnity before he was on the list & before any call was made on him.

A man who accepts a liability . . . is entitled to go to the man who made the request & say, "I am entitled to be indemnified" & if the right to indemnity is denied he has a right to come to this *ct.* & obtain a declaration that he or his testator's estate is entitled to be released from that liability (*KEKEWICH, J.*).—*HOBBS v. WAYET* (1887), 36 Ch. D. 256; 56 L. J. Ch. 819; 57 L. T. 225; 36 W. R. 73.

*Annotations*:—*Refd.* *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *St. Thomas's Hospital v. Richardson*, [1910] 1 K. B. 271.

### SECT. 4.—RIGHTS AFTER SATISFACTION OF DEBT BY SURETY.

#### SUB-SECT. 1.—WHAT AMOUNTS TO SATISFACTION.

924. Promissory note—Accepted by creditor in payment.]—If a party gives a promissory note for the debt of another, which the creditor accepts in payment, it is as a payment of money to the party's use, & may be recovered as such.—*BARCLAY v. GOOCH* (1797), 2 Esp. 571.

*Annotations*:—*Refd.* *Maxwell v. Jameson* (1818), 2 B. & Ald. 51; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Re Wyld* (1860), 2 L. T. 810; *Mayer & Fulda v. Mindlevich* (1888), 59 L. T. 400.

#### PART VII. SECT. 4, SUB-SECT. 1.

1. No monetary payment—Transfer of mortgage to creditor—By surety alone.]—*Pltf.* was surety, & *deft.* one

of the principals, on a promissory note. *Pltf.* had transferred a mortgage security to the holder of the note, who thereupon released him from liability; but it did not appear that any cash was

925. —.]—In 1855 R., & H. as his surety, gave to G. a bond for £2,000. R. gave to H. by way of indemnity a warrant of attorney. In 1858, G., without the knowledge of R., gave up the bond to H., & received in satisfaction for it the promissory note of H. for the sum remaining due. R. at same time assigned all his property to H. in satisfaction of the liabilities under which H. had come for him. In the following month R. became *bkpt.*, & the warrant of attorney & the assignment became void as against the assignees:—*Held*: the dealings between H. & G. had not taken away the rights of H. against R., & H. having paid the debt was entitled to prove against R.'s estate.—*Re ROBERTS, Ex p. ALLEN & CAZNOVE* (1858), 3 De G. & J. 447; 44 E. R. 1341, L. JJ.

926. No monetary payment—Bond to creditor—By surety alone.]—One of the makers of a joint & several promissory note, after same had become due, gave his bond to the holder for the amount; but before the commencement of the action no money was actually paid on the bond:—*Held*: until he had paid money upon the bond, he could not maintain an action for money paid, in order to recover contribution against any of the other makers of the original note.—*MAXWELL v. JAMESON* (1818), 2 B. & Ald. 51; 100 E. R. 286.

*Annotations*:—*Refd.* *Dally v. Wolferstan* (1823), 1 L. J. O. S. K. B. 246; *Power v. Butcher* (1829), 10 B. & C. 329; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Jones v. Orchard* (1855), 3 C. L. R. 1275.

927. —.]—By surety jointly with principal.]—Where a surety in a bond for the *bkpts.*, after the *bkpts.* had obtained their certificate, joined with them in a new bond to the representatives of the creditor, & the old bond was delivered up to the surety:—*Held*: this was not equivalent to payment by the surety so as to enable him to prove under the commission.

Security has never been considered as equivalent to payment. This is clearly a release of the old debt. The surety has altered his character, & is no longer surety for the estate, but for a new obligation created subsequent to the certificate (*LEACH, V.-C.*).—*Re PARKINSON, Ex p. SERGEANT* (1822), 1 Gl. & J. 183; *affd.* (1825), 2 Gl. & J. 23, L. C.

*See, also*, Part IX., Sect. 1, sub-sect. 2, *post*.

928. Execution against surety—Proceeds paid to creditor.]—Where an execution has been levied against a surety in an action upon the security which he had given for another, & the money paid over to *pltf.* by the sheriff, the surety may maintain an action for money paid against his defaulting principal, & therefore, he may also prove same facts under a plea of set-off for money paid in an action brought against him by his principal.—*RODGERS v. MAW* (1846), 15 M. & W. 444; 4 Dow. & L. 66; 16 L. J. Ex. 137; 7 L. T. O. S. 260; 153 E. R. 921.

*Annotation*:—*Refd.* *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

#### SUB-SECT. 2.—RIGHT TO STAND IN PLACE OF CREDITOR.

##### A. In General.

*See* Mercantile Law Amendment Act, 1856 (*c.* 97), s. 5.

paid by or on behalf of *pltf.*:—*Held*: *pltf.* was entitled to a verdict for the value of the mortgage.—*FAHEY v. FRAWLEY* (1890), 26 L. R. Ir. 78.—*IR.*

**Sect. 4.—Rights after satisfaction of debt by surety:**  
**Sub-sect. 2, A. & B.; sub-sect. 3.]**

**929. General rule.]**—Sureties who have paid the money are creditors of the principal.—**OSBORN & BRADSHAW v. CHURCHMAN** (1606), Cro. Jac. 127; 79 E. R. 111.

**Annotations:—Mentd.** Crossing v. Scudamore (1671), 1 Vent. 137; Samon v. Jones (1690), 2 Vent. 318; Taylor v. Jones (1743), 2 Atk. 600.

**930. —.]**—**NEWTON v. CHORLTON**, No. 809, ante.

**931. On death of debtor intestate—Payment after death—Administration of estate as creditors.]**—A surety who after the death of the principal pays off the debt is, in case of intestacy, entitled to administration as a creditor.—**WILLIAMS v. JUKES** (1864), 34 L. J. P. M. & A. 60.

**Right to creditor's securities.]**—See Part VI., sect. 4, sub-sect. 2, B., ante.

**B. Surety for Crown Debt.**

**932. General rule.]**—A surety paying the Crown's debt was ordered to stand in the place of the Crown & to have the aid of the ct. to recover the whole against the principal in the bond or a moiety against the other surety.—**R. v. DOUGHTY** (1702), Wight. 2, n.; 145 E. R. 1152.

**Annotations:—Reid.** R. v. Bennett (1810), Wight. 1; R. v. Robinson (1855), 1 H. & N. 275, n.

**933. Aid of Crown process.]**—**R. v. DOUGHTY**, No. 932, ante.

**934. —.]**—**Surety to customs collector.]**—**R. v. WEBBER** (1718), Wight. 3, n.; 145 E. R. 1152.

**Annotations:—Reid.** R. v. Bennett (1810), Wight. 1; R. v. Robinson (1855), 1 H. & N. 275, n.

**935. Assignees of sureties—In trust for all creditors.]**—**R. v. WALTON** (1735), Wight. 3, n.; 145 E. R. 1152.

**Annotation:—Reid.** R. v. Bennett (1810), Wight. 1.

**936. Priority of Crown—Administration of debtor's estate.]**—A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate.—**Re CHURCHILL (LORD), MANISTY v. CHURCHILL** (1888), 39 Ch. D. 174; 58 L. J. Ch. 136; 59 L. T. 597; 36 W. R. 805.

**SUB-SECT. 3.—RIGHT OF ACTION AGAINST DEBTOR.**

**937. General rule—Action maintainable against debtor.]**—When a surety pays money on behalf of his principal, how far he will be entitled to bring an *indebitatus assumpsit* against the principal.

A. had recovered against another, & when he was going to take out execution, deft. there offered to give him a note for the money, & to get one to join in it as security with him; which was done accordingly. After this pltf. in the former action commenced another action against the security, & recovered; upon which the security paid the

money, & now brought his action against the principal for so much money laid out to his use. This matter appearing at the trial, deft.'s counsel excepted, that the action would not lie.—**Held:** it would.—**MORRICE v. REDWYN** (1731), 2 Barn. K. B. 26; 94 E. R. 333.

**938. —.]**—(1) No difference in the relation of sureties that one is so by a separate instrument.

(2) It is now held that a surety, having paid, may maintain an action against the principal for the whole (LORD ELDON, C.).—**WARE v. HORWOOD** (1807), 14 Ves. 28; 33 E. R. 432, L. C.

**Annotations:—Generally.** Mentd. Dupuis v. Edwards (1813), 18 Ves. 358; Simpson v. Howden (1837), 3 My. & Cr. 97; Houston v. Sligo (1855), 52 L. T. 96.

**939. —.]**—A., being in want of some harness, went to B., accompanied by C., & ordered some, C. saying in A.'s presence, that he would pay the money if A. did not.—**Held:** C. thereby acquired an authority to pay the money on the default of A., & having paid it, he was entitled to recover it back from A., the authority not being shown to have been countermanded.—**ALEXANDER v. VANE** (1836), 1 M. & W. 511; 2 Gale, 57; Tyr. & Gr. 865; 5 L. J. Ex. 187; 150 E. R. 537.

**940. —.]**—**DAVIES v. HUMPHREYS**, No. 1068, post.

**941. —.]**—The surety has a right at any time to apply to the creditor & pay him off & then to sue the principal in the creditor's name . . . If the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such a period. It has been settled that such an interference with the rights of the surety must operate to deprive the creditor of his right of recourse against the surety (**COCKBURN, (C.J.)**).—**SWIRE v. REDMAN** (1876), 1 Q. B. D. 536; 35 L. T. 470; 24 W. R. 1069.

**Annotation:—Mentd.** Rouse v. Bradford Banking Co. (1894) A. C. 586.

**942. Right to recover debt & damages.—Although no counter bond.]**—A surety on a bond, against whom the debt has been recovered:—**Held:** entitled in equity to recover the debt & damages against the principal debtor although he had no counter-bond.—**FORD v. STORBRIDGE** (1632), Nels. 24; 21 E. R. 780.

**943. —& costs—Judgment against surety.]**—Declaration on bond; plea that it was conditioned for performance of covenants, which were to indemnify the obligee from alimony & debts incurred by his wife after their separation, & that deft. had performed the covenants. Replication that a judgment was recovered against the obligee by a creditor of his wife, & he paid debt & costs, of which deft. had notice. Demurrer & joinder:—**Held:** deft. was liable for the costs as the debt paid by pltf.; for, the covenant to

**PART VII. SECT. 4, SUB-SECT. 2.—A.**

**929 i. General rule.]**—It is not payment by the principal debtor but payment by the surety that gives him the rights of a creditor.—**MATTHEW v. BANK OF OTTAWA** (1919), 46 O. L. R. 499; 81 D. L. R. 353; 17 O. W. N. 249.—**CAN.**

**929 ii. —.]**—**HILL v. KELLY** (1794), 1 Ridg. L. & S. 265.—**IR.**

**929 iii. —.]**—**MARAS v. RYAN** (1838), 2 Jo. Ex. Ir. 715.—**IR.**

**PART VII. SECT. 4, SUB-SECT. 2.—B.**

**932 i. General rule.]**—A surety who

has paid the indebtedness of the principal debtor to the Crown is entitled to stand in the same position as the Crown & to exorcise the Crown's remedies for the recovery of the debt.—**Re PATHE FRERES PHONOGRAPH CO. OF CANADA** (1921), 64 D. L. R. 628; 50 O. L. R. 644; 2 C. B. R. 21.—**CAN.**

**932 ii. —.]**—**R. v. DENNIS, R. v. BAILEY** (1833), Hayes & Jo. 194.—**IR.**

**PART VII. SECT. 4, SUB-SECT. 3.**

**937 i. General rule—Action maintainable against debtor.]**—A. guaranteed to a bank the repayment by B. of a

certain sum "when called upon." The bank never specifically called upon A. to pay:—**Held:** A. was entitled to pay & sue for the amount guaranteed whenever he thought proper, without waiting till called upon.—**GREEN v. PARR** (1870), 4 S. A. L. R. 126.—**AUS.**

**937 ii. —.]**—**HARPER v. CULBERT** (1833), 5 O. R. 152.—**CAN.**

**937 iii. —.]**—**BORLAND v. CURRY** (1878), 4 L. R. Ir. 273.—**IR.**

**OR committee of lunatic debtor.]**—**TRACY v. M'CABE** (1893), 33 L. R. Ir. 21.—**IR.**

indemnify was general.—*DUFFIELD v. SCOTT* (1789), 3 Term Rep. 374; 100 E. R. 628.

*Annotations*.—*Consd.* *Amory v. Brodric* (1822), 5 B. & Ald. 712; *Lloyd v. Mostyn* (1842), 6 Jur. 974; *Gray v. Lewis, Parker v. Lewis* (1873), 8 Ch. App. 1035. *Reid.* *Smith v. Compton* (1832), 3 B. & Ad. 407; *Jones v. Williams* (1841), 9 Dowl. 252; *Penley v. Watts* (1841), 7 M. & W. 601. *Mentd.* *Tildasley v. Stephenson* (1834), 10 Bing. 545.

944. — *Customs of London.*—Where one obligee is sued, by the custom of London his co-sureties shall contribute. So by the custom of London where a surety pays a debt, he shall maintain an action against the principal, though he has no counter-bond.—*LAYER v. NELSON* (1687), 1 Vern. 456; 23 E. R. 582, L. C.

945. — *Debtor acceptor of bill of exchange—Subsequent bankruptcy—Payment after bankruptcy.*—*WARRINGTON v. FURBOR*, No. 359, *ante*.

946. *Action for money paid.*—*BARCLAY v. GOOCH*, No. 924, *ante*.

947. — *Debt not paid by desire of debtor.*—The goods of a stranger on the premises of another were distrained by the landlord for rent in arrear, & the stranger was obliged to pay the rent to redeem them:—*Held*: the stranger might maintain *assumpsit* for money paid to the use of the original lessees, who were bound by their covenants, to the landlord, although some of them had, to the knowledge of pltf., before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time.

I admit that where one person is surety for another & compellable to pay the whole debt, & he is called upon to pay, it is money paid to the use of the principal debtor & may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal (LORD KENYON, C.J.).—*EXALL v. PARTRIDGE* (1799), 8 Term Rep. 308; 3 Esp. 8; 101 E. R. 1405.

*Annotations*.—*Consd.* *Cumming v. Forester* (1813), 1 M. & S. 491; *Pownall v. Forrand* (1827), 6 B. & C. 439. *Distd.* *England v. Marsden* (1866), L. R. 1 C. P. 529. *Reid.* *Morro v. Pyke* (1809), 11 East. 52; *Asprey v. Levy* (1847), 16 M. & W. 851; *Lewis v. Campbell* (1849), 8 C. B. 541; *Griffiths v. Daubuz* (1855), 5 E. & B. 748; *Pell v. Whitaker* (1871), L. R. 7 Q. B. 120; *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.* [1899] 1 Q. B. 161; *Re Butten, Ex p. Havside*, [1907] 2 K. B. 180; *Re Nott & Cardiff Corp.*, [1918] 2 K. B. 146. *Mentd.* *Doe d. Wartney v. Grey* (1816), 1 Stark. 283; *Jones v. Nanney* (1824), M'Cle. 25; *Pawle v. Gunn* (1838), 7 L. J. C. P. 206; *Rodgers v. Maw* (1846), 15 M. & W. 444; *Dwyer v. Collins* (1852), 7 Exch. 639; *O'Donoghue v. Coalbrook & Broad Oak Co.* (1872), 26 L. T. 806.

948. — *Not where separate indemnity bond—From debtor to surety.*—(1) If a surety bound with his principal for payment of money by instalments, take a bond from the principal, conditioned for payment of the amount of the instalments before the first of them will be due, & before that time the principal become bkpt. & obtain his certificate, & afterwards the instalment bond be discharged by the surety, still he cannot maintain an action against the principal for money paid to his use.

(2) There is no doubt but that, wherever a person gives a security by way of indemnity for another & pays the money, the law raises an *assumpsit* (ASHHURST, J.).

(3) In ancient times no action could be maintained at law where a surety had paid the debt of his principal (BULLER, J.).—*TOUSSAINT v. MARTINANT* (1787), 2 Term Rep. 100; 100 E. R. 55.

*Annotations*.—*As to* (1) *Reid.* *Martin v. Court* (1788), 2 Term Rep. 640; *Ex p. Walker* (1798), 4 Vos. 373;

*Buckler v. Buttlivant* (1802), 3 East. 72; *Young v. Taylor* (1818), 8 Taunt. 315; *Schlenker v. Mossy* (1825), 5 Dow. & Ry. K. B. 747; *Freeman v. Burgess* (1827), 1 Moo. & P. 91; *Penny v. Foy* (1828), 8 B. & C. 11; *Baber v. Harris* (1839), 9 Ad. & El. 532. *As to* (2) & (3) *Reid.* *Sirling v. Forrester* (1821), 3 Bl. 575; *Freeman v. Burgess* (1827), 1 Moo. & P. 91; *Cowley v. Dunlop* (1798), 7 Term Rep. 565.

949. — *J*.—A., a clerk in the bank, having, at the request of B., undertaken, by parol, to guarantee B.'s debt to the bank, transferred money from his own account with the bank to B.'s account. This transaction was not repudiated by the bank, & there was some slight evidence of its having been subsequently sanctioned by B.:—*Held*: it was a payment on account of B. & might be recovered against him in an action for money paid.—*STORY v. STORY* (1843), 2 L. T. O. S. 227.

950. — *Surety for receiver—Leave of court.*—*SHACKEL v. MARLBOROUGH (DUKE)* (1814), 1 SETON'S JUDGMENTS & ORDERS, 6th ed. 805.

951. — *Effect of composition deed by debtor—Reserving remedies against surety.*—Pltf., a shareholder in a banking co., became a surety for advances to be made by the co. to deft. Deft. afterwards executed a composition deed, to which pltf. & the banking co. were parties, whereby he assigned his property to trustees for the benefit of his creditors; & this deed contained a stipulation for a reserve of remedies against sureties for deft. Pltf. having been compelled to pay the debt to the banking co.:—*Held*: he was entitled to recover back the amount in an action for money paid, from deft.—*KEARSLEY v. COLE* (1840), 16 M. & W. 128; 16 L. J. Ex. 115; 8 L. T. O. S. 234; 153 E. R. 1128; *previous proceedings*, 7 L. T. O. S. 89.

*Annotations*.—*Consd.* *Price v. Barker* (1855), 4 E. & B. 760; *Webb v. Hewitt* (1857), 3 K. & J. 438; *Batson v. Gosling* (1871), L. R. 7 C. P. 9; *Cargoe v. Jones* (1873), L. R. 8 Exch. 81. *Reid.* *Owen v. Homan* (1851), 3 Mac. & G. 378; *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 38 W. R. 537.

952. — *J*.—By a mortgage deed the debtor covenanted to pay principal & interest, & a surety covenanted to pay the interest in default. The debtor afterwards, by deed, assigned his property to a trustee on trust to sell & divide the proceeds amongst his creditors; the creditors releasing the debtor from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor:—*Held*: this deed only amounted to a covenant not to sue the debtor, & the surety was not released, but the surety could pay off the principal to the creditor & recover the amount from the debtor.—*GREEN v. WYNN* (1869), 4 Ch. App. 204; 38 L. J. Ch. 220; 20 L. T. 131; 17 W. R. 385, L. C.

*Annotations*.—*Consd.* *Batson v. Gosling* (1871), L. R. 7 C. P. 9. *Reid.* *Forbes v. Jackson* (1882), 10 Ch. D. 615; *Re Whitehouse, Whitehouse v. Edwards* (1887), 37 Ch. D. 683.

953. — *Covenant by creditors not to sue debtor—Surety in position of creditor.*—Declaration in the common form for money paid, etc. Plea that after Oct. 4, 1861, & before the passing of Bkpcy. Act, 1869 (c. 71) deft. was indebted to divers persons, & thereupon a deed dated Aug. 29, 1867, relating to deft.'s debts & his release therefrom, was made between deft. & his creditors, being "the several persons who, at the date of the deed, would be entitled to prove, under an adjudication in bkpcy., against deft., founded upon a petition filed on the day of the date of the said deed," which deed recited deft.'s

*Sect. 4.—Rights after satisfaction of debt by surety: Sub-sects. 3 & 4.]*

inability to meet his debts & his proposal to pay a composition of 5s. in the pound, which the said creditors had agreed to accept in full satisfaction & discharge of their said debts, & to execute the release thereafter contained: & deft. covenanted to pay the said composition in two instalments of 2s. 6d. each at three & six months from the registration of the deed, in consequence whereof the creditors thereby released him from all his debts, & it was thereby provided "that any creditor holding security for his debt, or having any claim upon or against any other person as well as deft. for such debt, might execute or assent to the said deed without prejudice to such security or claim." Averment of the

executed after the accruing of the claim of a certain other person whose name was to deft. unknown, & that such claim was for money due from deft. to such other person, who was a creditor of deft. in respect of his said claim at the time of the execution of the deed, & executed & was bound by the same; & that before & at the time aforesaid pltf. was a surety for deft. to such other person in respect of such claim, & that the money in the declaration alleged to have been paid by pltf. for the use of deft., was so paid after the execution of the deed by such other person, & was & is money paid by pltf. as such surety for deft. to such other person for & on account of such claim, & not otherwise; & that at the time it was paid deft. was released from such claim of such other person by the said deed. Replication that pltf. never executed or assented to the deed, & was no party thereto; & that although the respective times for payment of the composition on the amount of pltf.'s debt to which the plea is pleaded had elapsed before commencement of this suit, yet the said composition was never paid or tendered, or offered to be paid to pltf. pursuant to the said deed, & the same is still unpaid. On demurrer to the above replication on the ground that the release being absolute, payment, tender, or offer of the composition was not necessary to make the deed a bar to pltf.'s claim:—*Held*: giving judgment for deft. deft.'s plea was good, & afforded a defence to pltf.'s claim which was barred by the deed, the release contained in which was absolute, & would have been an answer to an action brought by the principal creditor, in whose place the surety was, by Bkpcy. Act, 1861, (c. 131) s. 173, entitled to stand, & so was bound by the deed.

The words of the deed may be read in two senses, & may cut down the release into a covenant not to sue; so that, *quoad* the principal creditor, it may be not a release but a covenant not to sue, whilst, *quoad* pltf., who had no surety but was himself a surety, it operates as an absolute release (BRAMWELL, B.).—HATCH v. HATCH (1872), 28 L. T. 506.

954. —.]—Pltf., a merchant at L., employed P., a commission agent at M., to purchase goods for him, P. purchased goods of various persons, & amongst them, of W. & Co. P. made out invoices in his own name, & drew upon pltf. for the amount. There being a balance of £180 7s. 7d. due from pltf. for goods bought of W. & Co., pltf. accepted a bill of exchange drawn by P. for payment to his order of that amount at three months date. P. not having paid W. & Co. they claimed payment from pltf., but he

denied all knowledge of them in the matter. P. became bkpt. At that time the bill of exchange was in his hands & was taken possession of by his official assignee who indorsed it & deposited it in a bank, pursuant to Bkpcy. Act, 1849 (c. 106). When the bill became due, it was presented by the bankers & paid by pltf. W. & Co. afterwards sued pltf. for the goods sold by them, & pltf. compromised the action. Pltf. then brought an action against the official assignee to recover back the amount of the bill:—*Held*: pltf. could not recover either for money had & received or money paid to his use.

If pltf. was in the situation of a surety for P. his right of action would be, not against deft., but against P. (MARTIN, B.).—BARBER v. PORT (1859), 4 H. & N. 759; 28 L. J. Ex. 381; 157 E. R. 1041.

955. Statute of Limitations -- When commencing to run.]—DAVIES v. HUMPHREYS, No. 1068, *post*.

*See, generally*, LIMITATION OF ACTIONS.

956. Right to sue in creditor's name — Agreement by creditor not to sue debtor.]—SWIRE v. REDMAN, No. 941, *ante*.

957. Surety a debtor to principal debtor — Agreement for discharge of surety's debt—By surety's payment of principal debt—Agreement as defence to surety's action.]—COPLAND v. MILLER (1903), *Times*, Nov. 28.

Where debtor a bankrupt.]—*See* Sub-sect. 4, *post*.

SUB-SECT. 4.—WHERE PRINCIPAL DEBTOR A BANKRUPT.

*See, generally*, Part XI., *post*.

958. Right to prove in debtor's estate — Bond debt—Bond delivered to surety by creditor—Without knowledge of debtor.]—*Re* ROBERTS, *Ex p.* ALLEN & CAZENOVE, No. 925, *ante*.

959. — Debtor member of partnership — Surety also a partner.]—A., a partner in a bank, becoming treasurer of a board of guardians, gave a bond as security, in which B., one of his two partners, & C. joined as sureties. The account was kept at the bank in the name of the board. The bank stopped. A. died, & shortly afterwards B. & the surviving partner in the bank were adjudicated bkpts. A.'s separate estate was insolvent, B.'s solvent. C., as surety under the bond, paid to the board the whole amount due to them from the bank on their account, & then recovered half of it as contribution from B., his co-surety. The trustee of B.'s separate estate now claimed, in the suit for administering the estate of A., the amount so recovered from B.'s estate by C.:—*Held*: as the claim if admitted, would increase the surplus of B.'s estate that would go to the creditors of the bank, diminishing the separate estate of A., it was, in effect, a claim by the joint creditors to the prejudice of the separate creditors, & therefore could not be allowed.—LACEY v. HILL, LENEX v. HILL (1872), 8 Ch. App. 443, n.; 42 L. J. Ch. 86; 21 W. R. 153; *sub nom.* LACEY v. HILL, *Re* BAILEY'S CLAIM, 27 L. T. 504; *affd.* on other grounds, 8 Ch. App. 441, L. J.J.

*Annotations*:—*Reid*, *Re* Head, *Ex p.* Head, [1891] 1 Q. B. 638. *Mentl*, *Re* White, *Ex p.* Westcott (1874), 30 L. T. 739; *Thacker v. Hardv* (1878), 4 Q. B. D. 685; *Coaks v. Boswell* (1886), 11 App. Cas. 232.

*See, generally*, PARTNERSHIP.

— In respect of bills of exchange.]—*See*

**BANKRUPTCY**, Vol. IV., pp. 287-289, Nos. 2684-2703.

—.]—*See, also*, **BANKRUPTCY**, Vol. IV. pp. 269-272, Nos. 2524-2553.

**960. Effect of composition deed — When bar to action.**—*HATCH v. HATCH*, No. 953, *ante*.

**961. Counter guarantee given to principal creditor.—By surety.**—The bank of L. had made advances to H. upon the security of a guarantee by B. & co. The loan was from time to time renewed, but ultimately the bank expressed its desire to have the transaction closed. H. & B. & co. then induced the K. Assocn. to grant H. a credit enabling him to discharge the debt, B. & co. giving to the assocn. a similar guarantee. Subsequently the bank gave to the assocn. a counter-guarantee, by which they guaranteed to provide funds to meet the liability of the assocn. in the event of B. & co. making default; & upon this state of facts the bills given to secure the debt were renewed from time to time, & were ultimately met by the bank. All the cos. were ordered to be wound up, & upon the claim of the bank:—*Held*: B. & co. were liable to the bank for the amount paid, inasmuch as the guarantee given by them entitled the bank which had paid the money to stand in the place of the assocn. to whom it was given, a right which the bank had not in any way released by its counter-guarantee.

The position of the bank was not, by reason of its having been the original guarantor at all affected; but it stood exactly as any third independent co. from which the assocn. might have obtained such a guarantee would have stood on paying the amount of the advances.—*Re BARNED'S BANKING CO., LTD., Ex p. BANK OF LONDON* (1869), 21 L. T. 126; 17 W. R. 634, L. J.

**962. Right to sue debtor — After acceptance of composition deed.—In respect of separate debt.—Due from debtor to surety.**—Resp. entered into a bail bond jointly with another on behalf of applt. for the payment of any damage & costs which might be awarded in a suit then pending in the Admty. Ct. Appellant giving become insolvent, presented a petition under the Bkpcy. Act, 1869 (c. 71), for liquidation by arrangement or composition. He inserted in his statement the name & address of resp. as creditor in respect of a certain sum not connected with the bail bond, but the statement did not contain any mention of the contingent liability on the bail bond. Resp. claimed a larger sum in respect of the inserted debt, & the statement was amended accordingly. Resp. proved for & received a composition on this debt, but no composition was paid to him in respect of the liability on the bail bond. Subsequently the suit in the Admty. Ct. was decided against applt., & on his default, resp. had to pay the amount secured by the bail bond:—*Held*: resp. was not bound by the composition proceedings in respect of the contingent debt, & he was entitled to recover what he had paid under the bail bond.—*BRESLAUER v. BROWN* (1878), 3 App. Cas. 672; 47 L. J. Q. B. 729; 39 L. T. 67; 26 W. R. 536, H. L.; *affg.* S. C. *sub nom.* *WILSON v. BRESLAUER* (1877), 2 C. P. D. 314, C. A.

*Annotations*:—*Refd.* *Oppenheim v. Jackson* (1879), 49 Q. B. 216; *Tea Co. v. Jones* (1880), 43 L. T. 255; *Morgan v. Hardy* (1887), 18 Q. B. D. 646; *Mentid.* *er v. Royle* (1880), 5 C. P. D. 354; *Re Lacey*, *Lacey* (1880), 16 Ch. D. 131; *Lewis v. Leonard* (1880), 5 Ex. D. 165; *Re* (1883), 23 Ch. D. 706.

**963. Rights after debtor discharged.—Surety obliged to give new security.—Before discharge**

**—Recovery of additional security.**—One who became surety for debt, before his discharge under an Insolvent Debtors' Act & was afterwards obliged to give a new security of a bond & warrant of attorney, etc., for the old debt cannot thereon hold debt, to bail by an affidavit as for so much money paid to his use.—*TAYLOR v. HIGGINS* (1802), 3 East, 169; 102 E. R. 562.

*Annotations*:—*Fold.* *Maxwell v. Jameson* (1818), 2 B. & Ald. 51. *Mentid.* *Naylor v. Eagar* (1828), 2 Y. & J. 90; *Power v. Butcher* (1829), 10 B. & C. 329; *Chambers v. Bernasconi* (1830), 6 Bing. 49; *Richardson v. Chasen* (1817), 16 L. J. Q. B. 311.

**964. — Debt due before discharge.—Payment by surety after.**—Principal & surety on a note payable by instalments. After one payment became due, principal discharged under Insolvent Debtors' Act. Bill by creditor, & decree against surety & him, to have remedy over against effects of the principal, for the first money due on the first payment, & the common decree for the rest.—*O'CARROLL'S CASE* (1745), Amb. 61; 27 E. R. 35, L. C.

*Annotation*:—*Refd.* *Hartwell v. Vere* (1779), 2 Wm. Bl. 1307.

**965. — — — — —.**—A discharged insolvent is not exonerated from the claim of a surety, who pays, subsequently to the discharge, a debt due before.—*POWELL v. EASON* (1831), 8 Bing. 23; 1 Moo. & S. 68; 1 L. J. C. P. 12; 131 E. R. 308.

*Annotation*:—*Apld.* *Abbott v. Bruere* (1839), 7 Scott, 753.

**966. — — — — —.**—An insolvent is not, by his discharge under Insolvent Debtors' Act, 1826 (c. 57), released from an action at the suit of his surety for money paid after the discharge in respect of an annuity granted by the insolvent before.—*HOCKEN v. BROWNE* (1838), 4 Bing. N. C. 400; 6 Dowl. 634; 6 Scott, 191; 7 L. J. C. P. 197; 2 Jur. 350; 132 E. R. 841.

*Annotation*:—*Apld.* *Abbott v. Bruere* (1839), 5 Bing. N. C. 598.

**967. — — — — —.**—A discharged insolvent is liable to repay his surety who pays for him, after his discharge, an annuity due before.—*ABBOTT v. BRUERE* (1839), 5 Bing. N. C. 598; 7 Scott, 753; 9 L. J. C. P. 81; 132 E. R. 1230.

**968. — — — — —.**—*Seemle*: a debtor who executes a valid deed of arrangement under Bkpcy. Act, 1861 (c. 134), ss. 192 *et seq.*, is not discharged from liability to his surety who is subsequently compelled to pay a debt from which the debtor would be discharged by the deed as against the creditor.—*MAYER v. UNDERHILL* (1863), 9 L. T. 280.

**969. — — — — —.**—**[Payment by surety before.]**—A. indorsed a bill of exchange drawn by B. upon & accepted by C. B. having become bkpt. before the bill was due, & the acceptor not having paid it, A. was obliged to do so. In an action by A. against B. for money paid after he had obtained his certificate:—*Held*: A. was in the situation of surety to B., & the certificate was a bar to the action.—*HAIGHT v. JACKSON* (1838), 3 M. & W. 598; 150 E. R. 1283; *sub nom.* *HEIGH v. JACKSON*, 1 Horn & H. 167; 7 L. J. Ex. 200; 2 Jur. 777.

**970. — Debt due & paid after discharge.**—A person discharged under Insolvent Debtors' Act, 1811 (c. 125), is liable to his surety for the arrears of an annuity due since his discharge which the surety has been obliged to pay.—*PAGE v. BUSSELL* (1814), 2 M. & S. 551; 105 E. R. 487.

*Annotations*:—*Consd.* *Abbott v. Bruere* (1839), 7 Scott, 753. *Refd.* *Freeman v. Burgess* (1827), 4 Bing. 416.

**Sect. 4.—Rights after satisfaction of debt by surety:**  
**Sub-sect. 4, 5 & 6.]**

**971.** ———.]—The ct. refused to liberate, on motion, a discharged insolvent, who had been arrested by his surety for the arrears of an annuity accruing subsequently to the insolvent's discharge, & paid by the surety.—**FREEMAN v. BURGESS** (1827), 4 Bing. 416; 1 Moo. & P. 91; 6 L. J. O. S. C. P. 34; 130 E. R. 828.

**Annotations:—***Reid*, **Powell v. Eason** (1831), 1 Moo. & S. 68; **Hocken v. Browne** (1838), 4 Bing. N. C. 400.

**972.** ———.]—A discharge of the principal under Insolvent Debtors' Act, 1838 (c. 110), does not exonerate him from the claim of a surety on a bond, in respect of payments [due after insolvency] subsequently made under it by the latter.—**EMERY v. CLARK** (1857), 2 C. B. N. S. 582; 20 L. T. O. S. 200; 140 E. R. 514.

**Benefit of creditor's proof—Dividends.]—***See* Part V., Sect. 3, sub-sect. 8, B., *ante*.

**SUB-SECT. 5.—ON COMPROMISE BETWEEN CREDITOR AND SURETY.**

**973. Right to recover damages—Compromise to save recognisance—Must not be injurious to principal—Or exceed original liability.]—***Semble*: if the principal make default, & his bail are in danger of forfeiting the amount of their recognisance, they may enter into a fair arrangement to save their recognisance, & recover over against their principal in damages, provided the arrangement be not injurious to the principal, & provided, in amount, it exceed not the penalty of the recognisance, or the sum they would be called upon to pay, in case they had made no arrangement.—**MORRISON v. GRAHAM** (1827), 5 L. J. O. S. K. R. 251.

**974. Right to recover amount paid—No notice to debtor of compromised action—Effect of want of notice—Proof of improvident compromise.]—****SMITH v. COMPTON**, No. 1844, *post*.

**975.** ———.]—**Surety taking assignment of debt—After payment.]**—A surety who compounds a debt for which his principal & himself have become jointly liable, & takes an assignment of that debt to a trustee for himself, can only claim, against his principal, the amount which he has actually paid.—**REID v. NOTTUS** (1837), 2 My. & Cr. 361; 6 L. J. Ch. 197; 1 Jur. 233; 40 E. R. 678, L. C.

**976.** ———.]—**Sale of goods.]—***Pltf.*, at the request of *deft.*, ordered goods of W. & R., telling them the purpose for which they were wanted. Before the order was given *pltf.* asked W. & R. for a list of prices, & having obtained it, showed it to *deft.*, who, seeing that the price was such that the order could not possibly have been understood, asked *pltf.* if he thought W. & R. knew what was wanted; whereupon *pltf.* said, "Oh, yes. If anything is wrong, of course you will see me all right." To which *deft.* answered, "Yes, I will bear you harmless." In consequence of some misunderstanding, arising in part probably from a verbal inaccuracy in the letters conveying the order, the goods supplied were useless to *deft.*, & were returned to the sellers, who (the intrinsic value of the goods being only about £3) expended in labour about £42 to make them correspond with the intention of *deft.*, but, in so doing, reduced their substance so as to render them useless for his purpose. *Deft.*, after considerable delay, persisting in refusal to take the goods, W. & R. sued *pltf.* for the value of the goods, & the jury found, with the implied authority of *deft.*, a compromise

action by the payment to them of £22 10s., & afterwards brought an action for money paid against *deft.*, to recover that sum:—*Held*: the action lay.—**PETTMAN v. KEBLE** (1850), 9 C. B. 701; 19 L. J. C. P. 325; 15 Jur. 38; 137 E. R. 1067.

**977.** ———.]—**Evidence of payment by surety.]**—In an action by the surety on a sheriff's bond against his principal [the bailiff] for the recovery of money forfeited under the bond, & alleged to have been paid to the sheriff, the evidence of payment was, that an action having been brought upon the bond against both, they had defended the action by one attorney; that a compromise had been effected under the immediate authority of the surety; that the surety had sent a cheque for the agreed sum to the sheriff by post, & that he had subsequently verbally stated to the principal that he had paid the debt & costs in the action, to which the latter made no reply; & that eight or nine years had elapsed since the compromise:—*Held*: there was evidence that the debt had been satisfied by the surety.—**PRICE v. BURVA** (1857), 30 L. T. O. S. 136; 6 W. R. 40.

**SUB-SECT. 6.—RIGHT TO LIEN OR CHARGE.**

*See, generally*, LIEN; MORTGAGE.

**978. Surety also agent for debtor—For sale of goods—Lien on price—To amount guaranteed.]**—A factor who becomes surety for his principal, has a lien on the price of the goods, sold by him, for his principal, to the amount or the sum for which he has so become surety.—**DRINKWATER v. GOODWIN** (1775), 1 Cowp. 251; 98 E. R. 1070.

**Annotations:—***Reid*, **Houghton v. Matthews** (1803), 3 Bos. & P. 485; **Hudson v. Granger** (1821), 5 B. & Ald. 27. *Mentd.* **Copland v. Stein** (1799), 8 Term Rep. 199; **R. v. Humphrey** (1825), *McCle. & Yo.* 173; **Taylor v. Watson** (1829), 4 Man. & Ry. K. B. 259; **Barnett v. Brandao** (1843), 6 Man. & G. 630; **Robinson v. Rutter** (1855), 4 E. & B. 954; **Hood v. Stallybrass, Balmer** (1878), 3 App. Cas. 880.

**979. On debtor's property—Right to exhaust securities—Before resorting to collateral securities.]**—The money payable on a policy of insurance on the life of A. deposited with the insurance co. as a security for a loan to B. is to be paid to the surety of B. satisfying the loan, & cannot be set off against a debt due by A. to the insurance co. of which B.'s surety had no notice.

Every surety who pays is entitled to exhaust the whole of the principal debtor's securities before he resorts to collateral securities (**MALINS, V.-C.**).—*Re* **JEFFERY'S POLICY** (1872), 20 W. R. 857.

**980.** ———.]—**Realty.]**—A merchant, being abroad, empowered certain persons in this country to receive moneys, adjust claims, & do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposited the deeds with the H. Insurance Co. to secure £12,000, & covenanted that he should execute the mtge.; this £12,000 was also secured by the bonds of sureties in sums corresponding to the shares of the partners. The power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the H. Co., requesting the loan of £8,000, "to be secured on his Essex property, which you now hold, in addition to the £12,000 already advanced"; & professing his readiness to execute the mtge. deed:—*Held*: (1) this was a confirmation of the security; (2) some of the parties having paid the amount of the sums secured by them, they had a lien on the property; (3) one of these sureties being a partner, the sum paid by



him was subjected to the partnership accounts.—*MUNNINGS v. BURY* (1829), Taml. 147; 48 E. R. 59.

**981. — Conveyed to surety—For sale & redemption of debt.]**—The obligor of several bonds, in which A., his solr., joined as surety, conveyed certain real property to A., upon trust to sell, & out of the proceeds of the sale to pay the bond creditors. The creditors did not execute, nor had any notice of the deed:—*Held*: the deed was a mere deed of agency, & not binding in favour of the creditors, but A. was entitled to retain the estates conveyed to him, until he should be discharged from his liability as surety under the bonds.—*WILDING v. RICHARDS* (1845), 1 Coll. 655; 4 L. T. O. S. 411; 63 E. R. 581.

*Annotations*:—*Mentd.* *Griffith v. Ricketts*, *Griffith v. Lunell* (1849), 7 Hare, 299; *Jones v. James* (1878), 39 L. T. 54.

**982. — Mortgage debt—Fund in court—Payment out to surety.]**—S. in May, 1850, assigned his interest in a fund in ct. to J. to secure the payment of a loan, & a bond was at the same time entered into by S. & petitioner & her brother as sureties, as a further security. All the parties resided at Calcutta. In consequence of the terms of the bond not having been complied with by S. a stop order on the request of petitioner, was in Mar. 1853, obtained by J. Petitioner had, however, in Feb. 1853, at Calcutta, on the demand of the attorney of J. paid the debt & interest. In May, 1853, the stop order was, on the application of S. with the consent of J. discharged, but the mtge. deed remained in the possession of the agents of J. The residue of the fund belonging to S. was, by an order of Dec. 1855, ordered to be paid over to his appointees, & thereupon the surety presented this petition, praying that so much of the fund as might be necessary might be sold & paid to her in satisfaction of her demand against S.:—*Held*: petitioner was entitled to the relief which she prayed, & she had adopted the proper means to obtain redress.—*ALLEN v. DE LISLE* (1856), 3 Jur. N. S. 928; 5 W. R. 158.

**983. — Part payment of debt.]**—*GEDYE v. MATSON*, No. 832, *ante*.

**984. — Legacy to debtor—Payable by executors of deceased surety—Satisfaction of debt by executors.]**—*WILLES v. GREENHILL* (No. 1), No. 993, *post*.

**985. — Insurance policy on third party life—For benefit of debtor.]**—*Re JEFFERY'S POLICY*, No. 970, *ante*.

**986. — Goods sold—Surety as unpaid vendor.]**—According to the usage of the London Dry Goods Market, a broker who contracts for the sale of goods without disclosing his principals is personally liable in default of his principal. On Mar. 3 certain goods belonging to Messrs. C., lying at the St. Katharine Dock, in the custody of the Docks Co., were bought by D., as broker for buyers & sellers, for B. & Co., without disclosing the name of his principals, & D. indorsed to them the delivery order he had obtained from the sellers, on the representation of B. & Co. that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to plffs., & indorsed the order to them. On the prompt day, Mar. 18, plff.'s clerk lodged the order at the London office of the Docks Co., with this memorandum, "Hold within to our order, & have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on Mar. 20. Three hours later a messenger from the office reached the warrant

office at the Dock House with a notice that the order had been lodged. Meanwhile B. & Co. had stopped payment, & D. being so informed, & having no notice of plff.'s title, on the same day paid Messrs. C. for the goods, & through a clerk, who reached the Dock House before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of Messrs. C., who indorsed the same to D., & gave him a second delivery order. The first delivery order was returned to plffs. by the Docks Co., who refused to act upon it. In an action by plffs., claiming, as against the Docks Co. Messrs. C., & D., to be entitled to the goods:—*Held*: (1) D. was the surety & B. & Co. the principal debtors; (2) the unpaid vendors' lien had passed to D.; (3) the title to the goods was in D., & Messrs. C. were not necessary parties to the suit.—*IMPERIAL BANK v. LONDON & ST. KATHARINE DOCKS CO.* (1877), 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233.

**987. — Assigned to surety as security—For debts of specific character—Other debts guaranteed.]**—*Re STARKEY, Ex p. FREEM & MORRICE* (1827), 2 Gl. & J. 246.

**988. — Surety in possession—Rights as against debtor's trustee in bankruptcy.]**—R. obtained a loan from W. on the guarantee of deft., & in consideration thereof, for the indemnity of deft., executed to him a deed. The deed recited as above, & witnessed that R. in consideration of the premises, did thereby "bargain, sell, assign, transfer & set over unto" deft., his exors., etc., a messuage & premises held by R. for a term of years, certain trade premises of R. held also for a term of years, & the trade fixtures not removable by the tenant, & a farm & land of R.; *habendum* to deft., his exors., etc. After this deed was executed, R. remained in possession, carried on the business &, in the ordinary course thereof, used up & consumed certain of the consumable effects, & substituted others. Deft. required to be relieved from the guarantee; & R. having taken no step for that purpose, deft. entered, & took possession of the property, including the substituted stores. It appeared that R. was aware of this, & made no objection. Deft. paid W. Afterwards R. committed an act of bkpcy. & was made bkpt.:—*Held*: deft. was entitled, as against the assignees under the bkpcy., to retain, to the extent of the payment made by him to W. not only the property mentioned in the deed of which R. was possessed at the time of the execution of the deed, but also the substituted effects.—*HOPE v. HAYLEY* (1850), 5 E. & B. 830; 25 L. J. Q. B. 155; 26 L. T. O. S. 109; 2 Jur. N. S. 486; 4 W. R. 238; 119 E. R. 690.

*Annotations*:—*Mentd.* *Carr v. Allatt*, *Allatt v. Carr* (1858), 27 L. J. Ex. 385; *Chidoll v. Galsworthy* (1859), 6 C. B. N. S. 471; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Krehl v. Great Central Gas Co.* (1870), L. R. 5 Exch. 289; *Evans v. Hullam* (1871), 19 W. R. 1158; *Morris v. Delobbel-Filipo*, [1892] 2 Ch. 352.

**989. Surety for receiver—Lien on money received by receiver.]**—A surety for a receiver is entitled to stand in the place of the receiver, to be paid sums ordered to the receiver out of funds in ct., in respect of disbursements made by him, the money for making such disbursements having been advanced by the surety, & the same giving him therefore a lien on the money ordered to be paid to the receiver.—*GLOSSOP v. HARRISON* (1814), Coop. G. 61; 3 Ves. & B. 134; 35 E. R. 478, L. C. ■ ■

**Right to creditor's securities.]**—*See* Part VI., Sect. 4, sub-sect. 2, B., *ante*.



**Sect. 4.—Rights after satisfaction of debt by surety:**  
**Sub-sects. 7, 8 & 9. Sect. 5: Sub-sect. 1.]**

**SUB-SECT. 7.—RIGHT TO INTEREST.**

**990. Interest on principal debt.]—JAWSON v. WRIGHT (1780), 1 Cox, Eq. Cas. 275; 29 E. R. 1164.**

**Annotations:—***Foll.*, *Hitchman v. Stewart* (1855), 3 Drew. 271; *Re Fox, Walker, Ex p. Bishop* (1880), 15 Ch. D. 400. *Reid*, *Berwick-upon-Tweed Corp'n. v. Murray* (1857), 7 De G. M. & G. 497; *Re Snowden, Ex p. Snowden* (1881), 17 Ch. D. 44; *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514; *Stirling v. Burdett*, [1911] 2 Ch. 418.

**991. —.]—B. as a surety for A. became bound with him in a joint bond to C. & D. in a penalty of £180,000, with conditions for payment of £90,000 with interest at 5 per cent. By a counter bond of the same date A. became bound to B. in a like penalty, with condition to save harmless, & indemnified the said B. his heirs, exors., etc., from payment of the said sum of £90,000 & interest, & from all damages he might sustain for or on account of the non-payment of the said sum of £90,000 & interest. After the deaths of A. & B. the exors. of B. were called upon to pay, & actually did pay, to C. & D. £22,000, on account of the principal, & several large sums on account of the interest of A.'s debt. In a suit for the administration of A.'s estate, the ct. allowed the exors. of B. to come in as creditors for the several sums of money so paid by them, & for interest on the £22,000, but not for interest on the several sums of money paid by them to C. & D. for interest of the original debt.—*RIGBY v. MACNAMARA* (1795), 2 Cox, Eq. Cas. 415; 30 E. R. 192, L. C.**

**Annotations:—***Apld.* *Bell v. Free* (1818), 1 Swan. 90. **N.F.** *Re Maria Anna & Steinbank Coal & Coke Co., McKewan's Case* (1877), 6 Ch. D. 447. Upon principle I should dissent from the decision in *Rigby v. Macnamara*. Although the general principle is in favour of the claim to interest so far as it is a case of principal & surety, yet upon the particular terms of this contract I must come to the conclusion that the liability to pay interest upon interest has not been established (*MAJINS, V.-C.*). *Reid*, *Booth v. Leicester* (1838), 3 My. & Cr. 459. **Mentd.** *Re Oriental Commercial Bank, Ex p. European Bank* (1871), 7 Ch. App. 99.

**992. — Wife surety for husband.]—**Husband & wife mortgaged their respective estates for securing the husband's debt. Both estates were sold & conveyed free from the mtge., & in 1832 the debt was paid out of the produce of the wife's estate. In 1841, a bill was filed to have the amount recouped out of the produce of the estate of the husband which was in ct.:—*Held*: the representative of the wife was not entitled to interest on the amount paid.—*LANCASTER v. EVORS* (1847), 10 Beav. 266; 10 L. J. Ch. 308; 50 E. R. 585.

**Annotation:—***Reid*, *Hudson v. Carmichael* (1851), 2 Eq. Rep. 1077.

**993. — Promissory notes — Interest on original amount of notes.]—**The exors. of testator, who was surety upon two promissory notes drawn by his son, borrowed £4,000 to take up the notes, & stop proceedings by the creditors to obtain payment:—*Held*: the share, to which the son was entitled as one of the residuary legatees under his father's will, was bound, as against subsequent mtgees., to repay to the trustees, not only the principal due upon the notes, but also the interest upon the amount for which they were originally drawn.—*WILLES v. GREENHILL* (No. 1) (1800), 29 Beav. 373; 30 L. J. Ch. 808; 9 W. R. 217; 54 E. R. 870.

**Annotations:—***Mentd.* *Newman v. Newman* (1885), 28 Ch. D. 674; *Re Palmer, Palmer v. Clarke* (1894), 13 R. 280; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Goy, Farmer v. Goy*, [1900] 2 Ch. 149; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 865; *Re Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown &*

*Gregory*, [1904] 1 Ch. 627; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239; *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37.

**994. — Bill of exchange.]—**F. & H. drew bills on F., W. & Co., which the latter accepted, & which the drawers indorsed, & discounted with S. & Co., bill brokers. S. & Co. rediscounted the bills with the L. Bank, with which bank they were in the habit of rediscounting. According to a general well-recognised custom S. & Co. did not on each occasion of discounting bills with the bank indorse the bills, but had given the bank a general guarantee, under which, in consideration of the bank discounting for them bills from time to time, they guaranteed due payment of the bills when they respectively became due. Before the bills became due the drawers went into liquidation, & in consequence S. & Co., the next day, suspended payment. Under a composition in the liquidation of S. & Co. the bank received dividends in respect of the bills held by them. The bank afterwards, under a deed of arrangement, received further sums towards discharge of the balance remaining unpaid on the bills from the estate of the drawers, & also from F., W. & Co., the acceptors. On F., W. & Co. going into liquidation, the trustee of S. & Co. claimed to prove in the liquidation against the estate of F., W. & Co. for the amount of the dividend paid out of S. & Co.'s estate to the bank, & for interest at 5 per cent. on that amount of dividend:—*Held*: the proof in respect of the amount of dividend must be admitted, & the proof must also be admitted in respect of the interest.—*Re Fox, Walker & Co., Ex p. Bishop* (1880), 15 Ch. D. 400; 50 L. J. Ch. 18, 43 L. T. 165; 29 W. R. 144, C. A. **Annotations:—***Apld.* *Omnium Insc. Corp'n. v. United London & Scottish Insc.* (1920), 36 T. L. R. 386. *Reid*, *Re Bonacino, Ex p. Discount Banking Co.* (1894), 1 Mans. 59. **Mentd.** *Edmunds v. Wallingford* (1885), 11 Q. B. D. 811; *Hand v. Blow* (1900), 44 Sol. Jo. 551.

**995. Interest upon interest.]—***RIGBY v. MACNAMARA*, No. 991, *ante*.

**996. —.]—**A co. was formed under the Act of 1856, with a capital of £160,000 divided into £10 shares, & the memorandum stated that the liability of the shareholders was limited. The arts. provided that certain debts of specified amount which had been incurred by six of the shareholders in forming the co. should be paid by the co., & that if the co. should not have sufficient funds to pay them, each shareholder for the time being should contribute & pay to the co. a proportionate amount of those debts according to the number of shares of each shareholder. The shares were not all allotted. The co. having been ordered to be wound up:—*Held*: the six shareholders were not entitled to interest upon large sums which they had paid for interest on the debts.—*Re MARIA ANNA & STEINBANK COAL & COKE CO., MCKEWAN'S CASE* (1877), 6 Ch. D. 447; 46 L. J. Ch. 819; 37 L. T. 201; 25 W. R. 857, C. A.

**Annotation:—***Mentd.* *Re Bangor & North Wales Mutual Marine Protection Assocn., Baird's Case*, [1899] 2 Ch. 593.

**997. Interest recoverable as damages—Assessment of damages.]—**A surety is entitled to interest upon the sum which he has been compelled by the default of his principal to pay.

*Pltf.* (as surety) & *def.* having covenanted to pay A. an annuity, *def.*, by way of indemnity to *pltf.*, covenanted with him that he would pay A. the annuity, & observe the covenants of the annuity deed, & also conveyed to *pltf.* real estates, with power by sale or mtge. to raise adequate sums to indemnify him against all costs, charges, damages, & expenses which he should incur by

his being surety. Pltf. was compelled to pay the annuity, & after several payments, an account containing these was submitted to deft., with interest charged upon them at the rate of 5 per cent., & a balance stated, which deft. acknowledged to be correct, & "recoverable under the trusts of the deed of indemnity." In an action upon the covenant of indemnity, to recover these & subsequent sums paid by pltf.:—*Held*: interest upon the payments was recoverable as damages, & in estimating the damages, the jury might take into consideration the rate of interest stated in the account approved by deft.—*PETRE v. DUNCOMBE* (1851), 2 L. M. & P. 107; 20 L. J. Q. B. 242; 16 L. T. O. S. 394; 15 Jur. 86.

*Annotations*:—*Reid*, *Re Fox, Walker, & P. Bishop* (1880), 15 Ch. D. 400. *Reid*, *Hitchman v. Stewart* (1855), 3 Drew. 271; *Re Maria Anna & Steinbank Coal & Coke Co.*, *McKewan's Case* (1877), 6 Ch. D. 447; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925.

*See, generally*, DAMAGES.

**Where debtor bankrupt.**—*See* BANKRUPTCY, Vol. IV., pp. 271, 272, Nos. 2517–2550, & Sub-sect. 4, *ante*.

**Winding up of company.**—*See* COMPANIES, Vol. X., pp. 932–933, Nos. 6385–6397.

#### SUB-SECT. 8.—RIGHT TO COSTS.

*See, generally*, DAMAGES, Vol. XVII., pp. 109–114, Nos. 209–240.

**998. General rule.**—The question as to the right to recover the costs of defending an action has frequently arisen. . . . The proper course is to leave it to the jury to say whether or not it was a reasonable thing to defend, & whether the defence was conducted in a reasonable manner (*GROVE, J.*).—*MORS-LE-BLANCH v. WILSON* (1873), L. R. 8 C. P. 227; 42 L. J. C. P. 70; 1 Asp. M. L. C. 605; *sub nom.* *LE-BLANCH v. WILSON*, 28 L. T. 415; 21 W. R. 109.

*Annotations*:—*Reid*, *Baxendale v. L. C. & D. Ry.* (1874), L. R. 10 Exch. 35; *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Agius v. Great Western Colliery Co.* (1899), 47 W. R. 403. *Mentd.* *Furness, Withy v. White*, [1891] 1 Q. B. 483.

**999.**—[A surety who is called upon to pay the debt due or duty owing from the principal may well be justified in defending an action at the principal's expense (*QUAIN, J.*).—*BAXENDALE v. LONDON, CHATHAM & DOVER RY. CO.* (1874), L. R. 10 Exch. 35; 44 L. J. Ex. 20; 32 L. T. 330; 23 W. R. 167, Ex. Ch.

*Annotations*:—*Reid*, *Fisher v. Val De Travers Asphalte Co.* (1876), 1 C. P. D. 511; *Evans v. Bullock* (1877), 35 L. T. 34; *Hornby v. Cardwell* (1881), 8 Q. B. D. 329; *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413; *Hooper v. Bromet* (1904), 90 L. T. 234; *The Millwall*, [1905] 1 P. 155.

**1000. Costs of defending action—Right to prove for—Bankruptcy of principal—Extent of Crown.**—

An extent of the Crown was taken out against a surety of a bkpt. who paid the debt, after disputing it some time, & was put to an expense thereby:—*Held*: he should, notwithstanding he disputed the payment of a just debt, be admitted to prove the expenses of such suit under the commission against the principal.—*Re GARWAY*,

*Ex p. MARSHALL* (1751), 1 Atk. 262; 20 E. R. 167.

**1001.**—**Brought by co-surety.**—*LAWSON v. WRIGHT* (1780), 1 Cox, Eq. Cas. 275; 29 E. R. 1181.

*Annotations*:—*Consd.* *Hitchman v. Stewart* (1855), 3 Drew. 271. *Reid*, *Berwick-upon-Tweed Corp. v. Murray* (1857), 7 Do. G. M. & G. 497; *Re Fox, Walker, & P. Bishop* (1880), 15 Ch. D. 400; *Re Snowden, & P. Snowden* (1881), 17 Ch. D. 44; *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514; *Stirling v. Burdett*, [1911] 2 Ch. 418.

**1002.**—**Improperly defended—Action against ball.**—*FISHER v. FALLOWS*, No. 873, *ante*.

—**Bill of exchange.**—*See* BILLS OF EXCHANGE, Vol. VI., pp. 337–339, Nos. 2214–2250.

**1003. Costs of judgment by default—When sanctioned by principal—Evidence of sanction.**—*BLYTH v. SMITH*, No. 1816, *post*.

**1004.**—**When no previous notice of default.**—Pltf. guaranteed that deft. would upon demand from time to time pay to A. what should be due. A demand was made upon deft. by A., & upon non-payment a writ was issued against pltf. for the amount, the writ being the first notification to him of the amount being due & unpaid. He allowed judgment to go by default, & an execution was levied upon his goods:—*Held*: he might recover against deft. the costs of the writ at the suit of A., but not the costs of the subsequent proceedings.—*PIERCE v. WILLIAMS* (1851), 23 L. J. Ex. 322.

**1005. Costs of execution—Levied after judgment.**—*PIERCE v. WILLIAMS*, No. 1001, *ante*.

**1006. Costs of proceedings for inquiries—Abandonment of railway undertaking.**—The sureties of a railway co., owners of the Parliamentary fund deposited in ct., mortgaged the fund. On the abandonment of the undertaking the usual inquiries were directed & the sureties had the conduct of the proceedings. On application for payment out:—*Held*: they were not entitled to their costs incurred in the proceedings wherein the inquiries were directed.—*Re LANCA-SHIRE, DERBYSHIRE & EAST COAST RAILWAY ACTS*, 1891 to 1896, *Re LINCOLN & EAST COAST RAILWAY ACTS*, 1897 to 1902, [1903] 2 Ch. 711; 72 L. J. Ch. 789; 52 W. R. 26; 48 Sol. Jo. 15.

#### SUB-SECT. 9.—RIGHT TO DAMAGES.

**1007. Damages in addition to debt.**—*FORD v. STOBIDGE*, No. 912, *ante*.

**1008.**—[—]*BADELEY v. CONSOLIDATED BANK*, No. 854, *ante*.

**1009. Damages incurred by ball.**—*FISHER v. FALLOWS*, No. 873, *ante*.

#### SECT. 5.—ENFORCEMENT OF RIGHTS.

##### SUB-SECT. 1.—ACTION FOR INDEMNIFICATION.

**1010. Sureties may sue separately—On joint covenant—When interest is several.**—Though a covenant be joint in its terms, yet if the interests of the covenantees be several, each may sue

#### PART VII. SECT. 4, SUB-SECT. 8.

**998 i. General rule.**—Judgment was obtained by pltf. against deft., who in the relation of principal & surety. The surety paid pltf. the amount of their debt & costs, took an assignment of the judgment, & then proceeded to enforce it against his principal:—*Held*: the costs as well as the debt were recoverable by the surety, as against his principal.—

*VICTORIA MUTUAL INSURANCE CO. v. FREEL* (1883), 10 P. R. 45.—*CAN.*

*n. Unsuccessful defence—Due to conduct of principal.*—Where a surety, in consequence of the conduct of his principal incur costs in unsuccessfully defending an action instituted by the creditor against him, he is entitled to recover such costs from his principal.—*DEVENISH v. JOHNSTONE* (1847), 2 Men. 82.—*S. AF.*

#### PART VII. SECT. 5, SUB-SECT. 1.

*o. Surety for guardian of infant—Indemnification against loss through misconduct of guardian.*—*M.* was appointed guardian of *P.*, an infant; in less than one year, *M.* expended \$500 of the infant's capital, & was about to make a loan of the infant's money, on property, which was not a sufficient security.

Pltf., who was surety for *M.*, applied

**Sect. 5.—Enforcement of rights: Sub-sects. 1, 2 & 3.**  
**Part VIII. Sects. 1 & 2: Sub-sect. 1, A.]**

separately for a branch.—*WITHERS v. BIRCHAM* (1824), 3 B. & C. 254; 5 Dow. & Ry. K. B. 106; 3 L. J. O. S. K. B. 30; 107 E. R. 728.  
*Annotations:—***Reid.** *Palmer v. Sparshott* (1842), 4 Man. & G. 137; *Sorsbie v. Park* (1843), 12 M. & W. 146.

1011. ————.]—*PALMER v. SPARSHOTT*, No. 1888, *post*.

Right of indemnity generally, *see* Sect. 2, *ante*.

**SUB-SECT. 2.—THIRD PARTY NOTICE.**

*See* R. S. C., Ord. 16, rr. 48–55; C. C. R., Ord. 11; & *generally*, PRACTICE.

1012. Right to serve third party notice—On debtor—No corresponding right in debtor.]—*Re KITCHIN, Ex p. YOUNG*, No. 708, *ante*.

1013. Right to sign judgment against debtor—On third party notice—Before satisfaction by surety.]—Deft. who is entitled to an indemnity from a co-deft. upon a special agreement is entitled to sign judgment against his co-deft. [on third party notice] for the amount of his (deft.'s) liability before he has actually paid anything in discharge of it.—*ENGLISH & SCOTTISH TRUST CO. v. FLATAU* (1887), 36 W. R. 238, D. C.

**SUB-SECT. 3.—SET-OFF.**

*See* R. S. C., Ord. 19, r. 3; C. C. R., Ord. 10, r. 2; & *generally*, SET-OFF.

1014. Set-off by surety—Action against surety & debtor—Money paid to use of debtor.]—A. was employed as storekeeper by B. & C., who were joint adventurers in a mine, & he was authorised to draw bills on B. for money laid out on account of the mining co. The bills were discounted by a banker, & the payment of them was guaranteed to him by B. & C. B. having been arrested, A., in order to provide funds to procure B.'s discharge, drew on B. a bill purporting to be on account of the mining co. The banker discounted the bill, & paid the amount to B. C. was afterwards compelled to take up the same in consequence of his guarantee. In an action brought by A. against B. & C. for his salary:—*Held*: C. could not set off the amount of the bill.—*JONES v. FLEMING* (1827), 7 B. & C. 217; 6 L. J. O. S. 113; 108 E. R. 701.

1015. ———— Action by debtor—Money paid under execution.]—*RODGERS v. MAW*, No. 928, *ante*.

1016. ———— On what right rests—Exoneration by principal.]—Pltfs. claimed in this case to receive from defts., the contractors, a sum in their hands, & a further sum for non-completion of the line within the stipulated time. By counter-claim defts. sought to recover similar sums from the Trustees (Corp.) on their guarantee. By an agreement of Nov. 21, 1889, the price to be paid for the construction of the works was fixed at the whole capital of the co. The money as received was to be paid to the bankers, & made applicable for payment to the contractors. By agreements of Dec. 1889 a sale of shares & debentures was arranged, & the bankers guaranteed the interest on the debentures & preference shares up to the time fixed for completion of the works. By agreement of Dec. 31, 1889, the contractors entered into an undertaking with the co. for the payment of such interest. During the progress of the works

the business of the bankers was transferred to a limited co., which eventually went into liquidation & such banking co. were allowed to continue as bankers on the guarantee of the Trustees Corp. The works were not completed for more than a year after the time fixed for completion. Interest on the debentures & preference shares in the meantime became due which was not paid by the contractors, & was paid by the co. only so far as concerned the debentures. Subsequently this action was brought, & the matters in dispute were referred to arb'n. The award was made in Nov. 1894:—*Held*: inasmuch as the debt of the bankers was not due at law to the contractors, this sum could in ordinary circumstances not be set off against them, yet, as the contractors were entitled to sue in their own name. set-off was available, & as the right of set-off in equity of a surety rested on exoneration by his principal, *Bechervaise v. Lewis*, No. 901, *ante*, was an authority as to what assets in the bankers' liquidation were available for this purpose.—*ALCOY & GANDIA RAILWAY & HARBOUR CO., LTD. v. GREENHILL* (1897), 76 L. T. 542; 41 Sol. Jo. 330; *on appeal* (1898), 79 L. T. 257, C. A.

Director surety to company.]—*See* COMPANIES, Vol. IX., p. 473, No. 3105.

1017. Set-off by debtor—Against principal creditor—Whether destroyed by action against surety.]—*ABRAHAM v. HANNAY* (1843), 1 L. T. O. S. 430.

1018. ———— Debtor also surety to creditor—On separate transaction.]—A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B. after his debts, etc., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, & A. was compelled to pay the notes. C. died, & then the assignee under his insolvency took out letters of administration, *de bonis non*, of B. & sued A. on the bond:—*Held*: A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt.

The obligor in a bond, becoming surety for advances to the obligee, & being, after the insolvency of the obligee, compelled to pay the debt for which he had become surety, is entitled to set off the sum so paid against the amount due upon the bond.—*JONES v. MOSSOP* (1844), 3 Hare, 568; 13 L. J. Ch. 470; 8 Jur. 1064; 87 E. R. 506.

*Annotations:—***Reid.** *Cochrane v. Green* (1860), 9 C. B. N. S. 418; *Re Willis, Percival, Ex p. Morier* (1879), 12 Ch. D. 491. **Mentd.** *Freeman v. Lomas* (1851), 9 Hare, 109; *Wilson v. Leslie* (1857), 5 W. R. 815; *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29.

1019. ———— Available to surety—Action against surety.]—*BECHERVaise v. LEWIS*, No. 901, *ante*.

1020. ———— Not affected by existence of surety.]—The indorser of a bill of exchange, who has been compelled by the bkpy. of the acceptor to take it up at maturity, may set off the amount of such bill against a debt to the estate of the acceptor, without being compelled to have recourse to a prior indorser, or being affected by any collateral security which such prior indorser may have.—*MCKINNON v. ARMSTRONG BROTHERS & CO.* (1877), 2 App. Cas. 531; 36 L. T. 482, H. L. *Annotation:—***Mentd.** *Re Daintrey, Ex p. Mant*, [1900] 1 Q. B. 546.

Against surety—Action for debt & interest—& costs of defending action by creditor.]—Declaration that, in consideration that pltf. would

to have the guardian removed, & for an account, & to restrain the guardian from loaning the infant's money, as

proposed:—*Held*: the surety was justified in asking to be indemnified against loss by reason, of the neglect

or misconduct of the guardian.—*PORR v. CARROLL* (1895), 27 N. S. R. 467,—CAN.

accept, for deft.'s accommodation, a bill of exchange drawn by deft. on pltf., & would deliver the same to deft. in order that he might negotiate it for his own use, deft. promised pltf. to indemnify & save him harmless from any consequent loss or damage. Averment, that pltf. accepted the bill & delivered it to deft. Breach, that deft. did not indemnify or save harmless pltf. from loss or damage; & pltf., as acceptor, was obliged to & did pay W., the holder, the amount of the bill & interest, & the costs of an action on the bill by W. against pltf., as acceptor; & pltf. also incurred costs & expenses in defending & settling such action. Pleas—First, to so much of the declaration as relates to pltf.'s claim in respect of his payment to W. of the amount of the bill & interest, a set-off. Demurrer. Joinder in demurrer. Secondly, to so much of pltf.'s claim as relates to the costs of the action brought by W. against pltf., & the costs & expenses incurred by pltf. in defending & settling

the said action, that the whole of the said costs & expenses were incurred by pltf. at deft.'s request; concluding with a set-off. Replication thereto, that the said costs & expenses were not, nor was any part thereof, incurred at deft.'s request as alleged. Demurrer. Joinder in demurrer:—*Held*: the first plea was good, for pltf.'s claim in respect of the amount of the bill & interest was a liquidated demand, capable of being ascertained with precision at the time of pleading; & was separable from the rest of the claim, though mixed up with it in one count; the second plea was bad, being pleaded to costs & expenses incurred by pltf., but not paid, & therefore not constituting a liquidated demand to which a set-off could be pleaded.—*GRAMPTON v. WALKER* (1860), 3 E. & E. 321; 30 L. J. Q. B. 19; 7 Jur. N. S. 43; 9 W. R. 98; 121 E. R. 463.

*Annotation*:—*Mentd.* *Johnson v. Skaple* (1869), 10 B. & S. 727.

## Part VIII.—Rights and Liabilities of Co-Sureties inter se.

### SECT. 1.—WHO ARE CO-SURETIES.

1022. Supplemental sureties—Guaranteeing both debtor & original sureties.]—*COOKE v. —*, No. 1047, *post*.

1023. —————.]—*GRAYTHORNE v. SWINBURN*, No. 1048, *post*.

1024. —————.]—*Re DENTON'S ESTATE, LICENSES INSURANCE CORPN. & GUARANTEE FUND, LTD. v. DENTON*, No. 9, *ante*.

### SECT. 2.—CONTRIBUTION INTER SE.

#### SUB-SECT. 1.—RIGHT TO CONTRIBUTION.

##### A. In General.

1025. No right at common law—Except by custom of London.]—O. & J. were bound as sureties with one A. to B. who recovered against J. in London, & had execution against him, & now J. sued O. to have of him contribution to the execution, *ut ultique eorum on retur pro rata* according to the custom of London, & because no action lies by common law, but only by custom in such cities the cause was remanded, for otherwise pltf. should be without remedy.—*OFFLEY & JOHNSON'S CASE* (1584), 2 Leon. 166; 74 E. R. 418.

*Annotations*:—*Reid.* *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. *Mentd.* *Caudell v. Shaw* (1791), 4 Term Rep. 361; *Beard v. Webb* (1800), 2 Bos. & P. 93.

1026. —————.]—*LAYER v. NELSON*, No. 944, *ante*.

1027. —————.]—*TOUSSAINT v. MARTINNANT*, No. 948, *ante*.

1028. —————.]—*WOLMERSHAUSEN v. GULLICK*, No. 1009, *post*.

1029. Equitable right.]—*DERING v. WINCHELSEA (EARL)*, No. 1050, *post*.

1030. —————.]—The discharge of a surety by the creditor has not the effect of a discharge of the

principal without reserve; & therefore a co-surety is not discharged. When it is ascertained, what each of the co-sureties has paid beyond his proportion, the equity as between them is arranged upon the principle of contribution for the excess.—*Ex p. GIFFORD* (1802), 6 Ves. 805; 31 E. R. 1318, L. C.

*Annotations*:—*Consd.* *Davies v. Humphreys* (1840), 6 M. & W. 153; *Kearsley v. Cole* (1846), 16 M. & W. 128; *Evans v. Brembridge* (1855), 2 K. & J. 174; *Webb v. Howitt* (1857), 3 K. & J. 438; *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 541. *Reid.* *Nicholson v. Revell* (1836), 4 Ad. & El. 675; *Thimbleby v. Barron* (1838), 3 M. & W. 210; *Hollier v. Eyre* (1842), 9 Cl. & Fin. 1; *Vyner v. Hopkins* (1842), 6 Jur. 889; *Thompson v. Lack* (1846), 3 C. B. 510; *Owen v. Homan* (1850), 13 Beav. 196; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Re Snowden, Ex p. Snowden* (1881), 17 Ch. D. 41; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Stirling v. Burdett*, [1911] 2 Ch. 418.

1031. —————.]—If one is a joint & several obligee or only a joint obligee there is a right of contribution against the other sureties in equity (*LORD ELDON, C.*)—*UNDERHILL v. HORWOOD* (1801), 10 Ves. 209; 32 E. R. 824, L. C.

*Annotations*:—*Reid.* *Evans v. Brembridge* (1855), 2 K. & J. 174; *In the Goods of Cowardin* (1901), 86 L. T. 261. *Mentd.* *Phillips v. Crawford* (1807), 13 Ves. 475; *Popple v. Edwards* (1813), 18 Ves. 358; *Copple v. Middleton* (1818), 2 Madd. 410; *Simpson v. Howden* (1837), 3 My. & Cr. 97; *Carew's Case* (1855), 7 De G. M. & G. 43; *Geinier v. Walsh* (1855), 1 Jur. N. S. 828; *Traill v. Baring* (1864), 4 De G. J. & Sm. 318; *Luke v. South Kensington Hotel Co.* (1879), 27 W. R. 514.

1032. —————.]—*GRAYTHORNE v. SWINBURN*, No. 1048, *post*.

1033. —————.]—The Bank of Scotland having discounted bills to the amount of £8,000 which were dishonoured, the acceptors becoming bkpts. agreed with the drawers to retain the dishonoured bills, & receive the dividends which might become payable from the bkpt. estates; & as additional security, to take four promissory notes, indorsed by four sureties, for £2,000 each, to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of £2,000 each.

### PART VIII. SECT. 2, SUB-SECT. 1.—A.

1029 i. *Equitable right.*]—A co-surety who has money in his hands to be applied towards payment of the creditor, may be compelled by his co-surety to pay such money to the creditor or to the co-surety himself if the creditor has already been paid by him.—*MACDONALD v. WHITFIELD, WHITFIELD & MERCHANTS BANK OF*

CANADA (1896), 27 S. C. R. 94.—*CAN.*

1029 ii. —————.]—*MAXWELL'S CREDITORS & HERON'S TRUSTEES* (1792), 5 Mor. Dict. 2136.—*SCOT.*

1029 iii. —————.]—Where a bond granted by six obligants was retired by a third party, who offered a discharge to each co-obligant, on payment of his proportion, but refused to assign the

bond to three of the co-obligants who tendered full payment.—*Held*: these co-obligants were bound to pay their proportion.—*GILMOUR v. FINNIE* (1832), 11 Sh. (Cl. of Sess.) 193.—*SCOT.*

1029 iv. —————.]—*KROON v. ENSCHEDÉ*, [1900] T. S. 374.—*S. AF.*

1029 v. —————.]—*NORWORTHY v. YORKE*, [1921] C. P. D. 404.—*S. AF.*

*Sect. 2.—Contribution inter se: Sub-sect. 1, A., B., C. & D.]*

This agreement having been carried into effect; when the notes were nearly due, upon the application of the original debtors for delay of payment, the Bank of Scotland gave up one of the promissory notes, & accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, & with the fourth surety, a treaty was carried on, respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the Bank to the original debtors, upon the treaty for the renewal of the notes:—*Held*: the fourth surety & his estate, by the legal effect of the transaction, was discharged as to three-fourths, & liable only as to one fourth, of the balance due upon the dishonoured bills, after giving credit for all moneys received or receivable from any of the parties upon the bills, or their estates; & on payment of such fourth part of such balance, the Bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills.

The principle established in *Dering v. Winchelsea* (Earl), No. 1050, *post*, is universal that the right of contribution is founded on doctrines of equity, it does not depend upon contract. If several persons are indebted & one makes the payment the creditor is bound in conscience, if not by contract, to give the party paying the debt all his remedies against the other debtors (LORD REEDSDALE).—*STIRLING v. FORRESTER* (1821), 3 Bli. 575; 4 E. R. 712.

*Annotations*:—*Consd.* Ward v. National Bank of New Zealand (1883), 8 App. Cas. 755; Wolmershausen v. Gullick, [1893] 2 Ch. 514. *Reid*. Duncan, Fox v. North & South Wales Bank (1880), 6 App. Cas. 1; Mackintosh v. Walmsley (1884), 51 L. T. 19; Bacon v. Camphausen (1888), 58 L. T. 851. *Mentd.* Itanbon S.S. Co. v. London Assoc., [1900] A. C. 6; Mills v. United Counties Bank, [1912] 1 Ch. 231.

1034. —.]—*COOPE v. TWYNAM*, No. 1054, *post*.

1035. —.]—(1) The directors of a co. advanced moneys of the co. upon an unauthorised security, & two sums of £600 & £400 so lent were lost. The £600 formed part of a loan of £800, & the £400 formed part of a loan of £1,000, which was granted by the board of directors & of which £100 was actually advanced & repaid, & a second £400 was advanced & not repaid. In an action by the co. against one of the directors who had taken part in granting the loans, he was held liable to pay the two sums of £600 and £100 to the co., & having paid them he sued three of his co-directors for contribution. One of debts. was not present at the meeting at which the loan of £800 was granted, & at which a cheque for the £800 was drawn, but he was present at a subsequent meeting at which the minutes of the former meeting were read & confirmed. The £800 had been already paid to the borrower:—*Held*: whether debt. would or would not have been liable to the co., there was no equity to compel him to contribute to pltf. in respect of the £600.

(2) The same debt. was present at the meeting at which the loan of £1,000 was granted, when he protested strongly against it. He was present at a subsequent meeting at which the minutes of the first meeting were read & confirmed, & he then signed a cheque which was drawn for the first £400:—*Held*: by signing the cheque he had adopted the whole loan of £1,000, & he was therefore liable to contribute in respect of the second £400 which was lost.

(3) Another debt. filed a liquidation petition under Bkpcy. Act, 1869 (c. 71), & had obtained a discharge from his creditors before the action was brought by the co. against pltf.:—*Held*: this

debt.'s liability to contribute was a liability "incurred by means of a breach of trust" within sect. 49 of the Act, & debt. was not released from it by the discharge.

(4) The third debt. died after the commencement of the action, & his administrator was then made a debt.:—*Held*: the liability to contribute survived against the debt.'s estate.

(5) The principle established in the case of *Dering v. Winchelsea* (Earl), No. 1050, *post*, is universal that the right & duty of contribution is founded in doctrines of equity & it does not depend on contract. If several persons are indebted & one makes payment the creditor is bound in conscience if not by contract to give the party paying the debt all his remedies against the other debtors (PEARSON, J.).—*RAMSKILL v. EDWARDS* (1885), 31 Ch. D. 100; 55 L. J. (Ch. 81; 53 L. T. 949; 34 W. R. 96; 2 T. L. R. 37.

1036. —.]—The directors of a co. issued a prospectus on the faith of which B. applied for & was allotted shares in the co. The co. went into liquidation. B. brought an action, under Directors Liability Act, 1890 (c. 64), s. 3, against three of the directors for compensation on the ground that the prospectus contained an untrue statement. Judgment was given in his favour with costs & an inquiry as to damages directed. Defts. appealed to the Ct. of Appeal & the House of Lords, but both appeals were dismissed with costs. A compromise was arrived at under which the inquiry was dropped, & B. was paid compensation at the rate of 15s. per share, his taxed costs of the inquiry, & £700 additional costs. Many other shareholders made claims, which were also compromised, & the three debts. in B.'s action & some of the other directors paid large sums in this way. They did not take advantage of third party procedure, but brought this action against the remaining directors & the exors. of three of them, who had died since the prospectus was issued, to enforce, under Directors Liability Act, 1890 (c. 64), s. 5, contribution by them of their share of the compensation which had been paid:—*Held*: if B. had brought an action against all the directors, including those who were now dead, he would have succeeded; the right to contribution, inasmuch as under the statute it arose as if from contractual relations between the parties, could be enforced against the estates of the deceased directors, & debts. must pay, with interest, their share of the compensation & the costs of B. & other shareholders which had been paid; but they were not liable to contribute in respect of the costs of debts. in the first case B.'s extra costs, the costs of the appeals, & other payments which had been made otherwise than under the provisions of the Act.

In cases of contract the right to recover contribution arises (except in cases of express stipulation), not from any notion of implied contract but as an equitable right springing from the relations of the parties as persons liable for the same debt (WARRINGTON, J.).—*SHEPHEARD v. BRAY*, [1906] 2 Ch. 235; 75 L. J. Ch. 633; 95 L. T. 414; 51 W. R. 556; 22 T. L. R. 625; 50 Sol. Jo. 526; 13 Mans. 279; *on appeal*, [1907] 2 Ch. 571, C. A. *Annotation*:—*Mentd.* Geipel v. Peach, [1917] 2 Ch. 108.

1037. —.]—Pltfs., an American insurance co., issued a policy by which they covenanted to pay an American bank for any loss or damage occasioned by the dishonesty of any of the employees according to an amount appended to each name in a sched.

Among the employees guaranteed was K. who was guaranteed up to 2,500 dollars. The bank also took out a policy at Lloyd's for £40,000, by

which the underwriters were to be liable for loss caused by the dishonesty of employees, & also for loss sustained by the loss or destruction on the owners' premises of bonds, banknotes, etc., owing to fire or burglary. K. made defalcations to the extent of 2,680 dollars, & the bank claimed from plffs. the full amount of the insurances, viz., 2,500 dollars, leaving a balance of 180 dollars. The bank claimed 180 dollars on the Lloyd's policy, which was paid.

The present action was brought by plffs. against deft., who was one of the underwriters on the Lloyd's policy, for contribution in respect of the loss:—*Held*: deft. was liable to pay a proportion of the whole loss of 2,680 dollars in the ratio of 2,680 & 2,500.

Contribution between co-insurers depends not upon contract but upon equity (HAMILTON, J.).—AMERICAN SURETY CO. OF NEW YORK v. WRIGHTSON (1910), 103 L. T. 663; 27 T. L. R. 91; 16 Com. Cas. 37.

*Annotation*:—*Mentd.* The Colorado, [1923] P. 102.

1038. Whether founded on contract.]—DERING v. WINCHELSEA (EARL), No. 1050, *post*.

1039. —.]—STIRLING v. FORRESTER, No. 1033, *ante*.

1040. —.]—RAMSKILL v. EDWARDS, No. 1035, *ante*.

1041. —.]—AMERICAN SURETY CO. OF NEW YORK v. WRIGHTSON, No. 1037, *ante*.

1042. —.]—Implied contract.]—CRAYTHORNE v. SWINBURNE, No. 1048, *post*.

1043. —.]—SHEPHEARD v. BRAY, No. 1036, *ante*.

Contribution between insurance underwriters.]—*See* INSURANCE.

#### B. On Bankruptcy of Co-Surety.

1044. Proof of debt in bankruptcy.]—Where plff., deft., & another person were co-sureties for A. by a joint & several promissory note payable on demand, & plff. paid less than his share before deft.'s bkpcy. but subsequently more than his proper proportion:—*Held*: in an action by him for one-third of the sum paid, the case was not within 6 Geo. 4 (c. 16), s. 52, as plff. was not a "person liable for" the bkpt.'s debt, & therefore he was entitled to recover the sum so claimed.—WALLIS v. SWINBURNE (1847), 1 Exch. 203; 17 L. J. Ex. 169; 11 Jur. 781; 151 E. R. 86.

*Annotations*:—*Refd.* *Re* Clark, *Ex p.* Stokes (1848), De G. 618; *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468; *Adkins v. Farrington* (1860), 5 H. & N. 586. *Mentd.* *Greet v. Webb* (1860), 5 H. & N. 599.

—.]—*See, further*, BANKRUPTCY, Vol. IV., pp. 272–273, Nos. 2554–2560.

1045. Action for money paid—Bankruptcy not defence thereto—Liability unascertained at date of bankruptcy.]—In Jan. 1860, a sum of money in Consols was lent to the promoters of a bill before Parliament. Plffs., deft. & others entered into an undertaking with the lenders that if the bill was thrown out the Consols should be returned, &

that if it passed, which was the event that happened, an equal amount of stock should be transferred to the lenders, & a sum in the nature of interest on the value of the Consols at the time they were lent, from the end of six months to the date of the transfer, should be paid to the lenders. In the following Apr. deft. was adjudged bkpt. In July he obtained his order of discharge. In Aug. the bill was passed, but the Consols were not transferred till the May following, & plffs. were thereupon compelled to pay, under their agreement, a sum of money as the equivalent for interest:—*Held*: in an action against the deft. for contribution in respect of the amount so paid, that his bkpcy. afforded no answer to the claim, as his liability could not have been valued at the date of the adjudication so as to be provable, either under 12 & 13 Vict. c. 106, s. 178 or 21 & 25 Vict. c. 131, s. 151.—CARY v. DAWSON (1869), 1 L. R. 4 Q. B. 568; 10 B. & S. 663; 38 L. J. Q. B. 300; 21 L. T. 23; 17 W. R. 916.

*Annotations*:—*Mentd.* *Holmes v. Symons* (1871), L. R. 13 Eq. 66; *Re Kelson, Tritton, Ex p. Wiseman* (1871), 7 Ch. App. 35.

Liability of solvent sureties.—For share of those insolvent.]—*See* Nos. 1073–1077, *post*.

#### C. Bills of Exchange.

*See* BILLS OF EXCHANGE, Vol. VI., pp. 414–415, Nos. 2681–2686.

#### D. Sureties under Separate Instruments.

1046. General rule.]—WARE v. HORWOOD, No. 938, *ante*.

1047. Supplemental suretyship—Guaranteeing debtor & original surety—No right of contribution.]—Three bound in a bond, one being principal & the other two sureties; afterwards a fourth man becomes bound to the obligee, that if the other three did not pay according to the condition of the bonds, that he would pay; a month after one of the two sureties pays the money & prefers his bill against the fourth, now, for contribution; & the question was, whether he should be bound to contribute, his being but a supplemental security.—(COOKE v. — (1886), *Freem. Ch.* 97; 22 E. R. 1082; *sub nom.* COOKE'S CASE, 2 Eq. Cas. Abr. 223. *Annotation*:—*Refd.* *Craythorne v. Swinburne* (1807), 14 Ves. 160.

1048. —.]—No contribution in favour of one surety against another: his engagement, according to the bond, & parol evidence, which was held admissible, being, not as co-surety, but, without the privity of the other, as a distinct collateral security, limited to default of payment by the principal & the other surety.

Upon the relation of principal & surety some things are very clear. It has been long settled, that, if there are co-sureties by the same instrument, & the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this ct., either upon a principle

1038 i. Whether founded on contract.]—The doctrine of contribution does not depend on contract but upon general principles of equity, & it is not an incident of suretyship alone.—TOOHEY v. McCULLA (1889), 10 N. S. W. R. 375.—CAN.

1038 ii. —.]—OSTRANDER v. JARVIS (1909), 13 O. W. R. 375.—CAN.

p. Liability to creditor must exist.]—CARNEY v. PHALEN (1883), 4 R. & G. 126.—CAN.

g. Sureties bound in separate sums—In same bond.]—Several cautioners

binding themselves in the same bond for separate & distinct sums for the same individual, & declaring that they were not bound *singuli in solidum*:—*Held*: there was *inter se* no claim for communication of cases.—LAWRIE v. STEWART (1823), 21 Fac. Coll. 274; 2 Sh. (Ct. of Sess.) 368.—SCOT.

r. Agreement amongst sureties to waive contribution—Binding only on parties to agreement.]—Where some of several parties to a guarantee come to an agreement in respect of their mutual liabilities, it does not affect the guarantors who are not parties to it, & if

it amounts to a waiver of contribution among the parties to it, the remaining guarantors are still liable to contribution.—LI PO HUNG v. YIK LUNG BAK, LI PO LUNG, LI PO YUNG, LI LING SHI & LI PAK (1912), 7 Hong Kong L. R. 132.—HONG KONG.

#### PART VIII. SECT. 2, SUB-SECT. 1.—D.

1046 i. General rule.]—Sureties by different instruments for the same principal debt are liable to contribute in proportion to the respective amounts for which they have agreed to be sureties.—OSTRANDER v. JARVIS (1909), 13 O. W. R. 17; 13 O. W. R. 375.—CAN.

*Sect. 2.—Contribution inter se: Sub-sect. 1, D., E. & F.; sub-sect. 2, A. & B. (a).]*

of equity, or upon contract, to call upon his co-surety for contribution; & I think, that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense; that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons; & it must be upon such a ground, of implied *assumpsit*, that in modern times cts. of law have assumed a jurisdiction upon this subject; & a jurisdiction convenient enough in a case simple & uncomplicated; but attended with great difficulty, where the sureties are numerous (LORD ELDON, C.).—*CRAYTHORNE v. SWINBURNE* (1807), 14 Ves. 160; 33 E. R. 482, L. O.

*Annotations:—*Consd. *Newton v. Chorlton* (1853), 2 Drew. 333; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton*, [1904] 2 Ch. 178. *Reid. Hodgson v. Shaw* (1834), 3 My. & K. 183; *Davies v. Humphreys* (1840), 6 M. & W. 153; *Kemp v. Finden* (1844), 12 M. & W. 421; *Farebrother v. Wodehouse* (1856), 23 Beav. 18; *Pearl v. Deacon* (1857), 21 Beav. 186; *Watts v. Shuttleworth* (1860), 5 H. & N. 235; *Reynolds v. Wheeler* (1861), 10 C. B. N. S. 561; *Bevan v. Whitmore* (1863), 15 C. B. N. S. 433; *Whiting v. Burke* (1870), L. R. 10 Eq. 539; *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Wolmershausen v. Gullick*, [1893] 2 Ch. 511; *Stirling v. Burdett*, [1911] 2 Ch. 418. *Mentd. Batard v. Hawes*, Same v. Douglas (1853), 2 E. & B. 287; *Re Bentinck, Bentinck v. Bentinck* (No. 2) (1899), 80 L. T. 71.

1049. ————]—*Re DENTON'S ESTATE, LICENSES INSURANCE CORPN. & GUARANTEE FUND, LTD. v. DENTON*, No. 9, *ante*.

1050. Sureties for same engagement.—Separate bonds.—Liability on respective penalties.]—The doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity on the ground of equality of burden & benefit. Therefore where three sureties are bound by different instruments, but for the same principal & the same engagement, they shall contribute.—*DERING v. WINCHELSEA (EARL)* (1787), 1 Cox, Eq. Cas. 318; 29 E. R. 1184; *sub nom. DEERING v. WINCHELSEA (EARL)*, 2 Bos. & P. 270.

*Annotations:—*Consd. *Craythorne v. Swinburne* (1807), 14 Ves. 160; *Stirling v. Forrester* (1821), 3 Bl. 575. *Distd. Coope v. Twynam* (1823) *Turn. & R. 426.* Consd. *Pendlebury v. Walker* (1841), 4 Y. & C. Ex. 424. *Appl. Whiting v. Burke* (1870), L. R. 10 Eq. 539. Consd. *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1. *Appl. Steel v. Dixon* (1881), 17 Ch. D. 825. Consd. *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. *Reid. Ware v. Horwood* (1807), 14 Ves. 28; *Mayhew v. Crickett* (1818), 2 Swan. 185; *Collins v. Prosser* (1823), 3 Dow. & Ry. K. B. 112; *Newton v. Chorlton* (1853), 2 Drew. 333; *Evans v. Brembridge* (1856), 8 De G. M. & G. 100; *Lake v. Bruton* (1856), 2 Jur. N. S. 839; *Bevan v. Whitmore* (1863), 15 C. B. N. S. 433; *Polak v. Everett* (1876), 45 L. J. Q. B. 369; *Re Arcedeckne, Atkins v. Arcedeckne* (1883), 24 Ch. D. 709; *Ramskill v. Edwards* (1885), 31 Ch. D. 100; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton*, [1903] 2 Ch. 670; *Godsell v. Lloyd* (1911), 27 T. L. R. 383. *Mentd. Re Jackson & Gowing, Ex p. Hunter, Ex p. Dixon* (1820), Buck. 552; *Re Direct Birmingham, Oxford, Reading & Brighton Ry. Spottiswoode's Case, Amisnuck's Case* (1855), 6 De G. M. & G. 345; *Moule v. Garrett* (1872), L. R. 7 Exch. 101; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629; *Leigh v. Dickeson* (1883), 12 Q. B. D. 194; *Edmunds v. Wallingford* (1886), 14 Q. B. D. 811; *Bacon v. Camphausen* (1888), 58 L. T. 851; *Re Bentinck, Bentinck v. Bentinck* (No. 2) (1899), 80 L. T. 71; *Bonner v. Tottenham & Edmonton Permanent Investment Bldg. Soc.*, [1899] 1 Q. B. 161; *Moxham v. Grant* (1899), 69 L. J. Q. B. 97; *Ituabon S.S. Co. v. London Assoc.*, [1900] A. C. 6; *Mills v. United Counties Bank*, [1912] 1 Ch. 231; *Moody v. Cox & Hatt*, [1917] 2 Ch. 71.

1051. ————]—*MAYHEW v. CRICKETT*, No. 1565, *post*.

1052. ————]—(1) If a banking co. agree that upon receiving the guarantee of a particular

person, they will advance a certain sum of money for the purpose of securing to the creditors of a trader a composition of 10s. in the pound, & setting up the trader in business again, & at the same time the co., being themselves creditors of the trader, enter into a secret arrangement with him by which they secure to themselves repayment of the difference between their composition & the full amount of their debt: this is a fraud upon the guarantor & upon the creditors, who execute the composition deed on the faith of the ostensible agreement, & the guarantor may sustain a bill in equity to set aside the guarantee.

(2) Where several persons are sureties for the payment of one sum of money, though by distinct instruments, & one pays more than an equal share of that sum, he may have contribution from his co-sureties; but if it be arranged by contract, which it may be, that each surety shall be answerable only for a given portion of one sum of money, in such case there is no right of contribution amongst the co-sureties.

(3) Where by the construction of the terms of a guarantee there is no right of contribution amongst the guarantors, any one of them may sustain a bill in equity to set aside the guarantee for fraud, without making his co-guarantors parties.—*PENDLEBURY v. WALKER* (1841), 4 Y. & C. Ex. 424; 10 L. J. Ex. Eq. 27; 5 Jur. 334; 160 E. R. 1072.

*Annotations:—*As to (2) *Reid. Steel v. Dixon* (1881), 17 Ch. D. 825; *Re Arcedeckne, Atkins v. Arcedeckne*, [1883] 24 Ch. D. 709; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton*, [1903] 2 Ch. 670.

1053. ————]—Effect of separate undertaking by one.—Subsequent to joint bond.]—A bond was executed by a principal & two sureties, with a stipulation that the sureties should not be discharged by any new arrangement between the creditor & the principal. One of the sureties compounded with his creditors, & by the terms of the bond the moneys secured became immediately payable. After this plff. signed a separate undertaking to become liable for the whole amount; & upon the principal becoming insolvent, the creditor sued plff. & obtained payment of the amount due. Plff. filed his bill against the solvent surety in the first bond for contribution:—*Held: plff. was entitled to contribution from deft.*—*WHITING v. BURKE* (1871), 6 Ch. App. 342, L. J.J.

1054. Sureties for different portions of debt.—No contribution.—Separate & distinct transactions.]—Where sureties are bound by different instruments for equal portions of a debt due from the same principal, & the suretyship of each is a separate & distinct transaction, there is no right of contribution between them.

It is admitted that the doctrine of contribution rests upon the principle of equality. The creditor has remedies, which he ought so to use, that the burden may be equally borne by all the sureties; & if from partiality or caprice, he chooses to enforce his remedies against only one of the sureties, the others may come into a ct. of equity & have that effected there, which, in conscience at least, the creditor should have done (LORD ELDON, C.).—*COOPE v. TWYNAM* (1823), *Turn. & R. 426*; 2 *Coop. temp. Cott.* 523; 37 E. R. 1164, L. C. *Annotation:—**Reid. Re Ennis, Coles v. Peyton*, [1893] 3 Ch. 238.

1055. ————]—*PENDLEBURY v. WALKER*, No. 1052, *ante*.

1056. ————]—Subsequent agreement to apportion whole debt.—Validity.]—Four persons who had become liable upon various bills & notes for the accommodation of C., there being however none



of the bills or notes upon which all the four were liable, being pressed for payment entered into a written agreement, which contained a recital that they were jointly liable upon certain bills given in favour of C. & by which they appointed W. their joint solr., to act for them in all matters relating to the bills, & gave him full authority to settle the same on the best terms he could.

The agreement then provided that "upon the amount being ascertained for which the liabilities can be discharged the parties to this arrangement undertake to provide the same in the proportion of one fourth each." W. was unable to effect any settlement, the bill holders having refused to accept less than the full amount due to them. One of the four persons, who were liable for & had paid the largest amount, filed a bill against the other three to enforce contribution according to the terms of the agreement.

*Semble*: the agreement was void for uncertainty inasmuch as it did not specify to what bills it was intended to relate, there being, in fact, no bills upon which the four persons were jointly liable.

But at any rate it was a condition precedent of the agreement that W. should be able to effect a composition with the bill holders, & as he was unable to do this the agreement came to an end. Bill dismissed.—*ARCEDECKNE v. HOWARD (LORD)* (1872), 27 L. T. 194; 20 W. R. 879, L. J.J.; *affd.* (1875), 45 L. J. Ch. 622, H. L.

1057. — Release of one surety.] — *WARD v. NATIONAL BANK OF NEW ZEALAND*, No. 1582, *post*.  
Guarantee insurance policies.] — *See* INSURANCE.

#### *E. When Right Arises.*

*See* Sect. 2, sub-sect. 2, *post*.

#### *F. Death of One Surety.*

*See* Part IX., Sect. 2, sub-sect. 11, C. (c) ii., *post*.

### SUB-SECT. 2.—WHEN RIGHT ARISES.

#### *A. Before Payment.*

Right to sue co-surety.] — *See* Sect. 2, sub-sect. 4, A. (a), *post*.

Where co-surety a bankrupt.] — *See* Sect. 2, sub-sect. 1, B., *ante*.

#### *B. After Payment.*

##### *(a) In General.*

1058. General rule—Surety entitled to contribution.] — *FLEETWOOD v. CHARNOCK* (1629), Nels. 10; Toth. 41; 21 E. R. 776.

1059. — — —.] — *MORGAN v. SEYMOUR* (1638), 1 Rep. Ch. 120; 21 E. R. 525.

*Annotation*: — *Consd. Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

1060. — — —.] — *WARE v. HORWOOD*, No. 938, *ante*.

1061. Effect of mode of joining as co-surety—At instance of surety—No contribution.] — Where deft. at the instance of pltf. became a joint security for a third person, & pltf. was forced to pay all the money, he cannot call on deft. for contribution

of a moiety. *Aliter* if he had become a joint security of his own motion.—*TURNER v. DAVIES* (1796), 2 Esp. 478, N. P.

*Annotations*: — *Reid. Batard v. Hawes, Batard v. Douglas* (1853), 2 E. & B. 287. *Mentd. Bevan v. Whitmore* (1863), 15 C. B. N. S. 433.

1062. — Of own motion—Liability to contribute.] — *TURNER v. DAVIES*, No. 1061, *ante*.

1063. Payment without assent of co-surety—Under subsequent separate security.] — (1) A surety in an indemnity bond, may bring an action for contribution against his co-surety although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond without the knowledge or consent of such co-surety.

(2) Though time given to the principal will, under certain circumstances, exonerate a surety; yet, time given to a surety, without the privity of his co-surety, will not, upon his paying the debt, affect his right of action for contribution against such co-surety.—*DUNN v. SLEE* (1817), 1 Moore, C. P. 2; Holt, N. P. 399, N. P.

1064. Time given to surety—Without privity of co-surety.] — *DUNN v. SLEE*, No. 1063, *ante*.

1065. Payment without demand by creditor—On promissory note—Not a voluntary payment.] — Where one of two persons, who as sureties for a third, signed together with the principal a joint & several promissory note, on the note becoming due, paid the amount, although no demand had been made or action brought against him by the holder: *Held*: such payment could not be considered voluntary, & he might sue his co-surety for contribution.—*PITT v. PURSORD* (1841), 8 M. & W. 538; 10 L. J. Ex. 475; 5 Jur. 611; 151 E. R. 1152.

1066. Payment out of funds of debtor—In hands of surety.] — A. & B., & two other persons, became sureties by a joint & several promissory note for £200, advanced to Y. Upon that occasion it was agreed between A. & Y., that A., who was indebted to Y. in £92 10s., should hold that sum as an indemnity against any amount he might be compelled to pay in the note. A. having been forced to pay an amount of nearly £50 sued B. for contribution of one-fourth part, as money paid:—*Held*: (1) A., not having paid more than the sum of £92 10s. was not entitled to contribution; (2) these facts formed a good defence under *non assumpsit*. — *GOPPEL v. SWINDEN* (1844), 1 Dow. & L. 888; *sub nom. GÖPEL v. SWINDEN*, 13 L. J. Q. B. 113; *sub nom. GÖPELL v. SWINDON*, 8 Jur. 340.

1067. Payment with aid of third party—Surety remainderman of entailed estate—Third party tenant for life—Mortgage of estate for payment of debt.] — Four young men, heirs apparent to landed estates, joined as co-sureties for a friend, C., in promissory notes to secure the sum of £13,000, for money lent & interest, in 1865. The debt was further secured by policies for £10,000 on the life of C. In 1866, H., one of the four, with the assistance of his father, B., paid off the £13,000 by means of a mtge. on the family estates, which were settled on E. for life with remainder to H., & obtained from the creditor an assignment of the policies. E. subsequently insured C.'s life for a

proportional share.] — A surety who has not paid to the creditor one-half the amount guaranteed by him & another, cannot recover from his co-surety any contribution to the amount he has paid.—*PAGRIATIDE v. DAVIS*, [1922] 2 W. W. R. 1114.—CAN.

10641. Time given to surety—Without privity of co-surety.] — *CAMERON v. BOULTON* (1882), 12 C. P. 570.—CAN.

### PART VIII. SECT. 2, SUB-SECT. 2.—B. (a).

1058 i. General rule—Surety entitled to contribution.] — *MURRAY v. GIBSON* (1880), 28 Gr. 12.—CAN.

1058 ii. — — —.] — A surety who pays the debt of his principal has the same rights against his co-surety that he has against the principal.—

*WOODS v. CREAGHE* (1828), 2 Hog. 50.—IR.

1058 iii. — — —.] — Competent for a cautioner who has paid only his share of the debt, to call upon his co-cautioner to pay his proportion.—*LOW v. FARQUHARSON* (1831), 9 Sh. (Ct. of Sess.) 411; 6 Fac. Coll. 290.—SCOT.

s. — — — On payment of pro-



**Sect. 2.—Contribution inter se: Sub-sect. 2, B. (a) & (b); sub-sect. 3, A.]**

further sum of £1,000. C. died in 1871, & the policy moneys were received by E. A., another of the co-sureties, having also died, H. claimed, in an action for the administration of A.'s estate, to be admitted to prove for an aliquot part of the £13,000:—*Held*: (1) H. & his father must be treated as one person for the purpose of the judgment, & H. was entitled to contribution as claimed by him, but he must set off against his claim the moneys received by him in respect of the policy of £10,000, subject to credit being given him for all premiums or other sums paid by him or his father in respect of the policy or the assignment thereof; (2) he was not bound to set off the moneys received under the policy of £1,000.—*Re ARCEDECKNE, ATKINS v. ARCEDECKNE* (1883), 24 Ch. D. 709; 53 L. J. Ch. 102; 48 L. T. 725.

*Annotations*:—*As to* (1) *Reid, Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Re Denton's Estate, Licenses v. Corpn. & Guarantee Fund v. Denton*, [1903] 2 Ch. 670.

**Sureties to bills of exchange.**—*See* **BILLS OF EXCHANGE**, Vol. VI., pp. 414–415, Nos. 2684–2686. **Method of reckoning contribution.**—*See* Sect. 2, sub-sect. 3, A., *post*.

**(b) Payment of Sum greater than Proportionate Share.**

**1068. Essential to right to contribution.**—(1) By a promissory note, H., W., & J., jointly & severally promised to pay to E. £300 with interest. W. having afterward paid E. £280 on account of the note, E. made the following indorsement upon it:—

“Received of W. the sum of £280, on account of the within note, the £300 having been originally advanced to H.” In an action brought by W., who had paid the whole amount due against J., to recover contribution against him “as a co-surety”:—*Held*: the indorsement was admissible in evidence, to prove not only the payment of the £280, but also that the money was originally advanced, to H. as principal.

The amount of principal & interest was paid by plff. more than six years before the commencement of the suit, with the exception of £30, which was paid by him within the period. Stat. Limitations having been pleaded:—*Held*: (2) plff. was entitled to recover only to the extent of £30 which had been paid within the six years, & Stat. Limitations was a bar to the rest, as the right of action attached as soon as plff. had more than his proportion; (3) Stat. Limitations was a bar to all except £30, as plff. had a right of action against the principal the moment he paid anything, for so much money paid to his use.

(4) A surety is not entitled to sue his co-sureties for contribution until he has paid on account of the principal debt a sum greater than he would be obliged to pay when the entire liability should be fairly apportioned among them.—*DAVIES v. HUMPHREYS* (1840), 6 M. & W. 153; 9 L. J. Ex. 263; 4 Jur. 250; 151 E. R. 361.

*Annotations*:—*As to* (1) *Reid, Percival v. Nanson* (1851), 7 Exch. 1. *As to* (4) *Apprvd. Re Snowdon, Ex p. Snowdon* (1881), 17 Ch. D. 11. *Consd. Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Stirling v. Burdett*, [1911] 2 Ch. 415. *Reid, Pitt v. Pursford* (1841), 8 M. & W. 538; *Kemp v. Finden* (1844), 12 M. & W. 421; *Batard v. Hawes, Batard v. Douglas* (1853), 2 E. & B. 287. *Generally, Mend. Doe d. Kinglake v. Boviss* (1849), 7 C. B. 456.

**PART VIII. SECT. 2, SUB-SECT. 2.—B. (b).**

**1068 i. Essential to right to contribution.**—*WALKER v. BOWRY & WILLEY*, [1924] St. R. Qd. 142.—**AUS.**

**1068 ii. —.**—*GARDNER v. BROOKE*,

[1897] 2 I. R. 6, 20; 30 I. L. T. 7.—**IR.**

**PART VIII. SECT. 2, SUB-SECT. 3.—A.**

**1073 i. Rule in equity—Contribution by solvent sureties only—Liability for**

**1069. — Although co-surety not requested by creditor to pay—Provided co-surety not discharged.]**

—A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor.—*Re SNOWDON, Ex p. SNOWDON* (1881), 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654, C. A.

*Annotations*:—*Consd. Wolmershausen v. Gullick*, [1893] 2 Ch. 514. *Expld. Stirling v. Burdett*, [1911] 2 Ch. 418. *Reid. Beckett v. Addyman* (1882), 9 Q. B. D. 783.

**1070. —**—*J.*—*Pltfs. & defts. executed a deed in May, 1907, whereby they jointly & severally guaranteed repayment of £15,000 advanced on mtge., interest thereon payable half-yearly, & premiums on a policy of insurance; & their respective liabilities were limited to maxima of various amounts. The £15,000 was not to be called in for ten years. Pltfs. had paid various sums for interest & premiums, & the amounts thus paid were more than their due proportion of the total of the interest & premiums paid, but not of the entire debt, & did not reach their respective limits:—Held: the £15,000 interest & premiums constituted one debt; that, until the pltfs. had paid more than their due proportion of the entire debt, they could not call on defts. to contribute; & it was immaterial that pltfs. had paid more than their share of the part which had become due.—*STIRLING v. BURDETT, [1911] 2 Ch. 418; 81 L. J. Ch. 49; 105 L. T. 573.

**1071. Only excess of proportionate share recoverable.**—*KNIGHT v. HUGHES*, No. 1087, *post*.

**In respect of interest on principal—Principal sum not paid.**—*See* No. 1070, *ante*, No. 1084, *post*.

**SUB-SECT. 3.—WHAT AMOUNT RECOVERABLE BY WAY OF CONTRIBUTION.**

**A. Method of Reckoning.**

**1072. Rule at common law—Each surety liable for own share—Irrespective of insolvency of co-surety.**—*BATARD v. HAWES, BATARD v. DOUGLAS*, No. 1080, *post*.

**1073. Rule in equity—Contribution by solvent sureties only—Liability for share of insolvent sureties.**—*Payment proportionately by two sureties, the third being insolvent.—PETER v. RICH* (1629), 1 Rep. Ch. 34; 21 E. R. 499.

*Annotations*:—*Distd. Hitchman v. Stewart* (1855), 3 Drew. 271. *Consd. Wolmershausen v. Gullick*, [1893] 2 Ch. 514. *Reid. Swain v. Wall* (1641), 1 Rep. Ch. 149; *Browne v. Lee* (1827), 6 B. & C. 689.

**1074. — — — — —**—*B.*, who being one of several sureties had been obliged to pay a large sum for the principal debtor, filed a bill against his co-sureties for contribution:—*Held*: (1) one co-surety being insolvent, the other sureties must pay the whole amount equally between them, & (2) the co-sureties must also pay interest to B. on their shares which had been paid by him; (3) the principal debtor & the insolvent surety were properly made parties to the suit, & all parties were ordered to pay their own costs.—*HITCHMAN v. STEWART* (1855), 3 Drew. 271; 3 Eq. Rep. 838;

*share of insolvent sureties.*—*BUCHANAN v. MAIN* (1900), 3 F. (Ct. of Sess.) 215; 38 Sc. L. R. 104; 8 S. L. T. 297.—**SCOT.**

**1073 ii. — — — — —**—*CLOETE v. BERGH* (1832), 2 Men. 13.—**S. AF.**

24 L. J. Ch. 690; 25 L. T. O. S. 168; 1 Jur. N. S. 839; 3 W. R. 464; 61 E. R. 907.

*Annotations:—As to (2) Apld. Re Fox, Walker, Ex p. Bishop (1880), 15 Ch. D. 400. Generally, Mentd. Re Maria Anna & Steinbank Coal & Coke Co., McKewan's Case (1877), 6 Ch. D. 447.*

1075. ————.]—DALLAS v. WALLS, No. 529, ante.

1076. ————.]—By agreement between plffs., defts., & B. & Co., a cargo of Californian wheat was to be shipped for their joint account by the correspondents of B. & Co. at San Francisco, consigned to plffs. at Liverpool for sale upon certain special terms; the shippers to reimburse themselves for cost & insurance of the cargo by drafts on plffs. at sixty days' sight to the extent of 45s. per quarter, less freight, & for the balance of invoice amount by separate drafts at sixty days' sight upon each of the above parties for one-third of the excess. The cargo was shipped, & a bill was drawn by the San Francisco house for £29,353 18s. 1d. on account of the invoice price of the wheat, less freight, upon plffs., & was duly accepted & paid by them, together with freight, insurance, & other charges in respect of the cargo; & the wheat on arrival was sold by plffs. at a loss.—In Dec. 1883, B. & Co., became insolvent & compounded with their creditors for 30 per cent. of their liabilities, which composition plffs. received, leaving an unpaid balance of £1,760 10s. 9d. due from that firm for their share of the loss on the adventure:—*Held*: the purchase & shipment of the wheat was a joint partnership adventure, each of the three firms to participate equally in the profit or loss; & defts., according to the rule of equity which since the Judicature Act, 1873 (c. 66), is to prevail, were liable to contribute equally with plffs. to make good the default of B. & Co.

In equity those who can pay must not only contribute their own share but they must also make good the shares of those who are unable to furnish their own contribution (LOPEZ, J.). —LOWE DIXON (1885), 16 Q. B. D. 455; 31 W. R. 111.

*Annotation:—Mentd. Morden Rugg & Eslingue v. Monks (1923), 8 Tax Cas. 450.*

1077. ———— Unless express agreement to contrary.]—Three are bound for II. in £300 & agree that if H. failed, to bear their respective parts of the money, two of the obligors proved insolvent, the third paid the £300, the other obligor becomes able, he shall be compelled to pay a third part, not a moiety.—SWAIN v. WALL (1641), 1 Rep. Ch. 119; 21 E. R. 531.

*Annotations:—Consd. Deering v. Winchelsea (1787), 2 Bos. & P. 270; Craythorne v. Swinburne (1807), 11 Ves. 160. Refd. Wolmerhausen v. Gullick, [1893] 2 Ch. 514.*

1078. According to number of sureties.]—It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties; though the insolvency of the principal & of the other sureties be not proved.—COWELL v. EDWARDS (1800), 2 Bos. & P. 268; 126 E. R. 1275.

*Annotations:—Consd. Kemp v. Finden (1844), 12 M. & W. 421. Refd. Collins v. Prosser (1823), 1 B. & C. 682; Davies v. Humphreys (1840), 6 M. & W. 153; Mackreth v. Walmesley (1884), 51 L. T. 19; Stirling v. Burdett, [1911] 2 Ch. 418. Mentd. Hunter v. Hunt (1845), 1 C. B. 300.*

1079. ———— Not number of principals.]—A surety may recover contribution from his co-surety, in an action for money paid, & he may recover contribution according to the number of the sureties, without reference to the number of the principals. Where pltf. & deft. had executed, as sureties, a

warrant of attorney, given as a collateral security for a sum of money advanced on mtgc. to the principals, & on default being made by the principals, judgment was entered up on the warrant of attorney, & execution issued against pltf.:—*Held*: he was entitled to recover from deft., as his co-surety, a moiety of the costs of such execution.—KEMP v. FINDEN (1844), 12 M. & W. 421; 13 L. J. Ex. 137; 2 L. T. O. S. 313; 8 Jur. 65; 152 E. R. 1202.

*Annotations:—Refd. Batard v. Hawes, Batard v. Douglas (1853), 2 E. & B. 287; Reynolds v. Wheeler (1861), 10 C. B. N. S. 561; Wolmershausen v. Gullick, [1893] 2 Ch. 514.*

1080. ———— Original sureties—Not number at time of payment.]—Pltf. being a provisional committee-man, became with eleven others, including deft., liable for a debt, contracted in respect of the scheme. The creditor sued pltf., who ultimately paid the whole debt. Two of the original co-contractors died before the payment. Pltf. sued deft. for contribution:—*Held*: pltf. was entitled to recover one-twelfth of the debt: the liability of a co-contractor to one who has paid the entire debt being at law to contribute an aliquot part according to the number of persons originally liable without reference to the number liable at law at the time of payment. *Scmble*: an action would have lain at law for contribution against the representatives of the deceased co-contractors.—BATARD v. HAWES, BATARD v. DOUGLAS (1853), 2 E. & B. 287; 1 C. L. R. 812, 818; 22 L. J. Q. B. 113; 21 L. T. O. S. 57; 17 Jur. 1151; 1 W. R. 287, 387; 118 E. R. 775.

*Annotation:—Refd. Muckreth v. Walmesley (1881), 51 L. T. 19.*

1081. Sureties bound for different amounts — Liability up to respective amounts.]—Where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, & not in equal amounts.

Four persons, as sureties for a principal, executed a joint & several bond of suretyship, by the terms of which the liability of two of them was limited to £50 each, & that of the other two to £25 each. One of those whose liability was limited to £50, after the other three had executed the bond, executed it himself, but added to his signature the words "£25 only." The obligee accepted the bond so executed without objection, & subsequently the principal became in default:—*Held*: the effect of the added words was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation; & as the last signatory only executed the bond as a joint & several bond, he was also not bound by it. —BLESMEYER BREWERY Co. v. COOPER, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173; 73 L. T. 567; 41 W. R. 254; 12 T. L. R. 86; 40 Sol. Jo. 117; 1 Com. Cas. 210, D. C.

*Annotations:—Consd. Re Denton's Estate, Licensees Insee. Corp., & Guarantee Fund v. Denton, [1903] 2 Ch. 670; National Provincial Bank of England v. Brackenbury (1906), 22 T. L. R. 797. Refd. Stirling v. Burdett, [1911] 2 Ch. 418.*

Sureties under separate instruments.]—See Sect. 2, sub-sect. 1, D., ante.

Death of one co-surety—Liability of survivors & representative.]—See Part IX., Sect. 3, sub-sect. 11, C. (c) ii., post.

Liability of co-insurers.]—See INSURANCE.

1081 I. Sureties bound for different amounts—Liability up to respective amounts.]—Re MACDONAGHS (1876), 10 I. R. Eq. 269.—IR.

*Sect. 2.—Contribution inter se: Sub-sect. 3, B., C., D. & E.; sub-sect. 4, A. (a) & (b).]*

*B. Portion of Principal Debt.*

*See Sect. 2, sub-sect. 2, B., ante.*

*C. Interest.*

**1082. On amount paid for co-surety—From when interest recoverable.]**—HITCHMAN v. STEWART, No. 1074, *ante*.

**1083. — Rate of interest.]—***Re* HUNT, HARVEY'S CLAIM (1902), 86 L. T. 504, L. J.

**1084. Interest on principal debt—Payment of greater sum than proportional share—Principal debt not paid.]**—JEVER v. PEARCE, [1888] W. N. 105.

**1085. — — — — —.]**—STIRLING v. BURDETT, No. 1070, *ante*.

*D. Costs.*

*See, generally, DAMAGES, Vol. XVII., pp. 100–114, Nos. 209–240.*

**1086. Action for contribution.]**—BABB'S CASE (1700), Wight. 2, n.; 115 E. R. 1152.

*Annotation: Mentd. R. v. Bennett* (1810), Wight. 1.

**1087. — — — — —.]**—A. & B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A. & recovered:—*Held*: (1) in an action for contribution, brought by A. against B., A. could only recover half the amount of the verdict against him, & he could not recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action brought by the obligees; (2) if A. after the verdict in the action against him on the bond, obtained a sum of money from C. he must take that in reduction of the amount of the verdict, & could not apply it either to pay his own costs or the taxed costs of the obligees.—KNIGHT v. HUGHES (1828), 3 C. & P. 467; Mood. & M. 247, N. P.

**1088. — — No improper defence by co-sureties.]**—HITCHMAN v. STEWART, No. 1074, *ante*.

**1089. — — Insolvent sureties.]**—HITCHMAN v. STEWART, No. 1074, *ante*.

**1090. — — Where surety has indemnity.]—***Re* HUNT, HARVEY'S CLAIM (1902), 86 L. T. 504, L. J.

**1091. Defending action by creditor—Fidelity guarantee.]**—KNIGHT v. HUGHES, No. 1087, *ante*.

**1092. — — Defence reasonably undertaken.]**—A., a broker, contracted with B. for the purchase on behalf of C. of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, & A. defended the action unsuccessfully. In an action by A. against C. for the damages & costs paid & incurred by him in the first action, C. paid into ct. enough to cover the damages only, & it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent & reasonable man would have done in his own case. The jury having found for pltf.:—*Held*: A. was

entitled to recover the costs.—BROOM v. HALL (1859), 7 C. B. N. S. 503; 141 E. R. 911.

*Annotation:—Apld. The Millwall*, [1905] P. 155.

**1093. — — Separate defence as third party—Unnecessarily undertaken.]**—Where a third party, with no sufficient reason, appears & defends an action separately he must bear the costs of so doing, even though pltf. be unsuccessful in the action.—WILLIAMS v. BUCHANAN, ALEXANDER THIRD PARTY (1891), 7 T. L. R. 226, C. A.

**1094. — — When creditor's claim reduced.]**—WOLMERSHAUSEN v. GULLICK, No. 1099, *post*.

**1095. Execution against surety.]**—KEMP v. FINDEN, No. 1079, *ante*.

**Costs against debtor.]—***See* Part VII., Sect. 4, sub-sect. 8, *ante*.

*E. For What Credit must be given.*

**1096. All moneys received or due—From any party—Bills of exchange.]**—STIRLING v. FORRESTER, No. 1033, *ante*.

**1097. Money received from principal—Fidelity guarantee.]**—KNIGHT v. HUGHES, No. 1087, *ante*.

**1098. — — Bankrupt principal—Dividend in bankruptcy.]**—Pltfs. had become security for N., & received bills of lading from him to protect themselves. Defts. were interested in the goods, & in consideration of being allowed to direct the sales, agreed with pltfs. that after the account sales were made up, "they would bear one-half of whatever loss might occur." There was a loss of £4,215. N. became bkpt., & pltfs. proved against his estate for the whole loss, & received a dividend thereon:—*Held*: defts. were not entitled to any deduction from the amount of their guarantee in respect of the sum so received by pltfs.—LIVERPOOL BOROUGH BANK v. LOGAN (1860), 5 H. & N. 461; 29 L. J. Ex. 249; 2 L. T. 382.

**SUB-SECT. 4.—ENFORCEMENT OF CONTRIBUTION.**

*A. Right of Action.*

*(a) Before Payment.*

**1099. Right to sue co-surety—Judgment against surety—What amounts to judgment—Claim against deceased surety's estate.]**—(1) A surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; & for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment, & where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, the surety may obtain a prospective order directing the co-surety, upon payment by the

such payment against the personal representative of his co-surety.—ONGE v. TRUELOCK (1828), 2 Mol. 31.—IR.

**PART VIII. SECT. 2, SUB-SECT. 4.—A. (a).**

*a. When right arises.]*—A surety is not entitled to sue as co-surety for contribution unless he has paid the whole of the principal debt or a part thereof in consideration of the whole debt or more than his share of the principal debt.—DOMINION OF CANADA INVESTMENT & DEBENTURE CO., LTD.

**PART VIII. SECT. 2, SUB-SECT. 3.—C.**

**1092 I. On amount paid for co-surety—From when interest recoverable.]**—A co-surety, who has paid the full amount of a receiver's recognisance is entitled to use the recognisance for the purpose of recovering out of the estate of his co-surety, one-half interest from the date of payment.—*Re* SWAN'S ESTATE (1869), 4 L. R. Eq. 209.—IR.

**1. — — — — —.]**—A surety having paid the whole amount of a recognisance, & having been allowed to use the recognisance for the recovery of a

contribution from his co-surety; he is not thereby entitled to recover interest thereon.—SALKELD v. ABBOTT (1832), Hayes & Jo. 110.—IR.

**1093 I. — — Rate of interest.]**—ROBINSON v. FORD (No. 2) (1913), 25 W. L. R. 674; 5 W. W. R. 542; 9 D. L. R. 67; 7 Sask. L. R. 433.—CAN.

**1. — — — — —.]**—*Whether recoverable—From personal representative of co-surety.]*—Where sureties joined as co-obligors in a bond one who had been compelled to pay the amount with interest, was not entitled to carry on interest upon

surety of his own share, to indemnify him against further liability.

(2) Stat. Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, i.e. until the claim of the principal creditor has been established against him; although at the time of the action for contribution the statute may have run as between the principal creditor & the co-surety.

(3) The superior cts. of common law in this country have never entertained any action for contribution by a surety against his co-surety, except the action for money paid (WRIGHT, J.).

(4) Costs incurred in proceedings by which the principal creditor's claim was reduced were included in ascertaining the contribution.—WOLMERSHAUSEN v. GULLICK, [1893] 2 Ch. 514; 62 L. J. Ch. 773; 68 L. T. 753; 9 T. L. R. 437; 3 R. 610.

*Annotations*.—As to (1) *Reid*. Ellis v. Pond, [1898] 1 Q. B. 426; Shephard v. Bray, [1906] 2 Ch. 235; Ascherson v. Tredegar Dry Dock & Wharf Co., [1909] 2 Ch. 401; *Re* Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Case, [1914] 2 Ch. 617. As to (2) *Apld*. Robinson v. Harkin, [1896] 2 Ch. 415. *Generally, Mentd.* *Re* Blackpool Motor Car Co., Hamilton v. Blackpool Motor Car Co., [1901] 1 Ch. 77.

1100. — Order for payment to creditor—Of proportionate share—Creditor party to action.]—WOLMERSHAUSEN v. GULLICK, No. 1099, *ante*.

1101. — Prospective order of indemnity—Creditor not party to action.]—WOLMERSHAUSEN v. GULLICK, No. 1099, *ante*.

1102. — Statute of Limitations—When commencing to run.]—WOLMERSHAUSEN v. GULLICK, No. 1099, *ante*.

1103. — — — — —.]—The principle established in *Wolmershausen v. Gullick*, No. 1099, *ante*, that the Stat. Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default. In such a case, therefore, time does not begin to run as between the co-trustees until the claim of the *cestui que trust* has been established against one of them.

Pltf., who was trustee of a marriage settlement, allowed the trust fund to be in the hands of deft., his co-trustee, for investment. Deft. entrusted the whole fund to an "outside" stockbroker, who applied a portion of it to his own use. In an action by pltf. & infant *cestui que trust* under the settlement, deft. denied his liability & claimed contribution against pltf. trustee:—*Held*: (1) deft., not having exercised proper care in the selection of a broker, & having improperly left the whole amount of the trust fund in the broker's hands, was liable for the loss which had occurred; (2) pltf. was in *pari delicto* with deft., & deft. was therefore entitled to contribution from pltf., & (3) as between the two trustees time did not begin to run under the Statutes of Limitation until the date of the judgment in the action.—ROBINSON v. HARKIN, [1896] 2 Ch. 415; 65

L. J. Ch. 773; 74 L. T. 777; 44 W. R. 702; 12 T. L. R. 475; 40 Sol. Jo. 600.

*See, generally, LIMITATION OF ACTIONS.*

Co-surety a bankrupt.]—*See* Sect. 2, sub-sect. 1, B., *ante*.

Rights of surety against debtor.]—*See* Part VII., Sect. 3, sub-sect. 2, *ante*.

#### (b) After Payment.

1104. Aid of Crown process—To surety paying Crown debt.]—BABB'S CASE (1706), Wight. 2, n.; 145 E. R. 1152.

*Annotation*.—*Mentd.* R. v. Bennett (1810), Wight. 1.

1105. Action for money paid.]—The case was this, two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this; pltf. here in this writ of error said to the other, pay you all the debt, & I will pay you the moiety of this again, the which he paid accordingly, & so made his request to have a repayment made to him of the moiety according to his promise, which to do he refused; upon this he brought his action upon the case against pltf. upon his promise; & upon *non assumpsit* pleaded, he had a verdict & judgment; & upon this judgment a writ of error was brought. In this case, & in the declaration, there is a good consideration set forth; the parties own contract here shall bind him, he had no remedy for the money paid, but when this is paid, here is a good *assumpsit* grounded upon a good consideration for repayment of the moiety by pltf. (COKE, C.J.).—BAGGE v. SLADE (1616), 3 Bulst. 162; Jenk. 324; 81 E. R. 137.

1106. — Special covenant as to contribution.]—CRAFTS v. TRITTON, No. 886, *ante*.

1107. — — — — —.]—KEMP v. FINDEN, No. 1070, *ante*.

1108. — Sureties to receiver—Form of order.]—SHACKEL v. MARLBOROUGH (DUKE) (1844), 1 Seton's Judgments & Orders, 6th ed. 805.

1109. — Promissory note.]—The right to enforce contribution between joint makers of a promissory note by an action at law is not affected by the fact that the makers were co-partners together with others, & that the note was given to secure money raised for the purposes of the partnership. Therefore, where A., B. & C., being shareholders with other adventurers in a Cornish mine, conducted on the cost-book principle, for the purpose of raising money for carrying on the mine, joined in a joint & several promissory note for £500, & which being discounted the proceeds were applied to the working of the mine, A. having subsequently paid the amount to the holder of the note:—*Held*: an action for money paid was maintainable by him against the other makers of the note, this not being a partnership transaction.—SEDGWICK v. DANIELL (1857), 2 H. & N. 319; 27 L. J. Ex. 116; 157 E. R. 132.

1110. Parties to action—Representative of deceased surety.]—Three persons are bound in a recognisance for another, one of them was sued, & paid the money, who afterwards sued the principal debtor upon the counter-bond, & had judgment & took him in execution, who was

v. GELBORN, [1917] 3 W. W. R. 231; 11 L. R. 154; 10 Sask. L. R.

b. — — — — —.]—Although a cautioner in a bond who has not paid the debt, has a right to insist for relief from the principal obligants, yet he has no title to insist to that effect against a co-cautioner.—ALSTON v. DENNISTOWN & Co. (1828), 7 Sh. (Ct. of Sess.) 112.—SCOT.

#### PART VIII. SECT. 2, SUB-SECT. 4.—A. (b).

1104 i. Aid of Crown process—To surety paying Crown debt.]—A. & B. entered as co-sureties into separate bonds to the Crown for C.; C. became a defaulter. The Crown obtained a separate judgment against each surety. A. satisfied the judgment against himself. B. moved to be allowed, on paying the judgment against himself

in full, to stand in the place of the Crown, & to have the benefit of the Crown process against his co-surety for a moiety of the judgment:—*Held*: the ct. could not thus relieve B.—R. v. LAND (1847), 3 U. C. R. 277.—CAN.

2. Renunciation of beneficium excussionis.]—Where two co-sureties have renounced benefits of order & excussion as between themselves & the principal debtor & thereafter the



68 L. J. Q. B. 228; 79 L. T. 624; 47 W. R. 230; 15 T. L. R. 125, C. A.

—[See, further, Part IX., Sect. 3, sub-sect. 4, *post*.

—[See, further, Part IX., Sect. 3, sub-sect. 10, *post*.

**1121. Discharge of principal debtor—Agreement between surety & debtor.**—A., B., & C. respectively drew, accepted, & indorsed a bill for £300 for the accommodation of D. B., having paid the amount of the bill to the holder at maturity, sued A., his co-surety, for contribution. A. pleaded that, after the drawing, acceptance, & indorsement of the bill, & before it became due, D. became bkpt., & after B. had so paid the bill he agreed with the assignees of D., that, in consideration of their delivering up to him a certain building agreement then subsisting between him & D., he, B., would pay them £150, & would relinquish amongst other things all moneys advanced to & for D., to wit, the £300 so paid, in satisfaction & discharge of the bill; that this agreement was fully performed; & that thereby, & without the consent of A., D. & his estate were exonerated from the claim. To this plea, B. replied on equitable grounds, that the bill was drawn, accepted, & indorsed, & the amount paid by him, as alleged in the plea; that, before the bkptcy. of D., he had advanced him moneys to the amount of £2,661 6s. 6d. to assist him to build certain houses pursuant to the terms of the building agreement mentioned in the plea, & had sold him timber & materials for the same purpose to the amount of £1,512; that, D., being so indebted to him in the sums above mentioned, & also in the sum of £300 so paid by him in discharge of the bill, & in £136 17s. 4d. for moneys advanced to him for other purposes, it was agreed between him & the assignees of D. that the building agreement should be delivered up to him to be cancelled on his paying them £150 in discharge of all claims which they might have on the houses & property comprised in the building agreement, & that he should relinquish all claim on the estate of D. for the moneys advanced by him to D. for the purpose of the erection of the said houses, & for the materials so supplied, but that such agreement did not extend to the £300 paid in discharge of the bill, nor to the £136 17s. 4d.; that, with a view to putting that agreement into writing, the following memorandum was drawn up:—"It is hereby agreed between the assignees & B., as follows: that the building agreement for eighteen houses on land in, etc., be given up to B. to be cancelled, on payment by him to the assignees of £150 in full for all claims they may have on the property; B. hereby relinquishing all claim for moneys advanced to & for the bkpt., & his claim for goods supplied for the above mentioned houses,"—that the memorandum was signed by him, B., & the solrs. of the assignees in the belief that it was in conformity to the agreement so made; & that the same was worded by mistake & error, so as to include & relinquish his claims against D. & his estate on account of the £300 paid by him, B., in discharge of the bill, contrary to the true intention of B. & the assignee when they signed the memorandum; that B. never relinquished or gave up his said last-mentioned claim against D. and his estate,

nor agreed to do so, nor was the same ever satisfied or discharged in any other manner than by the memorandum so executed in error: & that the real & true agreement so made between B. & the assignees, was in all respects performed & fulfilled by the said parties thereto:—*Held*: the replication disclosed a good answer "on equitable grounds" to the plea, whether the written memorandum did or did not include the claim for the £300; for, deft. by demurring to the replication, admitted, that, if it did include that claim, it did so by mistake; & the agreement having been executed, this ct. was bound to grant plff. the same relief that plff. would have been entitled to in equity, without compelling him to resort to a ct. of equity to reform it.—*VORLEY v. BARRETT* (1850), 1 C. B. N. S. 225; 20 L. J. C. P. 1; 28 L. T. O. S. 86; 5 W. R. 137; 140 E. R. 94.

*Annotations*:—*Reid*. *Bartlett v. Wells* (1862), 1 B. & S. 836. *Mentd.* *Reid v. Scottish Equitable Life Assoc. Soc.* (1857), 3 Jur. N. S. 417; *Thames Iron Works & Ship Building Co. v. Royal Mail Steam Packet Co.* (1861), 9 W. R. 912; *Wake v. Harrop* (1862), 1 H. & C. 202.

—[See, further, Part IX., Sect. 3, sub-sect. 9, *post*.

**1122. Agreement between surety & creditor—Without knowledge of co-surety—Conditions of original suretyship—Sureties to be principal debtors.**—*FRANCIS*, No. 1120, *ante*.

**Discharge of surety generally.**—See Part IX., *post*.

**Bankruptcy of co-surety.**—See No. 1045, *ante*.

#### SUB-SECT. 5.—RECOVERY OF CONTRIBUTION PAID.

**1123. Judgment entered up on warrant of attorney—Contribution paid by co-surety—Warrant invalid.**—Judgment was entered up on a warrant of attorney, executed by principal & sureties. One surety, being arrested, paid the debt, & recovered a proportional part from his co-surety, who afterwards discovered that the warrant had been attested by a person not qualified to act as an attorney, contrary to Judgments Act, 1838 (c. 110), s. 9:—*Held*: the co-surety, not being the party who had paid the debt, could not move the ct. that the warrant should be set aside for the defective attestation & the amount of his contribution repaid him by plff.; & a rule *nisi*, obtained by the co-surety for this purpose, was discharged without costs. *Seemle*: under Judgments Act, 1838 (c. 110), s. 9, a party who has introduced an unqualified person as qualified, to attest the execution of a warrant of attorney, cannot afterwards move to set it aside because attested by such person.—*PRICE v. CARTER* (1845), 7 Q. B. 838; 14 L. J. Q. B. 110; 9 Jur. 637; 115 E. R. 704; *sub nom.* *CARTER v. PRICE*, 5 L. T. O. S. 369.

#### SECT. 3.—RIGHTS IN RESPECT OF SECURITIES.

##### SUB-SECT. 1.—HELD BY CREDITOR.

See Part VI., Sect. 4, sub-sect. 2, B., *ante*.

##### SUB-SECT. 2.—HELD BY CO-SURETIES.

**1124. Security given by principal—Promissory note.**—One of the co-sureties of a bond received

was signed by plff., who, having paid the whole debt, sought to recover contribution from deft.:—*Held*: the condition was a good defence to the action.—*HARRY v. MORONEY* (1873), 1 L. R. 8 C. L. 551.—*IR*.

#### PART VIII. SECT. 3, SUB-SECT. 2.

**General rule.**—The principle of contribution in cases where one surety receives security from the principal debtor rests, not upon any

theory that each surety must suffer exactly the same damage or loss even if one of them gets a benefit or relief from a source which the others could not have touched, but that one co-surety must not get some counter-

**Sect. 3.—Rights in respect of securities: Sub-sect. 2.**  
**Part IX. Sect. 1: Sub-sect. 1, A. (a).]**

from his principal a promissory note to the amount of that instrument:—*Held*: it was a question for the jury to say *quo animo* the note was given, & whether it was given in pursuance of an arrangement that deft. should be thereby discharged, or merely by way of collateral security, in which latter case deft. would be liable for contribution on payment of the bond by his co-surety.—*DONE v. WALLLEY* (1848), 2 Exch. 198; 17 L. J. Ex. 225; 12 Jur. 338; 154 E. R. 463.

*Annotation*:—*Reid, Steel v. Dixon* (1881), 45 L. T. 142.

**1125. — Must be brought into hotchpot — Though security term of suretyship.**—A surety, who has obtained from the principal debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, & the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security.—*STEEL v. DIXON* (1881), 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735.

*Annotations*:—*Conrad, Berridge v. Berridge* (1890), 44 Ch. D. 168. *Reid, Re Arcedeckne, Atkins v. Arcedeckne* (1883), 24 Ch. D. 709; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 75; *Re Denton's Estate, Licenses Insee. Corp'n. & Guarantee Fund v. Denton*, [1903] 2 Ch. 670.

**1128. — — — Life Insurance.**—(1) One of several co-sureties, who obtains from the principal debtor a counter-security against the liability which he has incurred under the contract of suretyship, being bound to bring into hotchpot for the benefit of his co-sureties whatever he receives by virtue of the counter-security:—*Held*: when by means of the counter-security the surety has been repaid what he has paid on account of the principal debt, & has shared the amount thus received by him with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise & so on until the whole of the payments made by the co-sureties on account of the principal debt have been refunded, or the value of the counter-security has been exhausted.

(2) Five sureties jointly & severally guaranteed

security which withdraws something from the estate or assets of the principal debtor so as to render it unavailable as a source to which his co-sureties may look to be indemnified against their loss when they have to pay.—*GOODMAN v. KIEHL*, [1923] 4 D. L. R. 468; [1923] 3 W. W. R. 789.—*CAN.*

**f. — — —** *MILLIGAN v. GLEN* (1802), 13 Fac. Coll. 82.—*SCOT.*

**g. — — — Crown securities.**—A surety by recognisance who pays the whole amount into ct., when pressed with Crown process, is entitled to use the

Crown securities, in order to levy a moiety from his co-surety, provided he share with his co-surety the benefit of any counter-security he may have taken from the principal.—*LATOUCHE v. PALLAS* (1832), *Hayes*, 450.—*IR.*

**h. Security given by principal — Mortgage — Right of surety to enforce — Without consent of co-sureties.**—Where the principal debtor gives to his sureties counter-security by intgo. of real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the

to a banking co. the balance owing to them by a customer on his current account, to the extent of £2,000. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against all liability in respect of the suretyship. The principal debtor became bkpt., owing more than £2,000 to the banking co., & on their demand the five sureties paid them £2,000 under the guarantee. The principal debtor afterwards died, & the policy money was received by the surety with whom the deposit had been made:—*Held*: inasmuch as that surety was bound to bring into hotchpot for the benefit of his co-sureties whatever he received out of the policy money in payment of the amount which he had paid under the guarantee, the deposit in effect ensured for the benefit of all the co-sureties to the full extent of the principal debt, & the policy money must accordingly be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guarantee.—*BERRIDGE v. BERRIDGE* (1890), 44 Ch. D. 168; 59 L. J. Ch. 533; 63 L. T. 101; 38 W. R. 590.

**1127. — Advance of money — No notice to other surety.**—M. & W. became co-sureties for a sum of £500 borrowed by B. Of this sum of £500, £125 was by previous agreement advanced by B. to his surety W. No notice of this transaction was given to M. B. became bkpt. & M. & W. were called upon to pay the unpaid balance of the loan of £500. M. brought an action against W., claiming that W. should be treated as principal debtor on account of the advance of £125 given to him, & claiming the benefit of all securities given to him:—*Held*: there was no concealment between the co-sureties of any material fact, & pltf. was not entitled to the relief claimed.—*MAKRETH v. WALSLEY* (1884), 51 L. T. 19; 32 W. R. 819.

**1128. — Same principal & same engagement.**—*ELLESMERE BREWERY Co. v. COOPER*, No. 1081, *ante*.

**1129. Insurance policies on life of principal — Assigned to surety — By creditor.**—*Re ARCEDECKNE, ATKINS v. ARCEDECKNE*, No. 1067, *ante*.

**1130. — — — By principal debtor.**—*BERRIDGE v. BERRIDGE*, No. 1126, *ante*.

**1131. — Taken out by surety.**—*Re ARCEDECKNE, ATKINS v. ARCEDECKNE*, No. 1067, *ante*.

others.—*MOORHOUSE v. KIDD* (1898), 25 A. R. 221.—*CAN.*

**k. Right to have securities handed over — Before demand for contribution.**—A surety who has paid off a debt for which he is jointly liable with co-sureties is not entitled to contribution from his co-sureties unless he can hand over to them any securities he may have received from the principal creditor in the same plight & condition as received.—*MONK v. SMITH* (1893), 14 N. S. W. L. R. (E.) 311; 10 N. S. W. W. N. 109.—*AUS.*



## Part IX.—Determination of the Guarantee.

## SECT. 1.—FULFILMENT OF PURPOSE OF THE GUARANTEE.

## SUB-SECT. 1.—BY PRINCIPAL DEBTOR.

## A. Payment.

## (a) What Amounts to Payment.

**1132. Assignment of judgment debt—Part thereof received by debtor—With creditor's consent—Sum not passing through creditor's hands.]—**A. bound to B. in a bond of £1,000 for payment of £500; afterwards A. & C., as his surety, gave a bond to B. of £200 for payment of £100 as a further security for so much of the £500. Then A. assigned a judgment to B. of £500 towards further satisfaction of the debt, & B. received several sums on his judgment; & A. by the consent of B. received £30, also part of the money secured on this judgment. This should not go in exoneration of any part of the money secured by the £200 bond, as it would do, if B. had actually received it, & lent it to A.—*HALFORD v. BYRON* (1701), *Prec. Ch.* 178; 24 E. R. 86.

**1133. Payment of sum due—On recognisance—Whole liability not discharged.]—**Recognisance of debt. & two sureties for £2,000 discharged on payment of that sum, although in the meantime a larger sum appeared to be due.—*BAKER v. JEFFERIES* (1790), 2 Cox, *Eq. Cas.* 226; 30 E. R. 105, L. C.

**1134. Payment by agent of debtor—Made voluntarily.]—**An annuity being in arrear, & the rents of an estate on which it was secured being unpaid, the trustee of the estate, who had negotiated the annuity between the grantor & grantee having advanced a sum to the grantee in anticipation of the coming rents, & having received from the grantee on this advance the commission which he usually received on annuity payments, the ct. set aside an execution which, the rents proving insufficient, was afterwards issued for this sum in the name of the grantee, against one who, as surety for the payment of the annuity, had given a warrant to confess judgment.—*WILLIAMSON v. GOULD* (1823), 1 Bing. 171; 7 Moore, C. P. 579; 1 L. J. O. S. C. P. 38; 130 E. R. 70; *subsequent proceedings*, 1 Bing. 274.

*Annotations:—**Apprvd. & Foll'd.* *Carroll v. Gould* (1823), 7 Moore, C. P. 621. *Ref'd.* *Chappell v. Silverschildt* (1826), 12 Moore, C. P. 113.

**1135. ———.]—**Where, upon the grant of an annuity, the agent who negotiated it as between the grantor & grantee was appointed trustee & receiver of the rents of the estate of the grantor on which it was charged, & afterwards advanced money to the grantee out of his own funds, in anticipation of the receipt of the arrears from such estate, & debited the grantee with the usual commission charged by him on annuity payments:—*Held*: upon the failure of the securities & insolvency of the grantor, the agent could not treat such an advance as a mere loan; but it must be taken as a payment made to the grantee in liquidation of the arrears of the annuity; & the latter could only issue execution against the

grantor for the amount of the arrears actually due, after deducting the sum advanced & received by him from such agent.—*CARROLL v. GOULD* (1823), 1 Bing. 190; 7 Moore, C. P. 621; 1 L. J. O. S. C. P. 46; 130 E. R. 77.

**1136. Compromised payment.]—**Pltfs., on becoming sureties for debt., took a joint & several indemnity bond from debt. & J. Pltfs. afterwards became liable, as such sureties, to pay, & paid £1,098. They then sued J. on the indemnity bond, & obtained a verdict for £1,098, but accepted £215, from him in compromise, giving him a receipt as follows: "Received of J. £215, being the sum we have agreed to accept in discharge of the damages & costs in this action." Pltfs. afterwards sued debt. on the same bond, & he pleaded payment by J. of £215 in full satisfaction:—*Held*: proof of the compromise with J. as above stated, did not support the plea. *FIELD v. ROBINS* (1838), 8 Ad. & El. 90; 3 Nev. & P. K. B. 226; 1 Will. Woll. & H. 115; 7 L. J. Q. B. 153; 2 Jur. 855; 112 E. R. 770.

**1137. ——— Surety party to compromise Admissibility of evidence to vary.]—***Assumpsit* upon a guarantee, given by debt. to pltf. in 1833, for goods to be furnished to J. Breach, delivery of goods to the amount of £90 9s. 11d., & non-payment by debt. The plea alleged a subsequent agreement between J. & pltf. & debt. & others, embodied in the following note: "1836, we jointly & severally promise to pay to Messrs. J. McClure & Son, on order, the sum of £11 4s. 11d., which is to constitute a discharge in full, for a debt of £90 9s. 11d. due by J. to Messrs. McClure & Son." Signed by debt. & J. & four others, & delivered to pltf., & received by him. Upon the trial pltf. proposed to prove by parol that at the time he took this note it was expressly agreed that he was still to be at liberty to sue debt. upon his guarantee: *Held*: this evidence was rightly rejected. *MCCLURE v. FRASER* (1840), 9 L. J. Q. B. 60.

**1138. Payment as fraudulent preference Money recovered from creditor—By debtor's assignees in bankruptcy.]—**A. had guaranteed the payment to B. of two bills of exchange accepted by C. C. afterwards handed over the amount of the bills to B. A fiat having issued against C., his assignee, in an action for money had & received, recovered the money back from B., as having been paid by way of fraudulent preference. In an action by B. against A. upon the guarantee, A. pleaded that C. had paid, & B. had received, the money, in satisfaction of the bills, which allegation was traversed by the replication:—*Held*: (1) the payment did not amount to a payment in satisfaction; (2) B. might prove the facts under the above replication; (3) the verdict & judgment in the action by the assignees against B., although evidence to explain the transaction, was not conclusive against A., that the money had been received by B. to the use of the assignees.—

*v. HITCHCOCK* (1843), 6 Man. & G.

## PART IX. SECT. 1, SUB-SECT. 1.—

## A. (a).

1. *Payment after action commenced.]*  
—*BLAKLEY v. NICKERSON* (1812), 3 N. B. R. (1 Kerr) 523.—CAN.

m. *Investment of sum due—On recognisance.]—**Re O'CALLAGHAN* (1837),

1 L. J. R. 118, n.—IR.

n. *Book-keeping entry—Cheque credited to one account & debited to another.]—*Debt's testator guaranteed payment to a bank of the account of J. K. & Co., which consisted of K. He subsequently took in a partner, & a balance was struck, showing

J. K. & Co., to be indebted to the bank, & K. then gave his cheque to the bank for the amount of his debt. This cheque was credited to J. K. & Co.'s account, debited to him, & marked "paid." No cash or value passed for the cheque, K.'s account not being in funds:—*Held*: the transaction was



636; 10 Jur. N. S. 178; 11 W. R. 834; 143 E. R. 630.

**Annotations:—***Consd. Goldfarb v. Bartlett & Kremer*,  
[1920] 1 K. B. 639. *Refd. Yglesias v. River Plate Bank*  
(1877), 3 C. P. D. 60.

1142. Proceeds of sale of collateral security—  
Proceeds paid to creditor—Sale with consent of  
creditor. *TAYLOR v. BANK OF NEW SOUTH*

**creditor.**—**TAYLOR v. BANK OF NEW SOUTH WALES**, No. 1478, *post*.

**Bills of exchange.**—See **BILLS OF EXCHANGE**, Vol. VI., pp. 341-362, Nos. 2263-2389.

(b) *Appropriation.*

1143. In relief of surety—Intention when payment made—Right of creditor to appropriate—Where no intention expressed.]—A. was indebted to B. by bond, & C. bound as surety for A., & A. was likewise indebted to B. by contract in other money. A. & B. came to account of both debts, & stated *in toto* to be £84. A. after in satisfaction of his debt, made over certain goods of less value ; but there was no declaration, whether the sale or money for the goods was to be in part of one debt or other, but generally. C. the surety would have it paid on the bond, & thereby to discharge him. B. the creditor would take & make use of it as in satisfaction of the contract debt ; for A. was insolvent, & so else he might lose his debt ; & rather than so, he should apply the general payment to what debt he pleased, viz. to the satisfaction of the debt by contract, for which he had no other security ; or else A. being now grown insolvent, he must lose it, & it were hard when he had a just debt in law & equity to be expounded out of his debt by interpretation of a payment generally made.

If there had been two debts & a sum of money be generally paid, the creditor may elect & choose after to what debt to apply it when on payment the debtor made no distinction how he paid it; but this payment being pursuant on a precedent account of both debts, the payment shall be intended according to the account, viz. on both debts, & so shall be proportioned ratably on both debts (LORD NOTTINGHAM, C.).—*PERRIE v. ROBERTS* (1881), 2 Cas. in Ch. 83; 1 Vern. 34; 22 E. R. 857, 1. C.

-.] — KIRBY v. MARL-

BOROUGH (DUKE), No. 655, *ante*.

1145. [Creditor receiver of taxes.] - M. was surety in a bond given by G., the collector of taxes in Jamaica, for payment of the collection for the year 1812. G., at the date of the bond, was in arrear for taxes collected by him in 1811. G. appointed one S. his deputy, to collect the taxes for the year 1812, which he partly did, & G. collected the remainder. Shortly after the collection of the taxes, the Receiver-General pressed G. for the payment of the arrears of 1811. G. went to S. & obtained from him £3,000, to remit to the Receiver-General, S. taking that amount out of a chest, in which were placed the moneys collected for 1812. G. converted that sum, & also £2,000 which he had collected for taxes in 1812, into paper money, & transmitted £5,000 to the Receiver-General, who appropriated the whole amount in liquidation of the arrears for 1811. In an action brought by the Crown against M. upon the bond, the judge

purely formal, & did not operate as a satisfaction so as to discharge the surety.—NATIONAL BANK OF NEW YORK & REID (1885), 3 N. Y. L. R. C. A. 188.—N.Y.

c. In relief of surety—Right of surety.]—R. became security to plffs. for S. to the extent of \$100, & D.

received goods from them to the amount of \$151. S. desired to make a further purchase & H. wrote to pltt. becoming security to the extent of \$75, & in his letter he said, " I under-

charged the jury, that if they were satisfied that the sum of £5,000 had been remitted out of the taxes of 1842, & that G. had not expressly assented to the appropriation of that amount towards payment of the arrears of 1811, they ought to find for debt. :—*Held*: the Receiver-General had a right to appropriate the remittance by G., to the liquidation of the arrears of 1811, & it was not necessary that G. should assent to that appropriation, & M. was bound by the appropriation, & liable on the bond for the deficiency of the taxes for the year 1812.—*A.-G. OF JAMAICA v. MANDERSON* (1818), 6 Moo. P. C. C. 239; 12 Jur. 383; 13 E. R. 675, P. C.

**1146.** ————]—A payment by the obligor of a bond to the obligee to whom the obligor is also otherwise indebted cannot without some circumstances to show that it was intended to be made in discharge of the bond, be so applied in favour of the surety of the obligor in an action upon the bond under the plea of payment.—*PLOMER v. LONG* (1816), 1 Stark. 153, N. P.

*Annotation*:—*Refd.* *Rt. Mason, Ex p. Sharp* (1811), 3 Mont. D. & De G. 490.

**1147.** ———— *Intention gathered from circumstances—Payments for which discount allowed.*—Security having been given by a surety for goods to be supplied to his principal, & not in respect of a previously existing debt, goods are subsequently supplied, & payments are from time to time made by the principal, in respect of some of which discount is allowed for prompt payment, it is to be inferred in favour of the surety, that all these payments were intended in liquidation of the latter account.—*MARRYATTS v. WHITE* (1817), 2 Stark. 101, N. P.

*Annotation*:—*Refd.* *Rt. Mason, Ex p. Sharp* (1811), 3 Mont. D. & De G. 490.

**1148.** ———— *Payment of annuity.*—(1) Where the agents for the grantor & grantee of an annuity rendered an account to the latter, in which they gave him credit for instalments due from the former, stating at the same time that the money had not been then received, & allowed the grantee to draw upon them for the amount; & the agents having in about twelve months afterwards become bkpt. & neglected to apprise the grantee in the interval that the instalments still remained unpaid by the grantor, who had become insolvent: :—*Held*: the money so advanced to the grantee was not recoverable back by the assignees of the agents.

(2) So where the same agents had a bill account with the grantor of several annuities, for the payment of which A. became surety, & in consequence of a letter written by an attorney in the names of the grantees, at the instance of the agents, demanding payment of the arrears of the annuities, from the grantor and his surety, a sum of money was paid under circumstances, from which it was to be collected, that the money was intended to be specifically appropriated to the annuity account, & the agents applied it to the bill account: :—*Held*: this was a misapplication, & the money ought to be appropriated *pro rata* among the annuitants in relief of the surety.—*SHAW v. PICTON* (1825), 4 B. & C. 715; 7 Dow. & Ry. K. B. 201; 4 L. J. O. S. K. B. 29; 107 E. R. 1226.

*Annotations*:—*Is to* (1) *Consd.* *Cave v. Mills* (1862), 7 H. & N. 913. *Refd.* *Shaw v. Dartnall* (1826), 6 B. & C. 56; *Hume v. Bolland* (1832), 1 Cr. & M. 130; *Townsend*

*v. Crowdy* (1860), 8 C. B. N. S. 477; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603. *Generally, Mentd.* *Pierce v. Evans* (1835), 2 Cr. M. & R. 294; *Bato v. Lawrence* (1841), 7 Man. & G. 405.

presumption, that, where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation, may be rebutted by circumstances of the case showing that such could not have been the intention of the parties. *Pltfs.*, a discount co., were in the habit of discounting bills for S. In consideration that *pltfs.* would advance money to a certain amount to S. on the deposit of a lease of S.'s premises, debt. guaranteed any part of the money so advanced that might remain due after the realisation of the leasehold security, the guarantee to last for a period not exceeding two years. Advances were made to S. by *pltfs.* in accordance with the guarantee, & a great number of other transactions by way of further advance upon the discount of bills by *pltfs.* for S. took place in the usual course of business between them. Within two years from the date of the guarantee S. failed, owing to *pltfs.* an amount exceeding the sum guaranteed. A long debtor & creditor account was kept by *pltfs.* of their transactions with S. during such time, including the advances made under the guarantee. The aggregate of the items on both sides of the account very largely exceeded the amount of the sum guaranteed. In this account the practice was to credit S. with the amount of the bills discounted, less discount & commission, & debit him with the amount of the bills if they were dishonoured. Many of the bills discounted were renewed at maturity, & the same system of crediting & debiting applied to the renewals. The account was balanced on several occasions before S. failed, & showed balances against S. of much less amount than the sums advanced under the guarantee, but these balances were arrived at by crediting S. with the amount of outstanding bills, many of which were not paid at maturity, & were included in the ultimate balance against S. Bills were discounted with *pltfs.* by S. to cover advances made under the guarantee, & were from time to time renewed but never were paid. Bills, discounted by S. with *pltfs.* after the advances under the guarantee, had been paid to an amount exceeding the sum guaranteed, but it did not appear that in point of fact the balance really due from S. to *pltfs.* after the date of the guarantee was ever less than the sum guaranteed. In an action on the guarantee to recover the moneys advanced under it: :—*Held*: under the circumstances of the case, it could not have been the intention of *pltfs.* & S. by the mode in which the account between them was kept, that the advance under the guarantee should be considered as satisfied by the items of credit therein, & consequently the action was maintainable.—*CITY DISCOUNT CO. v. McLEAN* (1871), 1 L. R. 9 C. P. 692; 43 L. J. C. P. 314; 30 L. T. 883, Ex. Ch.

*Annotations*:—*Folld.* *Browning v. Baldwin* (1879), 40 L. T. 248. *Consd.* *Deeley v. Lloyds Bank*, [1912] A. C. 756. *Refd.* *Hooper v. Keay* (1875), 1 Q. B. D. 178; *Re Hamilton, Ex p. Smith* (1877), 25 W. R. 760; *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Cory v. Turkish S.S. The Mecca*, [1897] A. C. 286; *Parker v. Guinness* (1910), 27 T. L. R. 129; *Galula v. Pintus* (1911), 104 L. T. 574.

stand from S. that he has paid you £75 on account of the £100." The £75 had been paid by S., & in his letter enclosing it he said, "I send you £75

on account of goods bought by me, being one-half of the whole": :—*Held*: It was entitled to have the whole of this payment credited against the

£151, & *pltfs.* could not appropriate it to any part of the debt of S. for which it was not liable.—*LYMAN v. MILLER* (1854), 12 U. C. R. 215.—*CAN.*

*Sect. 1.—Fulfilment of purpose of the guarantee: Sub-sect. 1, A. (b) i. & ii., B. & C.]*

**1150. In respect of what payments—Debt payable by instalments—Bankruptcy of debtor—Appropriation of dividends received by creditor.]**—The obligee of a bond given by principal & surety conditioned for the payment of money by instalments, who has proved under a commission of bkpcy. against the principal the whole debt, & received a dividend thereon of 2s. 7d. in the pound, may recover against the surety an instalment due, making a deduction of 2s. 7d. on the amount of such instalment, & the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only ratably in part payment of each instalment as it becomes due.—*MARTIN v. BRECKNELL* (1813), 2 M. & S. 30; 2 Rose, 156; 105 E. R. 207.

*Annotations:—Consd. London Assoc. v. Buckle* (1820), 4 Moore, C. P. 153. *Reid. Re Garner, Ex p. Holmes* (1839), 4 Deac. 82.

**1151. — — — Debts incurred at one place—Payment at another.]** (1) Letter of guarantee to pltf. by deft., "that C. shall faithfully & honestly discharge any duty assigned to or trust reposed in him." Pltf., upon receiving this, employed C. as his agent:—*Held*: sufficient consideration appeared on the face of the guarantee to bind deft.

(2) Pltf., in an action against the surety for an agent, showed that he employed the agent first at B. & afterwards at L.; & that the agent when removed to L. was indebted to him in a considerable balance, & produced accounts which bore on the face of them, that various sums remitted by the agent from L. were so remitted as the proceeds of sales made at L.:—*Held*: the judge was not bound to direct the jury as matter of law, that they must consider the remittances from L. to be made in discharge of the balance due at B., so as to relieve the surety from his liability, but he was right in leaving the question to the jury on the whole matter in evidence.—*LYSAGHT v. WALKER* (1831), 5 Bli. N. S. 1; 2 Dow & Cl. 211; 6 E. R. 707, H. L.

*Annotations:—Generally, Mend. Banbury Union Grdns. v. Robinson* (1839), 4 Jur. 170; *Kempe v. Gibbon* (1818), 17 L. J. Q. B. 298.

**1152. — — — Monthly subscriptions & premiums to money club—Surety for member thereof.]**—The surety on a promissory note given to secure a loan to a member of a money club formed for the purpose of raising money by means of monthly subscriptions, & lending it in small sums at interest to the members, & dividing the proceeds when the shares are fully paid up & the loans repaid, cannot rely upon the monthly subscriptions & premiums paid by his principal, as payments in reduction of his liability upon the note.—*WRIGHT v. HICKLING* (1866), L. R. 2 C. P. 199; 36 L. J. C. P. 40; 15 L. T. 245.

**— — — Bail in Admiralty action.]—See ADMIRALTY, Vol. I., p. 170, No. 811.**

**1153. Alteration in status of parties—Death of joint creditor—Banking guarantee—Payment subsequent to death.]** *STRANGE v. LEE*, No. 1009, *post*.

**1154. — — — — —.]** *PEMBERTON v. OAKES*, No. 1011, *post*.

**1155. — — — — — Bill accepted before but payable after death.]**—*HOLLOND v. TEED*, No. 1012, *post*.

**1156. — — — — — Increase or diminution of guarantee after death.]**—*HOLLOND v. TEED*, No. 1012, *post*.

**1157. — — — — — Death of joint debtor.]**—*ROYAL BANK OF SCOTLAND v. CHRISTIE*, No. 1620, *post*.

**1158. — — — — — Death of surety.]**—*Re SHERRY*, LONDON & COUNTY BANKING Co. v. TERRY, No. 633, *ante*.

**1159. — — — — — Addition of partner—To creditor's firm.]**—*SPIERS v. HOUSTON*, No. 1283, *post*.

**1160. — — — — —.]**—*EYTON v. KNIGHT*, No. 1284, *post*.

**— — — — —.]**—*See, generally, Sect. 3, sub-sects. 3, 11, C., post.*

**Appropriation generally.]—See CONTRACT, Vol. XII., pp. 474 et seq.**

## ii. Banking Guarantee.

**1161. Appropriation to guaranteed debt—Intention of parties—No definite appropriation.]**—A. & B. entered into a joint & several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond & before it became due A. paid money to the bankers, & he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between A. & the bankers in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but A. became bkpt. before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. & the bankers, & to the arrangement respecting the warrant of attorney:—*Held*: (1) B. was not discharged by the time given to A.; (2) the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account & the bankers being entitled to hold the bond & warrant of attorney as distinct securities.—*TYSON v. COX* (1823), Turn. & R. 395; 37 E. R. 1153, L. C.

**1162. — — — — —.]**—*WILLIAMS v. RAWLINSON*, No. 657, *ante*.

**1163. — — — — —.]**—In an ordinary banking account the first item of the debit side is discharged by the first item on the credit side. But where pltf. were bankers, & one of defts. upon opening an account with them had borrowed of them £1,000 for which he, together with the other defts., became bound to pltf. with a condition for repayment with interest by a certain day, & continued afterwards to pay in & draw out money upon the usual footing of a banker's account; & the first sum entered to his debit on the account was partly made up of the £1,000, to secure which the bond had been given:—*Held*: on a plea of *solvit post diem*, the bond was not satisfied by sums subsequently paid in exceeding in amount the £1,000, it not being the intention of the parties that the first item of the debit side should be reduced by the first item of the credit side, but that the bond should stand to secure pltf. against such advances as they should from time to time make to deft.—*HENNIKER v. WIGG* (1813), 4 Q. B. 792; Dav. & Mer. 160; 1 L. T. O. S. 229; 7 Jur. 1058; 114 E. R. 1095.

*Annotations:—Distd. Re Boys, Eedes v. Boys, Ex p. Hop Planters Co.* (1870), L. R. 10 Eq. 467. *Fold. City Discount Co. v. McLean* (1871), L. R. 9 C. P. 692. *Consd. Deeley v. Lloyds Bank*, [1912] A. C. 756. *Reid. Merriman v. Ward* (1860), 1 John. & H. 371; *Mosse v. Salt* (1863), 32 Beav. 269; *Re Handiton, Ex p. Smith* (1877), 25 W. R. 760; *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Cory v. Turkish S.S., The Mecca*, [1897] A. C. 288.

**1164. — — — — — Terms of written agreement.]**—A customer borrowed from his bankers £2,000,

which was placed to the credit of his current account, & to secure the debt gave them ten promissory notes payable at intervals of a week. At the same time a friend of the borrower wrote to the bankers as follows:—"You having this day at my request placed the sum of £2,000 to the credit of Mr. C.'s" (the borrower's) "account with you, in the event of his promissory notes & interest or any of them representing that amount not being paid at the due dates, I hereby undertake, upon demand, to secure payment of the same," by a mtge. of certain specified property. On the first five due dates the sums represented by the first five notes respectively were debited by the bankers to the customer in the current account; & on each of the first two due dates enough cash was paid in to the account in the course of the day to liquidate the amount of the note. On the remaining three days the balance throughout the day was against the customer. The amounts of the last five notes were not entered by the bankers in the account at all. The payments in to the credit of C. to his current account, & to another special account after the last note became due, were sufficient to cover all debits up to & including the last note; but the accounts were during all this time overdrawn:—*Held*: the bankers were bound to apply all moneys paid in first to the notes secured by the surety which had fallen due; & the debt was, moreover, discharged, on the principle of *Clayton's Case* (1816), 1 Mer. 572. The real question is to be determined on the written agreement between the parties (*BACON, V.-C.*).—*KINNAIRD v. WEBSTER* (1878), 10 Ch. D. 139; 48 L. J. Ch. 348; 39 L. T. 494; 27 W. R. 212.

*Innovation.*—*Expld.* *Browning v. Baldwin* (1879), 40 L. T. 218.

1165. ———.]—*BROWNING v. BALDWIN*, No. 660, *ante*.

1166. ——— *Separate accounts kept.*]—Pltfs. lent £1,000 to B., one of their customers, upon the security of a joint & several promissory note, payable on demand, made by B. & deft., a solr., & also upon the deposit of the deeds of a house of which B. was the owner, together with a memorandum signed by B. that the deeds were deposited as security for any general balance not exceeding £1,000, which might then or thereafter be due to pltfs. from him. The memorandum contained an undertaking by B. to execute a legal mtge. of the house, but this undertaking was not carried out. Subsequently, in Mar. 1875, an arrangement was entered into without the knowledge of deft., between pltfs. & B. whereby it was agreed that pltfs. should not press for repayment of the loan, but that B. should pay instead a higher rate of interest than that on which the loan was originally made, & this higher rate was afterwards debited to B. in his current account. The loan & current account were always kept distinct, & for some months subsequent to this arrangement pltfs. always had a balance exceeding £1,400, to the credit of B. Pltfs. having pressed for the execution of a legal mtge. with the usual power of sale, deft.'s partner, on behalf of & in the name of his firm, prepared a legal mtge. to pltfs., another solicitor acting for B. This mtge. which was executed by B. secured the payment to pltfs. of any sum not exceeding £1,500 which might thereafter be due to pltfs. upon B.'s general

account with interest at 6 per cent. & also contained a covenant for payment three months after demand, & a power of sale in case of default. In an action brought upon the promissory note against deft., after default made by B.:—*Held*: (1) deft. had signed & was liable upon the promissory note as principal, & as there was no evidence to show that pltfs. had agreed to accept deft. merely as surety, he was not entitled to be treated as such.

(2) Assuming deft. was & had been accepted by pltfs. as surety for B. the transaction of Mar. 1875, did not amount to such a giving of time to B. as to discharge deft. from his liability on the promissory note; (3) pltfs. were not bound to discharge the loan, which had been kept distinct from the current account, by appropriating to the payment of the promissory note the balance which they held to the credit of B.—*YORK CITY & COUNTY BANKING CO. v. BAINBRIDGE* (1880), 43 L. T. 732; 45 J. P. 158.

1167. ———.]—*BRADFORD OLD BANK v. SUTCLIFFE*, No. 1613, *post*.

1168. ——— *Bankruptcy of debtor when guarantee given—Knowledge of bank—Ignorance of surety.*]

—Where bankers, with the knowledge of an act of bkpey. committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then or thereafter to become due from the customer, but the surety had no notice of the act of bkpey., & afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the banker's debt the payment was to be applied:—*Held*: such payment was to go in reduction of that portion of the bankers' debt which was provable under the fiat, & not of that which was not provable. *Re MASON, Ex p. SHARP* (1841), 3 Mont. D. & De G. 490; 8 Jur. 1012, Ct. of R.

*Alteration of status of parties—Increase or decrease in numbers.*]—*See* Sub-sect. 1, A. (b) i., *ante*.

*Appropriation generally.*] *See* CONTRACT, Vol. XII., pp. 474 *et seq.*

*B. Set-Off as between Principal Debtor and Creditor.*

*See* Part VI., Sect. 3, sub-sect. 2, *ante*.

*C. Other Modes of Fulfilment.*

1169. *Execution against debtor Ball bond.*]—*v. EWER* (1735), Barnes, 66; 91 E. R. 809.

1170. *Sale of goods the subject of guarantee—Sale at profit—Misappropriation of proceeds by debtor.*]—Words in a guarantee "In consideration of, etc., I guarantee the payment by A. of any loss which may possibly accrue to you on your share of this transaction":—*Held*: the liability of the party giving the guarantee terminated upon the sale of the goods at a profit, so as not to include a loss occasioned by the misappropriation by A. of the proceeds of sale.—*Re LACY, Ex p. DE SOUZA* (1853), 1 Bankr. & Ins. R. 30.

1171. *Distress levied against debtor—Distraintors also mortgagees of goods distrained—Mortgage additional security for debt.*]—*PEARL v. DEACON*, No. 815, *ante*.

#### PART IX. SECT. 1, SUB-SECT. 1.—C.

*p. Accounts of principal debtor adopted & passed by creditor.*]—*SHEWFEET v. KINCARDINE TOWNSHIP* (1915), 9 O. W. N. 370; 35 O. L. R. 344.—CAN.

*Sect. 1.—Fulfilment of purpose of the guarantee: Sub-sect. 2. Sect. 2: Sub-sect. 1, A. & B.]*

**SUB-SECT. 2.—BY SURETY.**

**1172. Fulfilment of conditions of guarantee—Ensuring attendance of debtor—Time given to debtor by creditor—Debt payable by instalments.]—**Debtor gave a *cognovit* for the payment of his debt by instalments of £5 with a proviso that on default made in paying any instalment, judgment might be signed & execution issued for the whole. By agreement of even date with the *cognovit* a third party undertook that, within seven days after any notice given to him for that purpose, the debtor should attend at a certain place, so that, in case of any of the instalments not being previously discharged, a *ca. sa.* to be issued on the judgment to be entered up on the *cognovit*, might be duly executed; & in default of debtor's appearing at the time & place stipulated, the surety undertook to pay the debt & costs. The first instalment being unpaid, & notice given, debtor appeared at the proper time & place but was dismissed on promising to pay the £5 in a few days, which he did: *Held*: the agreement of the surety was satisfied by his having once rendered the debtor to be taken in execution on the *cognovit*; & he was not bound to produce him again upon notice, on default as to a subsequent instalment. *TURNER v. PYNE* (1834), 1 Ad. & El. 34; 3 Nev. & M. K. B. 354; 3 L. J. K. B. 120; 110 E. R. 1120.

**1173. Payment—Into court—Guarantee for annuity—Annuity subsequently set aside.]—**Where a surety taken in execution, under a judgment entered up on a warrant of attorney, given by him to secure the payment of an annuity, obtained an order to be discharged out of custody on payment into ct. of the balance which might be found due to the grantee, on taking an account before the Prothonotary; & the principal afterwards succeeded in setting aside the annuity deed & other securities on which it was founded, upon the ground of an illegal retainer of part of the consideration money, on payment of the balance which might be found to be due to the grantee, on an account to be taken by the Prothonotary; & the surety afterwards applied to be discharged out of custody, on the ground that the deeds were set aside as against his principal: the ct. refused to interfere, unless he had previously paid the balance into ct., according to the terms of the first order, or would give security to the Prothonotary to cover the amount which might ultimately be found to be due from his principal to the grantee of the annuity.—*WILLIAMSON v. GOULD* (1823), 1 Bing. 271; 8 Moore, C. P. 224; 1 L. J. O. S. C. P. 100; 130 E. R. 110.

**1174. — Surety for receiver—Notice to creditor.]—**Proceedings were commenced in the common law side of this ct., against the surety

of a receiver, to compel the payment of the balance, ordered to be paid to pltf. The surety paid the amount to the solr. prosecuting the proceedings, & then applied to have his recognisance vacated. The petition was served on pltf., who did not appear. The ct. refused to make the order, but directed pltf. to be served with a notice, that the order would be made on a given day, unless pltf. showed cause to the contrary. Pltf. not then appearing, the order was made.—*MANN v. STENNETT* (1845), 8 Beav. 180; 9 Jur. 98; 50 E. R. 75.

**1175. — — — — —]—***SHUFF v. HOLDAWAY* (1857), cited in *Daniell's Chancery Practice*, Vol. II., 8th ed. at p. 1500.

**1176. — Appropriation—According to surety's intention—Not for benefit of debtor.]—**(1) A payment by a surety must be appropriated in accordance with his intention, & cannot be controlled for the benefit of the principal.

(2) A surety guaranteed the sufficiency of a security covering part of the principal's debt:—*Held*: the release of his guarantee did not necessarily vacate the security.—*WAUGH v. WREN* (1862), 1 New Rep. 142; 7 L. T. 612; 9 Jur. N. S. 365; 11 W. R. 214, L. C.

**1177. — — — — — Agreement to appropriate not carried out—Effect on surety not party to agreement.]—**Several persons had become guarantors of a sum of money to a bank. Three of these persons deposited with the bank a sum of money equal to half the total guaranteed debt, & such sum was carried to a suspense account. The bank had power to appropriate the money to the payment of the debt, but never made such appropriation:—*Held*: until appropriation the deposit with the bank did not operate as a payment of the debt *pro tanto*, & the liability of the remaining guarantors for the total amount of their debt was in no way affected thereby.—*COMMERCIAL BANK OF AUSTRALIA v. WILSON & CO.'S ESTATE* (OFFICIAL ASSIGNEE), [1893] A. C. 181; 62 L. J. P. C. 61; 68 L. T. 540; 9 T. L. R. 307; 41 W. R. 603; 1 R. 331, P. C.

*Annotation*:—*Mentd.* *Edwards v. Hood-Barrs*, [1905] 1 Ch. 20.

**1178. Set-off—Debt due from creditor to one surety—Creditor's action against other surety.]—***BOWYEAR v. PAWSON*, No. 773, *ante*.

**Bills of exchange.]—***See* *BILLS OF EXCHANGE*, Vol. VI., pp. 341-362, Nos. 2263-2389.

**SECT. 2.—DISCHARGE FROM LIABILITY.**

**SUB-SECT. 1.—VARIATION OF TERMS OF**

**PRINCIPAL CONTRACT.**

**A. General Rule.**

**1179. Material variation—Discharges surety.]—***BROWNE v. CARR*, No. 1196, *post*.

**PART IX. SECT. 1, SUB-SECT. 2.**

**a. Fulfilment of conditions of guarantee.]—***MACINTOSH v. ALLEN* (1817), 2 Krr. 362.—*CAN.*

**f. — — — — —]—***DOBELL v. ONTARIO BANK* (1884), 9 A. R. 484.—*CAN.*

**g. Payment—Whether advances given to principal debtor—Without knowledge of creditor.]—***CHATHAM v. BELL* (1883), 8 A. R. 337.—*CAN.*

**t. — Full amount of guarantee.]—**A guarantor can only end his liability by paying the full amount guaranteed or by paying the amount secured at the time & informing the creditor not to allow any more to the debtor on the strength of the guarantee.—

*ROYAL BANK v. STERNS*, [1921] 3 D. L. R. 1030.—*CAN.*

**PART IX. SECT. 2, SUB-SECT. 1.—A.**

**1179 i. Material variation—Discharges surety.]—***MOORE v. ANDREW* (1864), 23 U. C. R. 307.—*CAN.*

**1179 ii. — — — — —]—**Where an alteration is in the contract of suretyship, then, unless it is without inquiry self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the ct. will not go into an inquiry or permit the question to be submitted to the jury, but will hold that the surety must be the sole judge as to whether he will remain liable, notwithstanding the

alteration.—*CITIZENS INSURANCE Co. v. CLUXTON* (1886), 13 O. R. 382.—*CAN.*

**1179 iii. — — — — —]—**Pltf. bank made a loan to S. on a promissory note & an agreement by S. to give security on his threshed grain. Applt. signed the note as surety. The grain was hauled to an elevator & storage tickets issued to S. who took them to the bank, which instead of applying them on the note, made fresh advances thereon:—*Held*: as the storage tickets when brought into the bank were applied for a purpose other than that set out in the agreement, to the detriment of applt.'s position, he was thereby released.—*CANADIAN BANK OF*

1180. — — —.]—THE HARRIETT, No. 1370, *post*.

1181. — — —.]—GENERAL STEAM NAVIGATION CO. v. ROLT, No. 1219, *post*.

1182. — — —.]—BLEST v. BROWN, No. 759, *ante*.

1183. — — —.]—HARRISON v. SEYMOUR, No. 1183, *ante*.

1184. — — —.]—HOLME v. BRUNSKILL, No. 1216, *post*.

1185. — — —.]—WARD v. NATIONAL BANK OF NEW ZEALAND, No. 1582, *post*.

1186. — — —.]—Where one of several persons jointly & severally liable had become bkpt., & the alleged release was given to his trustee in bkpcy.:—*Held*: (1) as the joint liability had become several by the bkpcy., & bkpt.'s estate was severally liable only, the release could not under any circumstances be a release to the other persons liable; (2) the facts showed no intention to give a general release, but merely to compromise a right of proof against bkpt.'s estate.

(3) Under the law of principal & surety a creditor must not act in a manner inconsistent with the contract under which the obligation of suretyship was incurred; do anything to prejudice the right of contribution between the co-sureties. If he does, the sureties will be released either wholly or *pro tanto*.

(4) Where the creditor had effected a compromise with the trustee in bkpcy. of one of several sureties, by which he precluded himself from receiving a dividend against the estate:—*Held*: the co-sureties were discharged to the extent of the dividend which, but for such compromise the creditor might have received.—*Re WOLMERSHAUSEN, WOLMERSHAUSEN v. WOLMERSHAUSEN* (1890), 62 L. T. 511; 38 W. R. 537.

*Annotation*:—*Is to* (1) *Reid*. *Re E. W. A.*, [1901] 2 K. B. 612.

1187. — — —.]—LUNING v. MILTON (1890), 7 T. L. R. 12.

1188. — — —.]—Although variance diminished risk.—WHITCHER v. HALL, No. 1215, *post*.

1189. — — —.]—GRANT v. BUDD, No. 1293, *post*.

1190. — — —.]—Although damage only nominal.—POLAK v. EVERETT, No. 1222, *post*.

#### B. Consent of Surety to Variation.

1191. *Surety not discharged*.—A. indorsed to S. & co. as a security for advances made to him by them, certain promissory notes made by B. While the notes were running A. stopped payment, & a deed was executed by him & several of his creditors, & among them by S. & co. whereby his affairs were placed in the hands of the inspectors, & the creditors, parties to the deed, agreed on certain terms not to call for or compel payment of the debts due from him for the period of three years. After the execution of this deed

by A. & S. & co. & before the notes became due, B. signed a written consent to the creditors' signing the deed, & giving time to A. without prejudice to their claims on her. B.:—*Held*: her liability on the notes to S. & co. was thereby revived.—SMITH v. WINTER (1838), 4 M. & W. 451; 1 Horn & H. 381; 8 L. J. Ex. 31; 150 E. R. 1507.

*Annotations*:—*Reid*. *Kearsley v. Cole* (1846), 16 L. J. Ex. 115; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666.

1192. — — —.]—(1) A firm were holders of a joint & several promissory note made by a father & son. The son assigned all his property to trustees for the benefit of his creditors, who were expressed to be parties to the assignment & to be named in a sched., & the deed purported to contain an absolute release of the debts without any reservation of rights against sureties. One of the trustees was a partner in the above-mentioned firm, & the deed was executed by him & the other trustees, but not by any other creditor. It was also executed by the son, with the privity & concurrence of the father. Upon its execution as an act of bkpcy., an adjudication was pronounced against the son:—*Held*: even assuming the father to have joined in the note as a surety merely, & the partner to have executed the deed as a creditor & not merely as a trustee, the father's liability was not discharged.

(2) It is not universally necessary, in order to reserve on a composition deed remedies against sureties, that the reservation should be expressed in the deed.

(3) The general rule, that a surety who has concurred in or ratified an arrangement between his creditor & the principal debtor cannot claim to be discharged by the effect of that arrangement, was not disputed in argument (TURNER, L.J.).—*Re BLAKELY, Ex p. HARVEY, Ex p. SPRINGFIELD* (1854), 4 De G. M. & G. 881; 1 Bankr. & Ins. R. 220; 23 L. J. Bcy. 26; 13 E. R. 752, L. J.J.

1193. — — —.]—*Surety blind & deaf*.—VICKERS v. BELL, BELL v. VICKERS, No. 339, *ante*.

1194. *What amounts to consent*.—*Permitting creditor to sign debtor's certificate*.—*In bankruptcy*.—A. writes orders to B. for the delivery of goods to C., which are accordingly delivered to the latter upon the credit of the former. The usual credit of the trade is four months, & the bills of parcels are made out in the name of C. The period of credit is enlarged from time to time without the knowledge of A.; & C. becoming bkpt., B. proves the amount of the goods under the commission, which exceeds more than two-fifths of C.'s debts, & signs his certificate without any communication with A., who at the time of the bkpcy. is abroad, & does not return to this country until eight years afterwards:—*Held*: A. was still liable as surety for C. to B.—LANGDALE

COMMERCE v. SWANSON & McMILLAN, [1923] 3 D. L. R. 188; 33 Man. L. R. 127; [1923] 1 W. W. R. 1201.—CAN.

1179 iv. — — —.]—Plffs. sold shares to K. for \$110,000, of which \$50,000 was paid in cash, & the balance was secured by promissory notes, payable in one year, with interest at 6 per cent. p.a., payable quarterly. The agreement of sale provided that the notes were to be collaterally secured by the bond of a guarantee co. To implement this, deft. co. gave its bond, in the penal sum of \$60,000 to plffs. K. joining as obligor. Before the notes matured, K. proposed to pay a part of what was due upon them, & renew for the balance. Plffs. assented

to this on condition that the liability of deft. co. should be renewed. The rate of interest was raised to 7 per cent. A renewal receipt was issued by deft. co.:—*Held*: deft. co. was not discharged by reason of what it alleged was an alteration in the contract between the debtor & the obligor—i.e. by the increase in the rate of interest.—SEE v. LONDON GUARANTEE & ACCIDENT CO. (1923), 56 O. L. R. 78.—CAN.

1179 v. — — —.]—HOBSON'S EXECUTORS v. SPIERS (1929), 3 Wils. & S. 392; 3 Sh. (Cl. of Sess.) 180; 1 Sh. (Cl. of Sess.) 366; 1 Fac. Coll. 346.—SCOT.

1179 vi. — — —.]—UNION GOV-

ERNMENT v. DIEDRIKHS (1915), 36 N. L. R. 458.—S. AF.

a. *Dealings subsequent to guarantee*.—*Whether surety discharged*.—A surety is not discharged by dealings between the creditor & the principal debtor, subsequent to the contract, which are manifestly to the advantage of the surety, or which are contemplated in the contract between the creditor & the principal debtor, or which do not amount to a binding contract founded on valuable consideration.—WRIGHT v. WESTERN CANADA ACCIDENT & GUARANTEE INSURANCE CO., LTD. (1914), 20 B. C. R. 321; 20 D. L. R. 478; 6 W. W. R. 1409.—CAN.

**Sect. 2.—Discharge from liability: Sub-sect. 1, B. & C. (a), (b), (c), (d), (e), (f) & (g).]**

*v. PARRY* (1823), 2 Dow. & Ry. K. B. 337; 1 L. J. O. S. K. B. 70.

1195. — — — — —.]—If a surety for the debt of a party who becomes bkpt. do not take up the proof in the mode pointed out by 6 Geo. 4, c. 16, s. 52, the creditor retains the right to prove under the commission & sign the certificate, & does not, by so doing, discharge the security.—*HATFIELD v. THOMAS* (1830), L. & Welsb. 201.

1196. — — — — —.]—(1) A surety for a bkpt. is not discharged by the creditor's signing the bkpt.'s certificate, even after notice from the surety not to do so. It is the duty of the surety to pay the debt, & if he declines so doing, thereby permits the creditor to prove, the signing the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an act done by the creditor which altered the surety's right, without his control, & scarcely, indeed, without his consent (*TINDAL, C.J.*).

(2) The ground upon which it has been extended that this proceeding amounts to a release is the general acknowledged principle that wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged at law (*TINDAL, C.J.*).—*BROWNE v. CARR* (1831), 7 Bing. 508; 5 Moo. & P. 497; 9 L. J. O. S. C. P. 114; 131 E. R. 197.

*Annotations:—A. to (1) Reid, Ellis v. Wilnot* (1874), L. R. 10 Exch. 10; *Beckett v. Addyman* (1882), 9 Q. B. D. 783.

1197. — **Knowledge of transactions—Between creditor & debtor.**—A., B. & C. contracted with a co. to execute certain works on given terms. D. & E. gave a bond as their sureties for the performance of the contract. A. & B. retired from the partnership, & F. was substituted. Afterwards disputes arose between the co. & C. & F. as to the conduct of the works, & various transactions took place by which the terms of the contract were varied, & during which the co. paid to C. & F. certain moneys which it had been agreed originally should be paid to A., B. & C. D. & E., the sureties, were no parties to these transactions, & gave no express consent; but they had been the solrs. of A., B. & C. in the original contract; knew of all the subsequent transactions, & acted as the solrs. of C. & F., & as such solrs. prepared many of the documents required for such transactions. The co. having brought an action on the bond against the sureties, for breach of the contract, they filed this bill to restrain the action:—*Held*: the sureties were not discharged, & the action could not be stopped.—*WOODCOCK v. OXFORD & WORCESTER RY. CO.* (1853), 1 Drew. 521; 61 E. R. 551.

*Annotation:—Ment. Noyes v. Pollock* (1886), 32 Ch. D. 53.

1198. **Bankruptcy of surety after consent given—Creditor no knowledge of bankruptcy—When effecting variation.**—A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorised the creditor to act according to the best of his discretion in the settlement of the affairs. The creditor accordingly went to Paris & entered into a composition for the debt with the Paris house. After the departure of the creditor from England, & previous to the composition, a commission of bkpt. issued against the London house, of which fact the parties to the composition were ignorant:—*Held*: the bkpey. did not determine the

authority.—*Re MACDONNELL, Ex p. MACDONNELL* (1819), Buck, 399.

**C. Particular Instances.**

**(a) Separable Contracts.**

1199. **Alteration in one transaction—Surety not discharged from other—Transactions entirely distinct.**—When one enters into a bond as surety for the performance by another of two things which are separate & distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other. By agreement between pltf. & S., pltf. agreed to purchase of S. the ship *Devonport*, the price being a sum of money & the transfer to S. of pltf.'s ship the *Lord Dalhousie*. Pltf. also agreed to lend S. £8,000 on mtge. of the *Lord Dalhousie*; & S. agreed to repair her, so as to class her eight years A1 at Lloyd's; & also to do anything remaining to be done to the *Devonport* within two weeks after that ship's arrival in London. Deft., as surety for S., gave his bond to pltf., conditioned to be void if S. forthwith repaired the *Lord Dalhousie*, & if S., within the two weeks mentioned did all that remained to be done to the *Devonport*. Pltf. & S. afterwards, without the knowledge of deft., made another agreement, whereby the time within which the *Devonport* was to be completed was shortened, & more was to be done to her than was included in the original agreement:—*Held*: the conditions in the bond as to the *Lord Dalhousie* & the *Devonport* were separate & distinct; & deft., though released by the alteration made by the second agreement in the terms of the first from his liability so far as related to the completion of the *Devonport*, was not released from his liability in respect of the *Lord Dalhousie*.—*HARRISON v. SEYMOUR* (1866), L. R. 1 C. P. 518; Har. & Ruth. 567; 35 L. J. C. P. 261; 12 Jur. N. S. 924.

*Annotations:—Distd. Croydon Gas Co. v. Dickinson* (1876), 1 C. P. D. 707. *Reid, Polak v. Everett* (1876), 31 L. T. 128.

1200. — — — **Debt payable by instalments.**—A principal with sureties for the performance of the contract contracted to take tar from a gas co., & to pay for each month's supply within the first fourteen days of the ensuing month, unless the co. should by writing allow a longer time for payment. After the expiration of the first fourteen days of Aug. the co. took a promissory note from the principal for the amount due for July. Default was made by the principal in payment of the amounts due for July, for Aug., & for Sept.:—*Held*: time having been thus given for the payment of the amount due for July, the sureties were discharged as to that amount; but not as to the amounts due for Aug. & for Sept.; the contract being separable, & the position of the sureties as to those amounts not being affected by the giving time for payment of the amount due for July.—*CROYDON GAS CO. v. DICKINSON* (1876), 2 C. P. D. 46; 46 L. J. Q. B. 157; 36 L. T. 135; 25 W. R. 157, C. A.

*Annotations:—Reid, Holme v. Brunskill* (1878), 3 Q. B. D. 493; *Alliance & Dublin Gas Consumers' Co. v. Blott* (1886), 3 T. L. R. 111; *Egbert v. National Crown Bank*, [1918] A. C. 903.

**(b) Advances on Loans.**

1201. **Form of advance—Accepted bills—Instead of consignments of goods.**—By the old law of France, where the dealing between a principal & his debtor is of such a nature as to operate simply



as a prolongation of time for the payment of the debt; if the surety is not precluded by such dealing, from suing the debtor for his indemnity, he will not be discharged: but if such dealing between the principal & his debtor amounts to a present, though but *pro tempore* payment, as the surety cannot then sue the principal debtor, he is discharged from his guarantee.

Where, therefore, a party became surety, upon an agreement for securing certain advances, by future consignments of West India produce, & after such advances, but before any consignments, the party having contracted to make the same accepted bills to the amount of the advances:—*Held*: inasmuch as such acceptances operated as a *pro tempore* payment of the sums advanced under the agreement, the surety was discharged.—*BELLINGHAM v. FREFRE* (1837), 1 Moo. P. C. C. 333; 12 E. R. 841, P. C.

**1202. Contract for delayed advance—Advance made immediately.]**—R., together with J. as his surety, gave a promissory note to bankers, who were to give to R. a draft, payable at three months. No draft was given, but the bankers immediately advanced the amount to R. without the concurrence of J.:—*Held*: this was a substantially different transaction, & J. was released from his liability as surety.—*BONNER v. COX* (1811), 13 L. J. Ch. 260; 2 L. T. O. S. 493; 8 Jur. 387, L. C.

*Annotations*:—*Distd. Cooper v. Evans* (1867), L. R. 4 Eq. 45. *Refd. Archer v. Hudson* (1846), 7 L. T. O. S. 105; *Beckett v. Addyman* (1882), 9 Q. B. D. 783; *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Re Wolmerhausen, Wolmerhausen v. Wolmerhausen* (1890), 62 L. T. 541.

**1203. Advance by loan society—Variation in terms of discount.]**—To an action by the payee against the maker of a promissory note, deft. pleaded that the note was made by him jointly & severally with, & as surety for A., to secure the repayment of a loan of £20, advanced by a certain loan society to A.; that the loan was advanced by the society in the ordinary way of business; that, according to the rules of the society, it was to be repaid by weekly instalments; that discount to the amount of 2s. in the pound, & no more, was to be charged by the society to A.; that the society wrongfully & fraudulently, & contrary to the rules, & without deft.'s consent, deducted from the loan a larger sum of money than at the rate of 2s. in the pound, to wit, the sum of 12s.: *Held*: the surety was liable.—*BROWN v. WILKINSON* (1844), 13 M. & W. 14; 13 L. J. Ex. 302; 3 L. T. O. S. 161; 153 E. R. 6.

*Annotation*:—*Refd. Rayner v. Fussey* (1859), 26 L. J. Ex. 132.

#### (c) Banking Guarantees.

**1204. Transfer of account—To debtor & third person.]**—Defts. signed a note jointly & severally with one C. B., the elder, as security for his account with plffs. as his bankers. They were aware that C. B., the elder, a maltster, paid in to his account sums received by him from his son, who was in

business as a miller, & paid his son such sums as he required; but the cheques were drawn & the accounts kept in the name of the father, & it did not appear that he & his son were partners. Afterwards, a balance being due from the father, the father, in the son's presence, agreed with plffs. that in future the cheques should be drawn & the accounts kept in the name of "C. B. & Son"; & this was done, but nothing was said to the son as to the transfer to the new account of the old balance due to plffs. from C. B., the elder, & no balance was struck on plffs. books; it was simply carried on to the new accounts, with the account of the credit on the other side, & the passbook was unaltered. Afterwards, a larger amount than the amount of the old balance was paid in generally to the new account, but C. B. & Son then failed, there being then a balance against them exceeding the amount of the note. In an action against the sureties, the judge having left it to the jury whether the arrangement really was made as appeared in the books, & they having found for plffs., the ct. refused to set aside the verdict as against the weight of evidence, & held that there was no evidence for the jury that the old account was transferred to the father & son, so that deft. was not discharged.—*ALLAWAY v. HARRIS, ALLAWAY v. ROBERTS* (1860), 29 L. J. Ex. 214; *sub nom. ALLAWAY v. BENNETT, ALLAWAY v. HARRIS*, 2 L. T. 131; 6 Jur. N. S. 317.

**1205. Increase of rate of interest.]**—*EGBERT v. NATIONAL CROWN BANK*, No. 1008, *post*.

#### (d) Bills of Exchange.

*See* BILLS OF EXCHANGE, Vol. VI., pp. 405–413, Nos. 2637–2676.

#### (e) Building Contracts.

*See* BUILDING CONTRACTS, Vol. VII., pp. 427–430, Nos. 376–385.

#### (f) Compositions and Deeds of Arrangement.

*See* BANKRUPTCY, Vol. V., pp. 1100–1104, Nos. 9612–9638.

#### (g) Fidelity Guarantees.

**1206. Agent—Irregular conduct of creditor's business—Breach of revenue regulations.]**—A., B., C., D., & E., carried on trade in partnership, as distillers, & C. alone carried on the business of a retail dealer in spirits, within two miles of the distillery, contrary to the 4 Geo. 1, c. 94, ss. 132, 133, & his name was not inserted as one of the partners in the distillery in the Excise-book, or licence, as required by Excise Licences Act, 1825 (c. 81), s. 7:—*Held*: these being mere Revenue regulations, the breach of them by one of the partners, with the knowledge of the others, did not render the trade carried on by the five so illegal as to deprive them of the right to recover the price of spirits sold by them, or for the breach

#### PART IX. SECT. 2, SUB-SECT. 1.—C. (g).

**b. Change in mode of remuneration—Agent.]**—To a declaration against a surety on a bond, conditioned for the performance of his duty by W. while in plffs.' service as their agent, or in any other capacity whatsoever, deft. pleaded that W. entered plffs.' employment as agent at a certain commission or percentage on the business done, & deft. executed the bond under the agreement that he should be so paid,

& that afterwards plffs., without deft.'s knowledge or consent, changed the mode of remuneration to a fixed salary:—*Held*: no defence.—*BANK OF TORONTO v. WILMOI* (1859), 19 U. C. R. 73.—*CAN.*

**c. ———.]**—*CHITTOPI, ETC. v. VINAYAK, ETC.* (1920), 1 L. R. 45 Bom. 157.—*IND.*

**d. ——— Division court clerk.]**—After defts. had become sureties for a division ct. clerk, a special arrangement was made between plffs. & the

clerk, under which the latter was to receive no costs but disbursements only in all suits entered with him by plffs. in which nothing was realised, & he on his part guaranteed that the ct. had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, & a cheque given for the balance thus shown. It was afterwards discovered that the statements were incorrect.



**Sect. 2.—Discharge from liability: Sub-sect. 1, C. (g), (h) & (i).]**

of a guarantee for the due accounting of an agent, to whom they had consigned the spirits for sale. —*BROWN v. DUNCAN* (1829), 10 B. & C. 93; 5 Man. & Ry. K. B. 114; 109 E. R. 385; *sub nom.* *BROWN v. DUNCAN*, L. & Welsb. 91; 8 L. J. O. S. K. B. 60.

*Annotations: Refd.* *Forster v. Taylor* (1831), 5 B. & Ad. 887; *Cope v. Rowlands* (1836), 2 M. & W. 149; *Bailey v. Harris* (1819), 12 Q. B. 905; *Taylor v. Crowland Gas & Coke Co.* (1851), 10 Exch. 293; *Brightman v. Tate*, [1919] 1 K. B. 163.

**1207. — Method of accounting—Left entirely to employers—Method of accounting varied.]—**Pltfs., bottle-manufacturers, appointed M. their agent for the sale of bottles on commission, & received the following guarantee signed by deft.: "I hereby agree to guarantee my brother M.'s intrusions as your agent in Leith to the extent of £500." The terms of sale between pltfs. & M. at the time of the guarantee were, that the moneys received should be remitted from time to time, & an account of sales rendered at the end of each month, or when required, & an account current every three weeks. It was soon after agreed between pltf.'s & M. that the account current should be rendered every six months; & subsequently, in pursuance of an agreement between them, M. from time to time gave his promissory notes to pltfs., payable four months after date, for sums having no relation to the amount due from him, & pltfs., as the notes became due, transmitted M. the difference between the money then in his hands & the amount of the notes. Deft. had no knowledge of & never inquired as to the original or subsequent terms of dealing:—*Held*: the alteration in the mode of accounting & paying did not discharge the surety. —*STEWART v. McKean* (1855), 10 Exch. 675; 3 O. L. R. 460; 24 L. J. Ex. 145; 24 L. T. O. S. 275; 3 W. R. 216; 156 E. R. 610.

*Annotation:—Consd.* *Sanderson v. Aston* (1873), 42 L. J. Ex. 61.

**1208. — Agency terminable on notice—Length of notice varied.]—**Declaration on a bond given to pltf. by deft., which recited that by an agreement of even date pltf., had agreed to admit J. into his service as "clerk & traveller," not further stating the terms of the agreement, & was conditioned for J.'s accounting for & paying over to pltf. all moneys which he might receive

on pltf.'s account; the breach alleged being that J. had received moneys for pltf. which he had not accounted for or paid over. Pleas, on equitable grounds. Second, that the original agreement between pltf. & J. was that it should be terminable by one month's notice; & that pltf. & J. afterwards, & before the defaults sued for, made it terminable by three month's notice, without pltf.'s consent. Third, that before the defaults sued for, J. had committed other defaults of the same kind; & that pltf. had, with a knowledge of those defaults, continued to employ J. in his service without notice to deft.; & that the defaults sued for were committed during such continuance of the service. On demurrer to these pleas:—*Held*: (1) the second plea was bad, on the ground that it did not show that the term as to the period of notice was made part of deft.'s contract, & the alteration alleged did not in fact materially add to deft.'s risk; (2) the third plea was good, on the authority of *Phillips v. Foxall*, No. 1680, *post*.

The case of *Phillips v. Foxall*, No. 1689, *post*, clearly shows that if any default or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him (*KELLY, C.B.*). —*SANDERSON v. ASTON* (1873), L. R. 8 Exch. 73; 42 L. J. Ex. 61; 28 L. T. 35; 21 W. R. 293.

*Annotations:—As to (1) Consd.* *Holme v. Brunskill* (1878), 3 Q. B. D. 495; *Loves v. Maughan & Fearon* (1884), Cab. & El. 340. *As to (2) Distd.* *Durham Corp'n. v. Fowler* (1889), 22 Q. B. D. 394. *Refd.* *Loves v. Maughan & Fearon* (1884), Cab. & El. 340.

**1209. Rate or tax collector—Performance under specific statutes—Alteration in rate of tax—By subsequent act.]—**The condition of a bond, after reciting that "A. had been appointed a collector of the property, income & assessed taxes, which had been or thereafter should be charged or assessed within the parish of D., under & by virtue of the several Acts relating to the said duties," provided, in the usual terms, that the bond should be void if A. should properly discharge the duties of his office.

By a subsequent Act the income-tax was raised 2d. in the pound:—*Held*: this alteration in the law increased the risk of the sureties & avoided the bond. —*BADGER v. FINCH* (1857), 29 L. T. O. S. 88.

*HLAITH ASSURANCE ASSOC'N.*, [1909] 2 L. R. 700.—IR.

**1. Liability of surety—Failure to account—Defalcations previous to date of bond.]—***TULLAMORE URBAN DISTRICT COUNCIL v. ROBINS* (1913), 48 L. L. T. 150.—IR.

**m. Exclusion of period of employment of traveller—Whether material alteration.]—**By an agreement A. undertook to act as traveller to a firm & to collect moneys for them, for three years, at a fixed salary payable monthly. A cautioner bound himself in a separate document in general words "for the due & punctual payment of the sums of money collected" by the traveller. It did not appear that the terms of the principal contract were communicated to him. At the expiration of the three years the employment was renewed for a second period of three years by a writing appended to the original minute. Defalcations subsequently occurring, the firm sued the cautioner for the recovery of these:—*Held*: the cautioner was bound under the bond in question until he either intimated withdrawal or the service terminated

& that moneys collected by the clerk had not been paid over:—*Held*: the special arrangement made with the clerk discharged the sureties. —*VICTORIA MUTUAL FIRE INSURANCE CO. v. DAVIDSON* (1883), 3 O. R. 378.—CAN.

**n. Treasurer—Imposition of additional taxes since date of guarantee.]—**The imposition of additional taxes to those assessed at the time of taking the security, & the increase of the risk thereby, did not vitiate a bond given for the general performance of duties & payment of all moneys by the treasurer for the township. —*BEVERLEY TOWNSHIP v. BARLOW* (1860), 10 C. P. 178.—CAN.

**1. — Terms of guarantee not complied with—Early audit.]—**Action on a guarantee policy for loss sustained by pltfs. through the default of D., their secretary-treasurer. The guarantee proposal contained certain statements which were made to form part of the contract, one of which was that D.'s books would be balanced & closed at the end of each year, & that the cash & securities at pltfs.' credit at each balancing time would be examined & verified by the auditors

as required by the statute:—*Held*: P. not being an incorporated town withdrawn from the county, the audit should have been made by the county auditors, & not, as here, by the town auditors; & as there was no audit in fact, the terms of the guarantee had not been complied with. —*PARRIS BOARD OF EDUCATION v. CITIZENS INSURANCE & INVESTMENT CO.* (1879) 30 C. P. 132.—CAN.

**g. Non-compliance with terms of contract.]—**In an action upon a policy issued by defts. guaranteeing the honesty of an employee of pltf.:—*Held*: pltf. had not complied with the terms of the contract between himself & defts., & pltf. could not recover. —*GRAY v. EMPLOYERS' LIABILITY ASSURANCE CORPN.* (1913), 23 W. L. R. 527; 4 W. W. R. 106; 10 D. L. R. 369.—CAN.

**h. Tehsildar—Tehsil account not rendered yearly.]—***KANAI PRASAD ROSE v. JOTINDRA KUMAR ROY CHOWDHURY* (1909), 1 L. R. 36 Cal. 626.—IND.

**k. Rate or tax collector—Alleged non-compliance with statutory orders—No negligence on part of creditor.]—***DONEGAL COUNTY COUNCIL v. LIFE &*

**1210. County court bailiff—Jurisdiction of court subsequently increased—Nature of office changed.]**—*PYBUS v. GIBB*, No. 1263, *post*.

**Change of status of parties.]—See Sect. 3, subsect. 3, *post*.**

(h) *Sale of Goods.*

*See, generally, SALE OF GOODS.*

**1211. Alteration of credit.]—BASTOW v. BENNETT**, No. 636, *ante*.

**1212. Reduction in agreed price.]—ALLIANCE & DUBLIN GAS CONSUMERS' 'CO. v. BLOTT** (1886), 3 T. L. R. 111.

**1213. Continuation of supply—Accumulation of payments.]—ALLIANCE & DUBLIN GAS CONSUMERS' Co. v. BLOTT** (1886), 3 T. L. R. 111.

**1214. Subsequent restriction imposed on debtor—Creditor to have sole right of sale—Or commission in lieu.]—STEWART & McDONALD v. YOUNG** (1891), 38 Sol. Jo. 385.

(i) *Other Cases.*

**1215. Contract of letting—Milking cows—Reduction of number contracted for.]—A variance in the performance of a contract by pltf., with the assent of the principal, but without the consent of the surety, will discharge the surety, though the variance should tend to diminish his risk.**

Declaration stated that pltf. agreed to let, & B. agreed to take, the milking of thirty cows, for the sum of £7 10s. *per annum* per cow, from Feb. 14, the rent to be paid quarterly, in advance, on Feb. 14, May 14, Aug. 14, Nov. 14, & deft. agreed to pay the rent at the times therein mentioned. Pltf. then averred performance of the agreement by him, & B. took the milking of the thirty cows, & alleged as a breach the non-payment by deft. of the rent, which became due on Nov. 14. It appeared in evidence at the trial, that in May it was agreed between pltf. & B., the latter having then thirty-two cows, that pltf. instead of taking away two at that time, should be at liberty to take four at the fall of the year, & it appeared that between Oct. 4, & 20 pltf. did take away four cows, leaving B. after that period less than thirty. It was proved, that this alteration in the mode of using the cows made no substantial difference

as to profit or loss:—*Held*: (1) this was an entire contract for the letting of thirty cows, neither more nor less; (2) pltf. in this action against a surety, was bound to prove a literal performance of that contract, that he had not done so, inasmuch as he had shown that during part of the year he had allowed B. to have the milking of twenty-eight cows only.—*WHITCHIE v. HALL* (1826), 5 B. & C. 269; 8 Dow. & Ry. K. B. 22; 4 L. J. O. S. K. B. 167; 108 E. R. 101.

*Annotations*:—As to (1) *Consd.* Sanderson v. Aston (1873), L. R. 8 Exch. 73. As to (2) *Expld.* Gordon v. Rao (1858), 8 E. & B. 1065. *Consd.* Sanderson v. Aston (1873), L. R. 8 Exch. 73. *Refd.* The Harriett (1842), 1 Wm. Rob. 182, 188; Hollier v. Eyre (1812), 9 Cl. & Fin. 1; Bonser v. Cox (1844), 13 L. J. Ch. 260; Bonar v. MacDonald (1850), 3 H. L. Cas. 226; Holme v. Brunskill (1878), 3 Q. B. D. 495.

**1216. — Pasture with sheep—Surrender of land—Re-occupation at reduced rent.]—(1) Pltf.**

having agreed to let to B. as yearly tenant a farm including certain hill pastures & a flock of 700 sheep, deft. gave pltf. a bond to secure the redelivery to him at the end of the tenancy of the flock in good order & condition. In Nov. pltf. gave B. a notice to quit which was ineffectual to determine the tenancy at the expiration of the then current year. B. objected to the insufficiency of the notice & on Apr. 8 entered into an agreement with pltf. that B. should surrender a field to pltf. & that B.'s rent should be reduced £10 & the notice to quit should be considered as withdrawn, B. then continued tenant of the farm, less the field, at the reduced rent. In Oct. 1876, pltf. gave B. notice to quit on Apr. 10, 1877. On giving up the farm it was ascertained that the flock was reduced in number & deteriorated in quality & value & pltf. sued deft. on his bond:

—*Held*: the contract of the surety was that the flock should be delivered up in good condition together with the farm as originally demised to the tenant; the surety ought to have been asked to decide whether he would assent to the variation in the terms of the letting, & not having been asked to assent he was discharged from liability. (2) At the trial the judge left it to the jury to say whether the new agreement with the tenant had made any substantial or material difference in the relation between the parties as regarded the tenant's capacity to fulfil the conditions of the

—*NICOLSONS v. BURT* (1882), 10 Ll. (Cl. of Sess.) 121.—*SCOT*.

**PART IX. SECT. 2, SUB-SECT. 1.—C. (h).**

**n. Substitution of another chattel—For one described in lien note.]—A vendor of a chattel, sold under lien note, agreed with the purchaser that a different chattel might be substituted for that described in the lien note, & the purchaser thereupon made an exchange. The new agreement as to the substituted chattel was not registered:—*Held*: the lien against the first chattel was discharged, & a person who had signed the lien note as a surety & who was not a party to the new contract was released.—*SCHMIDT v. GAVRILOFF*, [1923] 2 W. W. R. 173.—*CAN.***

**o. Sale of chattel in lien note—Without notice to surety.]—In Saskatchewan a surety who has guaranteed payment of a lien note is not released merely because the vendor, without notice to the surety, & under authorisation of the purchaser, sells the chattel described in the lien note at private sale for the best price obtainable, where it is not shown that the surety is prejudiced thereby, & especially where such a dealing is not different from what is contemplated by the lien agreement.—*GRAY-CAMPBELL, LTD. v.***

*JAMILSON*, [1924] 1 D. L. R. 32; 17 Sask. L. R. 546; [1923] 3 W. W. R. 1446; *aff.*, [1923] 3 D. L. R. 845; 3 W. W. R. 478; 17 Sask. L. R. 105.—*CAN.*

**p. Variation of mode of dealing—Advances of money & goods.]—BING, HARRIS & Co. v. HISLOP** (1881), 2 N. Z. L. R. 311 (S. C.).—*N.Z.*

**q. — No provision for particular course of dealing in bond.]—BAIN v. BALFOUR & Co.** (1838), 16 Sh. (Cl. of Sess.) 1097.—*SCOT*.

**r. Stoppage of payment by principal debtor—Continuation of debtor's business by debtor—With connivance of creditor.]—"As you have this day opened an account with A., I hereby promise to guarantee their payments for articles, to be furnished for six months from this date, in order that you may have a sufficient opportunity to obtain satisfaction as to their trustworthiness, but this guarantee is to be limited to £500," & within six months A. stopped payment, which was known to the merchant; & A. having, by an arrangement with their other creditors, continued in business:—*Held*: the cautioner was not liable for furnishings made thereafter, although within six months, seeing that the stoppage sufficiently made the merchant acquainted as to the credit of**

**A.—COCHRANE & Co. v. MATTHE** (1821), 1 Sh. (Cl. of Sess.) 80; Hume, 115.—*SCOT*.

**s. Note taken from principal debtor.]—Terms of a letter of guarantee which held to be a general guarantee against loss in the course of dealing:—*Held*: the cautioner was not liberated by the creditor's taking a bill at one month from the debtor in payment of an account for goods furnished.—*STEWART, MORR & MUIR v. BROWN* (1871), 9 Macph. (Cl. of Sess.) 763.—*SCOT*.**

**PART IX. SECT. 2, SUB-SECT. 1.—C. (i).**

**t. Parol variation—Of building contract under seal—No discharge of surety.]—B. entered into a contract under seal, to build a house for pltf. according to a plan & specification, & deft. became security for the performance of the contract. The plan of the house was changed in some particulars, by verbal agreement between pltf. & B., without deft.'s consent. B. failed to perform the contract in respect to parts of the building in which there had been no alteration:—*Held*: the contract being under seal, the surety was not discharged at law by the parol variation of it, though it would have been otherwise if the contract had not been under seal.—**

**Sect. 2.—Discharge from liability: Sub-sect. 1, C. (i) & (j); sub-sect. 2, A.]**

**bond:—Held:** the question was one which ought not to have been submitted to a jury; the surety was the sole judge whether it was reasonable that he should remain liable notwithstanding the new agreement.

The true rule in my opinion is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, & that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial or one which cannot be prejudicial to the surety the court . . . will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, & that if he has not so consented, he will be discharged (GOTTON, L.J.).—**HOLME v. BRUNSKILL** (1878), 3 Q. B. D. 495; 47 L. J. Q. B. 610; 38 L. T. 838; 42 J. P. 757, O. A.

**Annotations.** As to (1) *Consd. Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Bolton v. Salmon*, [1891] 2 Ch. 48; *Egbert v. National Crown Bank*, [1918] A. C. 903; *Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee.*, [1922] 2 K. B. 461. **Refd.** *Webster v. Petre* (1879), 4 Ex. D. 127; *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596; *Mortgage Insee. Corp. v. Pound* (1895), 64 L. J. Q. B. 394; *Re Debtor* (No. 14 of 1913) (1913), 82 L. J. K. B. 907; *Freeman v. Evans*, [1922] 1 Ch. 36. As to (2) **Refd.** *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755. **Generally, Mentd.** *Baynton v. Morgan* (1888), 21 Q. B. D. 101.

**1217. Fresh warrant of attorney taken—For additional sums.]—**A guarantee given by a party as an additional security to a warrant of attorney given by a debtor, will be annulled, if the creditor take from the debtor & a stranger, a fresh warrant of attorney for other sums, besides that for which the original guarantee was given & for the payment of which a longer time than that originally specified is allowed.—**SYLVESTER v. ANTHONY** (1833), 9 Bing. 716; 3 Moo. & S. 191; 2 L. J. C. P. 103; 131 E. R. 791.

**1218. Action compromised—Bail in admiralty action.]—**THE HARRIETT, No. 1370, *post*.

**1219. Avoidance of security—Agreement between debtor & creditor.]—**Where a surety contracts with A. on behalf of a principal, the withdrawal by arrangement between A. & the principal, of funds which the surety had a right to rely on as a security that the things should be done which he, as surety, had contracted with A. should be done, is a prejudicial alteration of the surety's position, which discharges him from liability.—

**PETERS v. BRYSON** (1866), 6 All. 459.—CAN.

**a. Whether negligence by creditor—Discharges surety.]—**Mere negligence by the obligee in looking after the principal, in calling him to account, or in requiring him to pay over money, is no defence against either antecedent or subsequent liability of the surety.—**EAST ZORRA TOWNSHIP v. DOUGLAS** (1870), 17 Gr. 462.—CAN.

**b. ———.]—K.** signed as surety R.'s promissory note to plffs. on condition that a chattel mtge. on R.'s horses be taken as collateral security. The mortgage was taken. Before maturity of the note K., through an agent, informed the plffs.' manager that R. was removing the horses to another registration district & requested him to seize under the mtge. as plffs. by the terms thereof had the right to do upon such removal

being established. Plffs. took no steps, however, until after maturity of the note when they made some endeavours to find & seize the horses but found that the expense was too great to justify a continuance of such endeavours. There was evidence that had plffs. seized & sold the mtgd. chattels when requested they would have realised a sum in excess of K.'s liability on the note.—**Held:** as a result of plffs.' conduct K. was released from liability.—**BANK OF TORONTO v. BORDER & KNOX** (1921), 63 D. L. R. 459; 14 Sask. L. R. 465; [1921] 3 W. W. R. 483.—CAN.

**c. Bond for payment of purchase-money of tolls—Non-receipt of privileges by principal debtor—No discharge of surety.]—**Declaration against deft. as surety on a bond for the payment of the purchase-money of certain tolls. Plea, that at the execution of the bond

**GENERAL STEAM-NAVIGATION Co. v. ROLF** (1858), 6 C. B. N. S. 550; 6 Jur. N. S. 801; 8 W. R. 223; 141 E. R. 572, Ex. Ch.

**Annotations:—Refd.** *Watts v. Shuttleworth* (1861), 7 H. & N. 353; *Polak v. Everett* (1876), 24 W. R. 365. **Mentd.** *Jonasohn v. Ransome* (1858), 3 C. B. N. S. 779.

**1220. ——— Money due from surety to debtor—Under contract prior to guarantee—Cancellation of contract.]—**In an action on a guarantee that bricks supplied to a builder, for building a house for deft., should be paid, out of the money which might become due to the builder [from deft.], the issue being whether the money had become due to the builder, he having apparently given up the contract to be completed by his employer deft.:—**Held:** the question was whether this transfer was real or colourable.—**LEE v. FISHER** (1861), 2 F. & F. 591.

**1221. Variation by creditor's agent—Not acting as agent.]—**Ptffs., a limited co. of which C. was managing director, had begun printing a periodical for D. & co. a firm consisting of deft.'s son & two others, & the periodical was being sold on commission by S. Ptffs., represented by C. refused to go on printing without a guarantee, & deft. consented to become security by drawing a bill on D. & co. & indorsing it to ptffs., upon the understanding that he was to have funds to meet it out of the debt accruing from S. to D. & co. C. was told of this arrangement. Before deft. drew this bill, C. had lent money to D. & co. on his own account, & held their acceptance to his draft. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & co., without the knowledge or consent of deft. or his son, & under this order C. obtained the amount due from S. to D. & co., & appropriated it to the payment of this bill, the amount being more than sufficient to cover deft.'s bill. Ptffs. having sued deft. on his bill:—**Held:** deft. had no defence as against ptffs.; for ptffs. were not responsible for what C. did in getting his private debt paid, as though he was their managing director, he was not then acting for them or in pursuance of any authority from them.—**McGOWAN & Co., LTD. v. DYER** (1873), L. R. 8 Q. B. 141; 21 W. R. 560.

**Annotations:** **Refd.** *Lloyd v. Grace, Smith*, [1912] A. C. 716; *Percy v. Glasgow Corp.* (1922), 91 L. J. P. C. 187.

**1222. Agreement to redeem shares—Assignment of debts for that purpose Cancellation of assignment.]—**N., was indebted to ptffs. & by deed agreed, first to pay them £3,400 on Feb. 15, 1874; secondly, within a certain time after the allotment of shares in a co. to which he was about to assign his business, to transfer to them shares in it to the nominal value of £6,000, & redeem

there was attached thereto a handbill showing certain privileges to be received by the principal as set forth in the said plea, but which he did not receive by reason of omissions on ptffs.' part.—**Held:** bad, as not a defence sufficient to relieve deft. from the condition of his bond.—**MIDDLESEX COUNTY v. PETERS** (1859), 9 C. P. 205.—CAN.

**d. Covenant by assignor for payment of mortgage—Assignment of mortgage—Discharge of part of land.]—**Deft., when assigning a mtge. on lands to ptffs., covenanted that the mtgr. would pay. Ptffs. afterwards, without his consent, discharged half the lands from the mtge. on payment of half of the mtge. debt.—**Held:** this was such an alteration of the contract guaranteed as to release deft. from his liability whether the amount paid was the full value of the part released or

them at par within twelve months from Jan. 1, 1874; & fourthly, it was agreed between him & plffs. that the book debts due to him, to the nominal amount of £8,000, should be collected & one half paid to plffs. to be applied towards redemption of the shares & when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. Deft. guaranteed the performance of this agreement by N., so far as concerned the redemption of the shares of the value of £8,000. Subsequently an arrangement was made between plffs. & N. by which, for an equivalent in shares & cash, they released to him their interest in the book debts, that he might dispose of them to the co. Deft. having been sued on his guarantee for a deficiency of £2,250 in the amount of shares:—*Held*: the new arrangement was such a variation of the rights of deft. as surety as to discharge him.

If the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy (BLACKBURN, J.).—*POLAK v. EVERETT* (1876), 1 Q. B. D. 609; 46 L. J. Q. B. 218; 35 L. T. 350; 24 W. R. 689, C. A.

*Innovations*:—*Distd. Rainbow v. Juggins* (1880), 5 Q. B. D. 138. *Consd. Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755; *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596. *Reid. Holme v. Bruns-kill* (1878), 38 L. T. 838; *Carter v. White* (1883), 25 Ch. D. 666; *Lovys v. Maughan & Fearon* (1884), 1 T. L. R. 6; *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 38 W. R. 537; *Metropolitan Bank v. Coppee* (1895), 12 T. L. R. 129; *Greenwood v. Francis*, [1899] 1 Q. B. 312; *Egbert v. National Crown Bank*, [1918] A. C. 903.

**1223. Mortgage debt - Subsequent consolidation.**—Deft. covenanted, as surety, for repayment of a mtge. debt, & assigned property as collateral security. The mtge. was afterwards consolidated, & the covenant in the consolidated mtge. was for repayment of the debt at a later date:—*Held*: (1) both the property & the personal liability of the surety was thereby discharged; (2) the effect of the deed of 1884, by giving time to the principal debtor without consulting B., the surety, was not only to discharge B. from all personal

liability under her covenants in the deed of 1857, but also to release the securities which she, as surety, had included in that mtge.—*BOLTON v. SALMON*, [1891] 2 Ch. 48; 60 L. J. Ch. 239; 64 L. T. 222; 39 W. R. 589.

*Annotation*:—As to (1) & (2) *Reid. Egbert v. National Crown Bank*, [1918] A. C. 903.

**1224. Acceptance of new debtor.—For part of debt.—Express power of arrangement with debtor.**—*PERRY v. NATIONAL PROVINCIAL BANK OF ENGLAND*, No. 1549, *post*.

(i) *Agreement to give Time.*

See Sect. 3, sub-sects. 4, 5, 6, *post*.

SUB-SECT. 2.—VARIATION WITHOUT SURETY'S CONSENT OF HIS OWN CONTRACT WITH CREDITOR.

A. General Rule.

**1225. Surety discharged.**—*WHITCHER v. HALL*, No. 1215, *ante*.

**1226.** —*J.*—*BONAR v. MACDONALD*, No. 1277, *post*.

**1227.** — *Although alteration by operation of law.*—There is no general rule that a surety is not released when the effect of his contract is altered by operation of law. The general rule is that he is released if there is any material alteration of his position made without his consent, although made by operation of law (*WRIGHT, J.*).—*MORTGAGE INSURANCE CORPN., LTD. v. POUND* (1895), 61 L. J. Q. B. 391; *on appeal*, 61 L. J. Q. B. 397, C. A.; 65 L. J. Q. B. 129, H. L.

**1228. Variation must be by positive contract.**—The treasurer appointed by district-road trustees having absconded with the trust funds:—*Held*: a cautioner for the faithful discharge of his office was liable to the trustees for the balances due from the treasurer, although at several prior audits of his accounts they were guilty of neglect of their duty, by allowing him to retain in his hands balances far exceeding the amount allowed by the terms of the bonds of caution, without

not.—*FARMERS' LOAN & SAVING CO. v. PATCHETT* (1903), 23 C. L. T. 285; 6 O. L. R. 255; 2 O. W. R. 702; *affd.*, 25 C. L. T. 7; 8 O. L. R. 569; 4 O. W. R. 349.—CAN.

*e. Extension of time for payment.—Under agreement of sale.—Non-consent of surety.—Higher rate of interest stipulated for.*—An alteration in an original agreement for sale by an assignee thereof extending the time for payment thereunder in consideration of the payment of a higher rate of interest:—*Held*: to be an alteration to the prejudice of the surety & being without his consent, affected his discharge.—*GENERAL FINANCIAL CORPN. OF CANADA v. LE JEUNE*, [1918] 1 W. W. R. 372; 11 Sask. L. R. 38; 39 D. L. R. 33.—CAN.

PART IX. SECT. 2, SUB-SECT. 2.—A.

**1225i. Surety discharged.**—Pltf. took a bond from defts., conditioned for the faithful performance by D. of his duties as agent & clerk of pltf. in a store to be opened by D. for pltf. at L. Subsequently pltf. sold to D. the goods, etc., at L. without the consent of the sureties.—*Held*: they were discharged.—*VAN ALLAN v. WIGLE* (1858), 7 C. P. 459.—CAN.

**1225 ii.** —*J.*—*BURKE v. GLOVER* (1861), 21 U. C. R. 294.—CAN.

**1225 iii.** —*J.*—*SHAYER v. ALLISON* (1865), 11 Gr. 355.—CAN.

**1225 iv.** —*J.*—A surety may be discharged from liability if he has been prejudiced by an alteration without his consent, in a contract for the performance of which he has consented to be bound.—*DRISCOLL v. BARKER* (1878), 2 P. & F. 407.—CAN.

**1225 v.** —*J.*—C. supplied goods to B. on the strength of a guarantee given by A. to pay to a certain extent, B.'s account with C. Subsequently B. in good faith executed a chattel mtge. in favour of C. to secure his indebtedness & also assigned to him the lease of the premises which he occupied. C. with the consent of B. then made a *bond fide* sale under the mtge. of the stock-in-trade & took security on all goods supplied by him or other persons to B., it being agreed that the business was to continue on condition that only a limited amount was to be allowed to B. as salary & that B. purchase all his goods from C. These things were done without the privity of A.:—*Held*: there was a material variation in the terms of the contract between the creditor & the principal debtor without the privity of the surety, & therefore the latter was discharged.—*DRINKLE v. REGAL SHOE CO., LTD.* (1914), 29 W. L. R. 509; 7 W. W. R. 194; 20 B. C. R. 314.—CAN.

**1225 vi.** —*J.*—Where under a building contract, payments were to be made according to architect's cer-

tificates, but the owner paid to the contractor before the completion of the work more than the amount of the architect's certificates, the sureties under a bond given to guarantee due performance of the work, & whose consent to such departure from the method of payment provided by the contract had not been obtained, were held to be released from their liability.—*MACLIN SCHOOL DISTRICT NO. 2120 OF SASKATCHEWAN TRUSTEES v. SASKATCHEWAN GUARANTEE & FIDELITY CO.*, [1919] 2 W. W. R. 396.—CAN.

*1.* — *Although variation for surety's benefit.*—Deft. made a bond as surety for C., & upon the terms set forth, & the terms of his suretyship were altered, in one particular especially, namely, that by the original covenant C. was to have insured the subject-matter upon which he was surety, & that the insurance was done away with:—*Held*: the changing of the contract, even though for the surety's benefit, without his consent, would release him from liability thereon.—*TITUS v. DURKEE* (1862), 12 C. P. 367.—CAN.

*g. Arrangement between co-surety & principal debtor.—Not objected to.—Whether surety discharged.*—*ESSEX, KENT & LAMPTON MUNICIPAL COUNCIL v. BABY* (1852), 9 U. C. R. 34.—CAN.

*h. Where deviation trivial.*—*Held*: the guarantors were not released by

**Sect. 2.—Discharge from liability: Sub-sect. 2, A. & B.; sub-sect. 3, A. (a) & (b) i.]**

requiring payment & without notice to the cautioner.

The rule as to the liability of sureties in a bond is the same in Scotland as in England, viz., that they are not to be discharged from their obligations unless the contract between them & the obligee is varied by a positive contract between the obligee & the principal, without notice to the sureties. It is the duty of a surety to see that his principal performs his obligations.—*CREIGHTON v. RANKIN* (1840), 7 Cl. & Fin. 325; 7 E. R. 1092, 11 L.

**Annotations:—***Reid*, Black v. Ottoman Bank (1862), 15 Moo. P. C. C. 472; Mansfield Grdns. v. Wright (1882), 9 Q. B. D. 683; Rouse v. Bradford Banking Co., [1894] 2 Ch. 32.

**B. Particular Instances.**

**1229. Bill of exchange—Bill for larger amount than guaranteed.]—***PHILLIPS v. ASTLING*, No. 491, *ante*.

**1230. — — — ]—** In an action on a guarantee, the declaration alleged that in consideration that plffs. would give up their lien on certain goods of Y., & would take the acceptance of Y. for £140, deft. guaranteed to plffs. payment of the same, & plffs. accordingly gave up to Y. the said goods, & took the acceptances of Y. for the sum of £145, to wit, one acceptance for the sum of £105; & one acceptance for the sum of £40:—*Held*: the declaration disclosed no cause of action.—*PICKLES v. THORNTON* (1875), 33 L. T. 658, C. A.

**1231. — — — Money advanced by creditor to meet bill - Not separate loan - Invalidating original transaction.]—** Debt, against a surety upon a bond conditioned for the due payment by M. of all sums in which M. should from time to time become indebted to plffs. for goods supplied to him by them in the course of their business. Plffs. having drawn a bill upon M. for coals supplied to him, discounted the bill, which was dishonoured. M. went to plffs. & telling them that he wanted £80 to enable him to take up the bill, asked them to lend him that sum. Plffs. thereupon gave him a cheque for £80, with which, & his own money, he took up the bill:—*Held*: this was not in substance a loan by plffs. to deft. of the £80, but an advance by them for the specific purpose of taking up the bill, which, as between plffs. & M., remained unpaid to that extent; & consequently as plffs. might have recovered the £80 from M. as for goods sold, deft. was liable to pay that sum.—*DAVEY v. PHELPS* (1811), 2 Man. & G. 300; 2 Scott, N. R. 561; 133 E. R. 760.

**1232. — — — Renewed bills.]—***BARBER v. MACKRELL*, No. 480, *ante*.

—*See, generally*, **BILLS OF EXCHANGE**, Vol. VI., pp. 405 *et seq.*

a slight deviation from the letter of the agreement as drawn, where such amendment was in contemplation at the time of entering into the agreement, where the agreement in express terms provided for the possibility of the same.—*GUELFE v. JULES MOTOR CO.* (1912), 23 O. W. R. 823; 4 O. W. N. 401; 8 D. L. R. 635.—**CAN.**

**k. — — — ]—** Trivial verbal alterations in a contract after execution, of which sureties had no notice, did not operate to discharge them from their liability as they were in no way prejudiced thereby.—*NIAGARA & ONTARIO CONSTRUCTION CO. v. WYSE & CO.* (1912), 24 O. W. R. 302; 4 O. W. N. 975; 10 D. L. R. 11.—**CAN.**

**l. — — — ]—***ALLEN v. GRAND VALLEY RY. CO.* (1913), 24 O. W. R. 850; 4 O. W. N. 1578; 12 D. L. R. 855.—**CAN.**

**PART IX. SECT. 2, SUB-SECT. 2.—B. 1232 l. Bills of exchange—Renewed bills.]—***AUSTIN v. GIBSON* (1879), 1 A. R. 316.—**CAN.**

**m. Insurance of buildings—Position of buildings altered.]—** Deft. became surety that his principal should keep insured buildings sitged by him to plff. Afterwards the position of the buildings was altered by plff.'s assignee, & the risk thereby increased.—*Held*: deft. was discharged.—*GRIEVE v. SMITH* (1863), 23 U. C. R. 23.—**CAN.**

**n. Bond—Alteration—After execu-**

**1233. Supply of goods—Gold—Supply of gold & money.]—** Deft. guaranteed the payment of gold with which plff. should supply a goldsmith for the purposes of his trade. Plff. discounted bills for the goldsmith, & gave him for them partly gold, & partly money; the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:—*Held*: deft. was not liable under his guarantee for the gold so furnished.—*EVANS v. WHYLF* (1829), 5 Bing. 485; 3 Moo. & P. 130; 7 L. J. O. S. C. P. 205; 130 E. R.

**Annotations:—***Reid*, Hargrave v. Smees (1829), 3 Moo. & P. 573; Bonar v. Macdonald (1850), 3 H. L. Cas. 226.

**1234. — — — Flour—Inferior quality supplied.]—***BLEST v. BROWN*, No. 759, *ante*.

**1235. Agreement to give credit—Shorter credit than agreed.]—***BACON v. CHESNEY*, No. 709,

**Meaning of credit—Not confined to particular trade.]—***SIMPSON v. MANLEY*, No. 429, *ante*.

**1237. Agreement for advance—Credit only given—Without advance.]—** Surety by promissory note, for a floating balance due to bankers from a customer:—*Held*: released by the bankers crediting the customer with the full amount of the note, without advancing the money at the time.—*ARCHER v. HUDSON* (1811), 7 Beav. 551; 13 L. J. Ch. 380; 3 L. T. O. S. 320; 8 Jur. 701; 49 E. R. 1180; *on appeal* (1816), 15 L. J. Ch. 211, L. C.

**Annotations:—***Mentl*, Blackie v. Clark, Cock v. Clark (1852), 15 Beav. 595; Espey v. Lake (1852), 10 Hare. 260; Houghton v. Houghton (1852), 15 Beav. 278; Baker v. Bradley (1854), 2 Sm. & G. 531; Bury v. Oppenheim (1859), 26 Beav. 594; Dettmar v. Metropolitan & Provincial Bank (1863), 1 Hem. & M. 641; Turner v. Collins (1871), 7 Ch. App. 334, n.; Parfitt v. Lawless (1872), L. R. 2 P. & D. 442; Bainbridge v. Browne (1881), 18 Ch. D. 188; De Witte v. Addison (1899), 80 L. T. 207; Powell v. Powell, [1900] 1 Ch. 213.

**1238. Fidelity guarantee—For due receipt of moneys—Moneys not received by person guaranteed.]—***MILLS v. ALDERBURY UNION*, No. 781, *ante*.

**1239. Manner of paying off debt—Altered by subsequent agreement.]—** Partnership between A. & B. was dissolved on Feb. 15, 1831. On the same day B. as principal, & C. as surety, executed a bond in the usual money form, by which B. & C. were bound to A. in the penal sum of £10,000 to secure payment of £5,000 to A., with interest at 5 per cent. on Aug. 15, following. On Feb. 21, 1831, a written agreement was signed by A. & B. without, as it was alleged the privity of C. whereby it was provided that a bond should be given for £5,000 by B. & C., with interest at 25 per cent. to be paid half-yearly; that B. should pay £1,000 within a year from that date, in liquidation of the claim of A. & the remaining "claims" of A. within the five following years, by equal half-yearly payments, with interest at 5 per cent.,

*tion.]—**DICKIE v. WOODWORTH* (1886), 7 R. & G. 96.—**CAN.**

**o. Increasing rate of interest—On debt.]—** A new agreement between the debtor & creditor extending the time for payment of the debt & increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, & releases the surety.—*BRISTOL & WEST OF ENGLAND LAND CO. v. TAYLOR* (1893), 24 O. R. 286.—**CAN.**

**p. Release of retention money—In building contract.]—***NATHANSON v. DENNILL* (1904), T. H. 289.—**S. AF.**

**q. Reference to arbitration.]—** B. as surety, entered into a bond to plff., conditioned that A. should maintain plff. during his life; subsequently plff.

half-yearly. Several payments in respect of the debt were from time to time made by B. to A. In June, 1855, B. was adjudicated bkpt., & in Feb. 1856, an action was commenced by A. against plff., the personal representative of C.:—On a bill by plff. for a declaration that all liability in respect of the bond was gone:—*Held*: the obligation of suretyship was discharged by the subsequent act of B., the principal, & plff. was entitled to the assistance of the ct. against the legal right, if any, of A.—*WRIGHT v. SANDARS* (1857), 29 L. T. O. S. 175; 3 Jur. N. S. 501; 5 W. R. 611.

**1240. — Rules of loan society—Not incorporated in guarantee contract.]—PRICE v. KIRKHAM, No. 1441, *post*.**

**1241. Liability under statute—Altered by subsequent statute.]—FINCH v. JUKES, [1877] W. N. 211.**

*Annotation*:—*Reffd.* Mortgage Insee. Corpn. v. Pound (1895), 64 L. J. Q. B. 391.

**1242. Payment of sum to be awarded—By judgment of court—Sum awarded under judgment by consent.]—Defts., E., D., & S., executed a joint & several bond for £150, in order to comply with an order of a judge at chambers, directing deft. E. to find security as a condition for leave to defend, the condition of the bond being that it should be void if E. should pay to plff. the sum of £75, or such sum, not exceeding that amount, as the ct. should think fit to award. When the case came on for trial, E. consented to judgment being directed for £750, to include costs, payable, as to the first £100, by instalments of £25 per month; the remainder to be paid by instalments of £50 per month, the first instalment to be payable on Mar. 1, 1885, plff. to be at liberty to issue execution for any balance of the £750 upon default in payment of any instalments, deft. to reconvey all his interest in the premises to plff. forthwith. It was also provided that the first payment by deft. was to be taken in discharge of sureties *pro tanto*, but sureties not to be fully discharged until payment of £75. It was found as a fact that deft. D. consented to the terms of the judgment, but deft. S. did not consent:—*Held*: deft. S. was discharged from liability under the bond.—*TATUM v. EVANS* (1885), 51 L. T. 336.**

**1243. Payment under insurance policy—Agreement to incorporate rules of insurance company—Rules not in fact incorporated.]—SOLVENCY MUTUAL GUARANTEE CO. v. FREEMAN, No. 1292, *post*.**

**1244. — Payment under subsequent scheme.]—MORTGAGE INSURANCE CORPN., LTD. v. POUND, No. 609, *ante*.**

**Building contracts.]—See BUILDING CONTRACTS, Vol. VII., pp. 127 *et seq*.**

& A. without B.'s consent, bound themselves to refer all questions relating to the performance of the condition of the bond to arbitn., & to abide by their decision:—*Held*: the position of the surety was altered by this agreement, & he was discharged from liability on the bond.—*WILLIAMSON v. STEENES* (1860), 4 All. 419.—*CAN.*

**r. —.]—The changing of a contract by an award, even though for the surety's benefit, without his consent, would release him from liability thereon.—*TITUS v. DUCKLEE* (1862), 12 C. P. 367.—*CAN.***

**s. Interference with rights of surety.]—O'GARA v. UNION BANK OF CANADA (1893), 22 S. C. R. 101.—*CAN.***

**PART IX. SECT. 2, SUB-SECT. 3. — A. (a).**

**t. General rule.]—If the bargain**

between a principal debtor & a creditor is altered, i.e. if there is a different relation established between them as regards their position to one another in a material particular, it is sufficient to discharge a surety. *R. v. MOWAT* (1889), 1 Terr. L. R. 116. *CAN.*

**a. Principal debtor originally surety.]—Deft. sold certain land by agreement of sale & assigned to plff. the unpaid purchase-money & covenanted to pay it in case of the purchaser's default. The purchaser having defaulted, deft. paid plff. some moneys & then in consideration of plff. refraining from suit gave him his promissory note for a sum slightly exceeding the actual amount then owing under the agreement. To avoid suit on his note when overdue he gave a further note for an amount exceeding the debt under the agreement:—*Held*: the giving of the**

**SUB-SECT. 3.—CHANGE IN PARTIES.**

**A. Debtor.**

**(a) In General.**

**1245. Business converted into partnership—With knowledge of sureties.]—LEATHLEY v. SPYER, No. 572, *ante*.**

**1246. Company reconstructed—Without knowledge of creditor.]—(1) Two directors & a solr. of a co. gave a bank a joint guarantee of the banking account of the co. One of the guarantors died:—*Held*: the guarantee did not *pro facto* determine.**

**(2) The co. was reconstructed so that the guarantee no longer in terms applied, but the fact was concealed from plffs. who were led by defts. to suppose that the name only of the co. had been changed & that the guarantee continued, & the account was carried on as before with the addition of a word to the name of the co.:—*Held*: defts. were estopped from denying that their liability on the guarantee continued.—*ASHBY v. DAY* (1886), 51 L. T. 408; 34 W. R. 312; 2 T. L. R. 260, C. A.**

**Debtor becoming surety.]—See Sub-sect. 3, C., *post*.**

**Death of debtor.]—See Sect. 2, sub-sect. 11, C. (b), *post*.**

**Fidelity guarantees.]—See Sub-sect. 3, A. (b), *post*.**

**(b) Fidelity Guarantees.**

**i. Re-appointment to Same Office or Employment.**

**1247. Continuation of liability—Office tenable for definite time.]—Security bond for three years shall extend further. *WILLIAMS v. JONES* (1729), Bumb. 275; 115 E. R. 672.**

**1248. — —.]—A., B., & C. entered into a bond as sureties for D. & E. The condition of which bond recited that D. was on such a day appointed collector of the church-rate of the parish of S. by virtue of which office he was empowered to collect & receive all such moneys as were rated & assessed on the inhabitants by virtue of the said rate, & for which he was accountable to the wardens of the grand account, & bound the sureties for D.'s duly accounting for all moneys collected or received by him on account of the above rate, as also on all & every other rate or rates thereafter to be made & collected by him the said D.:—*Held*: the sureties were only answerable for D. in that single appointment, not on his appointment in the ensuing year.**

It is admitted by the replication that the office of collector is an annual office & that [the collector] was continued in that office from year to year. How then can it be intended that these persons

notes constituted deft. a principal debtor & his equities as a surety were gone.—*ALLIANCE TRUST CO. v. JOHNSON* (1920), 2 W. W. R. 800; 15 Alta. L. R. 479.—*CAN.*

**PART IX. SECT. 2, SUB-SECT. 3. A. (b) i.**

**1247 i. Continuation of liability—Office tenable for definite time.]—*WICKENS v. McMEELKIN* (1888), 15 O. R. 408.—*CAN.***

**b. — Office tenable for indefinite time.]—*BOTSFOORD v. HENDERSON* (1860), 4 All. 516.—*CAN.***

**c. — —.]—*R. v. MILLER* (1861), 20 U. C. R. 485.—*CAN.***

**d. — —.]—A township treasurer was appointed in 1861, & deft. became his surety by bond, which did not state the duration of the**

**Sect. 2.—Discharge from liability: Sub-sect. 3, A.**  
**(b) i., ii. & iii.]**

became sureties for the good behaviour of [the collector] at the distance of twenty years from the time when he was first appointed? Can we say that they intended to be bound for an indefinite period? With respect to the words: "The wardens of the grand account for the time being or hereafter to be" used in the condition of the bond, it must be remembered that if the collector proceeded to collect after the death of those with whom he was to account he would undoubtedly be bound to account with the wardens of the succeeding year for the moneys collected by him in that year in which he was collected (MANSFIELD, C.J.).—**ST. SAVIOUR'S, SOUTHWARK (WARDENS) v. BOSTOCK** (1806), 2 Bos. & P. N. R. 175; 127 E. R. 500.

*Annotations:—*Consd. Hassell v. Long (1814), 2 M. & S. 363. *Apld.* Leadley v. Evans (1821), 2 Bing. 32. *Refd.* Sanson v. Bell (1809), 2 Camp. 39, Smith v. Holtzmeier (1829), 8 L. J. O. S. K. B. 105.

**1249. — — — —.]** — **HASSELL v. LONG**, No. 392, *ante*.

**1250. — — — —.]** — **CURLING v. CHALKLEN**, No. 398, *ante*.

**1251. — — — —.]** — **LEADLEY v. EVANS**, No. 1299, *post*.

**1252. — — — —.]** — **KITSON v. JULIAN**, No. 395, *ante*.

**1253. — — — —.]** — **Re-appointment contemplated in agreement.] AUGERO v. KEEN**, No. 394, *ante*.

**1254. — — — —.]** — **Office tenable for indefinite time—Liability co-extensive with continuation in office.]—CURLING v. CHALKLEN**, No. 398, *ante*.

**1255. — — — —.]** — **BIRMINGHAM CORPN. v. WRIGHT**, No. 397, *ante*.

**1256. — — — —.]** — **Re-appointment after resignation.]—**E., the relieving officer of a district in a union, being required by the guardians to find a surety, the ordinary bond in the form settled by the poor-law commissioners was entered into by the relieving officer himself & S. as his surety. The bond was dated Dec. 15, 1817, & was in the penalty of £50. At the time the bond was given there was a balance of £61 3s. 11d. due from E. as such relieving officer to the guardians. Subsequently, on Feb. 12, 1818, E., the relieving officer, tendered his resignation to the board, which, on the 17th of the following month, was accepted. But upon his application, E. was again re-instated in the office of relieving officer, on the 24th of the same month; & he continued in the office until his death in 1854. There was in the hands of E. at the time of his resignation, a balance of £76, the money of his guardians, & such balance was carried over & continued in his accounts with the guardians upon his re-

liability. In 1863 the treasurer was re-appointed:—*Held*: this bond was only a continuing security until expiration of the treasurer's term of office & that the surety's liability ceased on the treasurer's re-appointment.—**R. v. McLEAE** (1870), 5 P. R. 398.—**CAN.**

**a. — — — —.]** — **A treasurer** was appointed by plffs. under R. S. O. 1877 (c. 174), by s. 274 of which all officers appointed by a council shall hold office until removed by such council. He furnished a bond dated Nov. 1, 1880, conditioned that if he should "well & truly discharge the duties of township treasurer so long as he shall remain in the said office, & shall render just & true accounts of all moneys, etc., as shall come & have come into his hands during his continuance in office, & hand the same promptly into the hands of his successor in office, then, etc." He was re-

appointed annually for several years:—*Held*: the re-appointments were not equivalent to removals & re-appointments, but were rather a retention in office of the same treasurer, & the sureties were not in consequence thereof discharged.—**ADJALA CORPN. v. McELROY** (1885), 9 O. R. 580.—**CAN.**

**f. — — — —.]** — On the appointment, in 1901, of B., by plff. society as their store-clerk, B. & defts. entered into a bond with plff. society for his fidelity "during such time as he continues to hold the same, in virtue of his present appointment, or of any renewal thereof, if such office is of a renewable character. Pursuant to a resolution passed by plff. society, that any employee seeking an increase of salary should give one month's notice of resignation, B., who sought an

appointment. At the time of E.'s death there was a balance of £91 due to the guardians. An action having been brought after the death of E. against S. by the guardians on the bond of 1847:—*Held*: the liability of S. as surety terminated upon the acceptance of E.'s resignation in 1847, & the guardians could not, therefore, recover in respect of the balance due at his death; they could not recover in respect of the balance due at the time of his resignation, as it had been discharged by being carried over to the new accounts, & a new balance created.—**HASINGSTOKE UNION GUARDIANS v. SMITH** (1855), 19 J. P.

**How far dependent on recital.]—See Part IV., Sect. 1, sub-sect. 2, *ante*.**

**Re-appointment involving alteration in duties—Or change in conditions of office or employment.]—See Sub-sect. 3, A. (b) iii., *post*.**

**Transfer to another district—Duties remaining unaltered.]—See Nos. 1264, 1276, *post*.**

**ii. Appointment to Other Office or Employment.**

**1257. Clerk appointed manager.]—**To debt on bond deft. after setting out the bond, which recited that G. had been appointed clerk, to a banking co., & was conditioned for his fidelity while in the service of the co., pleaded that before any breach, "to wit, on Jan. 1, 1836, G. was appointed manager; that the office of manager is different from that of a clerk & the responsibilities greater; that G. did from the day & year aforesaid cease to be clerk of the co., & that he performed the condition whilst he was clerk & before he was appointed manager:—*Held*: the plea was bad, because, the time of G.'s appointment as manager being immaterial & laid under a *videlicet*, the plea, if put in issue, might have been supported by proof that G. had been appointed manager on some day previous to the day mentioned, & that he ceased to be clerk on the day mentioned, or some subsequent day, so as to leave an interval between the appointment to be manager & the ceasing to be clerk, & therefore the plea did not show that G. ceased to be clerk when he became manager.—**ANDERSON v. THORNTON** (1812), 3 Q. B. 271; 2 Gal. & Dav. 502; 11 L. J. Q. B. 265; 6 Jur. 1109; 114 E. R. 510.

*Annotation:—*Mentd. Thom v. Bigland (1853), 21 L. T. O. S. 62.

*Compare* No. 1277, *post*.

**1258. Continuation of duties—Former office not vacated—Assistant appointed overseer.]—**The acceptance by the holder of one office of another incompatible office, does not vacate the former, unless it be such as he could determine by his own act simply, or unless that authority concurred in the new appointment, which could accept the

increase of salary, gave the notice, & was re-appointed, his salary being increased:—*Held*: the employment was not renewable in its character within the meaning of the bond, & the sureties were not liable for defaultations after the re-appointment.—**TOAMES CO-OPERATIVE AGRICULTURAL & DAIRY SOCIETY v. FOLEY**, [1910] 2 I. R. 277. **IR.**

**PART IX. SECT. 2, SUB-SECT. 3.—**  
**A. (b) ii.**

**g. Clerk appointed teller—Responsibility changed—Surety liable.]—****ROYAL CANADIAN BANK v. YATES** (1869), 19 C. P. 439.—**CAN.**

**h. Secretary treasurer appointed president & director.]—****TRENT & FRANKFORD ROAD CO. v. MARSHALL** (1860), 10 C. P. 329.—**CAN.**



surrender of or remove from the old one. In 1843, P. was according to Poor Relief Act, 1819 (c. 12), s. 7, nominated & elected by the vestry of a certain parish, & appointed by two justices assistant overseer of that parish. The warrant of appointment defined the duties of assistant overseer, one of which was to account, when required by the overseers or vestry, for money received or expended to the persons authorised to receive the same. By above Act every person so appointed is to continue assistant overseer until he shall resign such office, or until his appointment shall be revoked by the vestry. Security was, according to the Act, taken for the faithful execution of the office by bond with securities made to the churchwardens & overseers of the parish. P. continued to act in the execution of such office until Mar. 1852, when he resigned. In the year 1847, P. was appointed one of the overseers of the same parish, & he was afterwards from year to year re-appointed & acted as such until 1852. P. having made default in accounting for moneys received by him as assistant overseer, & an action having been brought on the bond against one of the sureties:—*Held*: assuming the two officers to be incompatible which they were not, the acceptance of the office of overseer did not vacate that of assistant overseer, since the holder could not divest himself of the latter office by his own act simply, the word "resign" in the Act meaning a formal notification to the vestry of the act of giving up the office; & since, also, there was no implied motion from the old by appointment to the new office, for the authority appointing to that office could not remove; nor was there any implied surrender because the same authority could not accept a surrender of the old office; if the offices were incompatible, the appointment as overseer would be either void or voidable only, in which case it would be vacated on appeal; as the assistant overseer was not bound to account to the overseers, his appointment as overseer did not make such an alteration in the mode of accounting as would affect the liability of the sureties.—*WORTH v. NEWTON* (1854), 10 Exch. 247; 2 C. L. R. 1471; 23 L. J. Ex. 338; 24 L. T. O. S. 157; 18 J. P. 777; 156 E. R. 435.

*Annotation*:—*Distd. Malling Union Grdms. v. Graham* (1870), 39 L. J. C. P. 74.

**1259. — Former office vacated—Assistant-overseer appointed collector.**—In June, 1865, deft. became surety for A. in a bond to the guardians of the union which comprise W., the condition of which bond was that A. should faithfully perform all the duties of his office, & in all matters relating thereto obey the overseers, subject to the orders of the Poor Law Board, & keep books, & pay over moneys to such persons as the overseers should direct. In April, 1866, the board of guardians of the M. Union, on the recommendation of the vestry of W., appointed A. collector of the poor-rates for W. at a poundage of 6d. The Poor Law Board duly approved the appointment, & made an order fixing the remuneration of the collector at 6d. in the pound as proposed. The duties under the two appointments were substantially the same. After the last appointment A. continued to perform the same duties as he had before performed, & the appointment of Apr. 1865, was not otherwise resigned or revoked. A. having made default, after the last appointment, in keeping books & in paying over money, deft. was sued on the bond:—*Held*: the two appointments were inconsistent & incompatible; the appointment of Apr. 1865, ceased, by virtue of Poor Law Amendment Act, 1844 (c. 101), s. 62, on A.'s acceptance of the

appointment by the guardians in 1866; & consequently the liability of the deft. as surety on the bond was at an end. *Semble*: there was both a revocation of the first appointment by the vestry, & a resignation by A.—*MALLING UNION v. GRAHAM* (1870), L. R. 5 C. P. 201; 39 L. J. C. P. 74; 22 L. T. 789; 18 W. R. 674.

*Annotation*:—*Mentd. Green v. Mepham* (1878), 2 Hop. & Colt. 458.

**1260. Appointment to additional office—Former office retained—Distinct duties—Rates collector.**—Declaration on a bond conditioned for the due performance by A. of his duties as collector of the poor-rates, & of the sewers & general rates for the parish of S., the bond to continue in force if A. held either office separately. Breach, that A. received money in each capacity, & failed to pay it over. Plea, that before breach two Acts were passed increasing A.'s duties as collector of sewers & general rates, & under which he was also appointed collector of main drainage rates, by the persons under whom he held his other appointments. These Acts altered the proportion in which certain sewers rates were to be borne by different parishes, increasing the proportion payable by the parish of S., & also imposed upon the sewers rates certain fresh charges of small amount:

*Held*: (1) the appointment of A. to the new office of collector of main drainage rates did not avoid the bond; (2) the changes introduced by the Acts did not amount to an alteration of the office of collector of sewers rates to which A. was originally appointed; (3) the bond was divisible, & the plea was bad, as affording no answer to deft.'s liability for A.'s breaches of duty as collector of poor rates.—*SKILLET v. FLETCHER* (1867), L. R. 2 C. P. 469; 36 L. J. C. P. 206; 16 L. T. 426; 31 J. P. 452; 15 W. R. 876, Ex. Ch.; *affg.* (1866), L. R. 1 C. P. 217.

*Annotations*:—14 to (3) *Distd. Croydon Gas Co. v. Dickinson* (1876), 1 C. P. D. 707. *Refd. Harrison v. Seymour* (1866), 35 L. J. C. P. 261.

**1261. — Guarantee in one capacity—Default made in other—Assistant overseer & clerk.**—A. was appointed assistant overseer of the parish of H., & by virtue of his appointment under Local Government Act, 1891 (c. 173), s. 17 (2), he became clerk to the parish council of H. Defts. entered into a bond guaranteeing the faithful performance of his duties as assistant overseer. A. committed defalcations in respect of moneys received by him as clerk to the parish council. In an action to recover the amount of such defalcations under the guarantee given by defts.: *Held*: the defalcations of H. in relation to the parish council accounts were not covered by the terms of the bond guaranteeing the faithful performance of his duties in the office of assistant overseer.—*COSFORD UNION v. POOR LAW & LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCN.*, 170 (1910), 103 L. T. 463; 75 J. P. 30; 8 L. G. R. 995, D. C.

**Second appointment involving altered duties—Or new conditions of office or employment.**—*Sub-sect. 3, A. (b) iii., post.*

iii. *Change in Condition of Office or Employment.*

**1262. Alteration in duties—Duties enlarged by statute.**—A bond given as security for a collector of the customs does not extend to a subsequent duty upon coals, where the collector had a new deputation, & gave security for the duty upon coals; & so it was held, where no security was given upon the second deputation.—*BAITLETT v. A.-G.* (1709), Park. 277; 145 E. R. 779.

*Annotation*:—*Refd. Portsea Island Union Grdms. v. Whillier* (1860), 2 E. & F. 755.



**Sect. 2.—Discharge from liability: Sub-sect. 3, A.**  
**(b) iii.]**

**1263. — Breach of original duties.]—**The condition of a bond recited that G. had been appointed bailiff of a county ct. under the 9 & 10 Vict. c. 95, & stipulated for the proper execution by G. of all warrants, etc., issued out of ct. to the high bailiff, & making true returns thereof according to the rules regulating the practice of the ct., & for his due performance of the office of bailiff, & for his not taking any fees except those specified in that Act. After this bond, & before any breach occurred, statutes were passed increasing the jurisdiction of the county ct. in point of amount, giving it jurisdiction in matters of insolvency & over absconding debtors, & enabling any one of the bailiffs authorised by the judge to sell goods seized in execution without the intervention of a sworn broker:—*Held*: by these statutes the duties & liabilities of the office were essentially changed, & the risk of the sureties increased; & consequently they were discharged, notwithstanding that the breach of duty relied upon arose entirely out of the original duties of the office.—*Pybus v. Gibb* (1856), 6 E. & B. 902; *Saund. & M.* 100; 26 L. J. Q. B. 41; 28 L. T. O. S. 81; 3 Jur. N. S. 315; 5 W. R. 44; 119 E. R. 1100.

*Annotations:—Apld.* Cambridge Corp. v. Dennis (1858), 6 W. R. 653. *Consd.* Skillett v. Fletcher (1867), L. R. 2 C. P. 469. *Refd.* Portsea Island Union Grdins. v. Whillier (1860), 2 E. & E. 755; Mortgage Insec. Corp. v. Pound (1895), 64 L. J. Q. B. 394. *Mentd.* Warden v. Stone (1857), 7 E. & B. 603.

**1264. — On re-appointment to same office.]—**A bond to secure the good conduct of a collector, under 43 Geo. 3 (c. 99), s. 13, may be declared to extend beyond the current year in which it is taken, although the collector himself must be annually appointed. But a re-appointment for a subsequent year must exactly follow the provisions of the bond, in order to charge the surety; for if it should not appear distinctly that the re-appointment was for the same description of duties, or not for the same district as those provided for by the first appointment, the surety will be discharged.—*Abington v. Jeans* (1826), 4 L. J. O. S. K. B. 186.

**1265. — Additional appointment to distinct office—Original duties unchanged.]—***Skillett v. Fletcher*, No. 1260, *ante*.

**1266. — Clerk paying wages—Default in wages account.]—**An insurance co. by a fidelity policy undertook with an urban council that the clerk to the council would faithfully discharge the duties of his office & account for all sums of money received by him whilst in that office. At the date

of the policy the council had a surveyor under whom certain works were being carried out, & the surveyor paid the men their wages. The surveyor subsequently left the council's employment, & the men were then paid by the clerk. In connection with these payments the clerk failed to account for certain moneys:—*Held*: the loss was not covered by the policy.—*Wembley Urban District Council v. Poor Law & Local Government Officers' Mutual Guarantee Assoc., Ltd.* (1901), 65 J. P. 330; 17 T. L. R. 516.

*Compare* No. 1277, *post*.

**1267. Change in salary—Poundage changed to fixed salary.]—**A bond, reciting that A. was appointed assistant overseer of the parish of M. was conditioned for the due performance of his duties "Thenceforth from time to time & at all times so long as he should continue in such office." On June 25, 1840, a vestry meeting was held at which A. was elected assistant overseer until Mar. 25, 1841, at a salary of 8*d.* in the pound on some sums collected & 4*d.* on others. Two justices, by their warrant dated July 9, 1840, reciting the vestry resolution & that his salary had been fixed for the execution of his office until Mar. 25 then next, stated, that in pursuance of Poor Relief Act, 1819 (c. 12), they appointed him assistant overseer. On Mar. 25, 1841, he was again elected to the same office at a salary of £50 *per annum* & re-appointed by the justices & he continued to be so re-elected & re-appointed until Mar. 1846. On ceasing to hold office he retained moneys in his hands:—*Held*: the sureties were not liable on the bond.

Assuming deft. would have been liable if the assistant overseer had continued in office upon the same terms, he has not done so (*Alderson, B.*).—*Bamford v. Iles & Neale* (1849), 3 Exch. 380; 3 New Mag. Cas. 128; 18 L. J. M. C. 49; 12 L. T. O. S. 379; 13 J. P. 652; 151 E. R. 892.

*Annotations:—Distd.* Frank v. Edwards (1852), 8 Exch. 214. *Refd.* Jones v. Lewis, [1919] 1 K. B. 328.

**1268. — Fixed salary changed to commission basis.]—***North Western Ry. Co. v. Whinray*, No. 399, *ante*.

**1269. — Salary reduced—Duties lessened—Same office continued.]—**In 1811, T. was, by a resolution of the vestry, appointed permanent assistant overseer to the parish of W., at an annual salary of £10, & he performed the duties without giving security. In May, 1846, it was resolved by the vestry that he should continue his office upon giving security; & accordingly, in June, 1846, a bond was entered into by T. with two sureties in pursuance of Poor Relief Act, 1819

**PART IX. SECT. 2, SUB-SECT. 3.—**  
**A. (b) iii.]**

**1264 i. Alteration in duties—On re-appointment to same office.]—**D. had been appointed plff.'s agent, & deft. had become surety by bond for the faithful performance of D.'s duties, the condition being that D. should faithfully execute the office of agent, & pay over all moneys. After the execution of the bond, a new agreement was made with D., imposing different & more onerous duties on him, without deft.'s consent:—*Held*: there was a material alteration in the original contract, whereby D.'s duties were different from those for the performance of which deft. became liable, & that he was thereby discharged.—*Canada Life Assurance Co. v. Calkins* (1884), 21 N. B. R. 276.—*CAN.*

**1265 i. Additional appointment to distinct office—Original duties unchanged.]—**A. & B. entered into a bond

as sureties for C. The condition of the bond recited that C. had been appointed a clerk in the bank of N. B. & bound the sureties for C.'s faithful performance of his duties as long as he continued to be employed as a clerk in the bank; & duly accounting for all moneys, etc., which should come to his hands during his service in the bank:—*Held*: the sureties were only answerable for C. in the appointment which he held when the bond was given, & not on a new appointment to a different situation in the bank, although he continued to be a clerk; & although it did not appear in the condition what his particular duties were.—*Bank of New Brunswick v. Wiggins* (1844), 2 Kerr, 478.—*CAN.*

**k. — —.]—**A surety by bond for the due performance of the office of a bank agent, is not responsible for losses occurring after the nature of the agency has been changed & the agent appointed a cashier.—*BANK OF*

UPPER CANADA v. COVERT (1837), 5 O. S. 541.—*CAN.*

**l. — Non-banking business—Transacted by bank cashier.]—**The sureties of a bank cashier are not relieved from liability by showing that the bank employed their principal in transacting what was not properly banking business.—*Springer v. Exchange Bank of Canada, Barnes v. Exchange Bank of Canada* (1887), 14 S. C. R. 716; 7 O. R. 309; 13 A. R. 390.—*CAN.*

**m. — Office of clerk & store-keeper separated.]—**R. v. HERRON & MONTGOMERY, [1903] 2 L. R. 474; 37 L. T. 121.—*IR.*

**1266 i. Change in salary—Fixed salary changed to commission basis.]—***Canada Agricultural Insurance Co. v. Watt* (1879), 30 C. P. 350.—*CAN.*

**n. Treasurer—Change in mode of appointment.]—**A. became surety to B., a county treasurer, for the due accounting, etc., by C., as deputy

(c. 12), subject to the condition that the said T. should, from time to time, & at all times thereafter during the continuance of his said appointment, faithfully account for the collection of the rates, etc., & duly execute all the duties of the office; & a few days afterwards a warrant of the appointment of T. as assistant overseer was executed by the magistrates. T. continued to perform the duties of assistant overseer till 1851, but the duties having become lessened, in consequence, amongst other things, of the appointment of a relieving officer in that year, a vestry, amongst whom was one of the sureties to the bond, with the consent of T. came to the resolution, that T. should continue the office at a salary of £14 *per annum*. After this, T. continued to discharge the duties of the office for some months, & then resigned it, when he was found in debt to the parish:—*Held*: the resolution of the vestry of 1851 did not amount to a revocation of the original appointment of T. but he continued in the office at a reduced salary, & consequently the sureties were not discharged from liability under the bond.—*FRANK v. EDWARDS* (1852), 8 Exch. 214; 22 L. J. Ex. 12; 17 J. P. 231; 155 E. R. 1325.

*Annotations*.—*Apld.* *Holland v. Lea* (1851), 9 Exch. 430. *Distd.* *North Western Ry. v. Whimray* (1851), 10 Exch. 77. *Refd.* *Berwick Corp'n. v. Oswald* (1854), 3 E. & B. 653; *Stewart v. McKean* (1855), 21 L. J. Ex. 145; *Sanderson v. Aston* (1873), 42 L. J. Ex. 64.

**1270. — Salary raised — Invalid appointment at lower salary—Subsequent valid appointment at higher salary.**—In Mar. 1815, R. was nominated & elected assistant overseer of the poor of the parish of W., by the inhabitants in vestry assembled, at the yearly salary of £27. In May following he entered into a bond, with two sureties, as a security for the faithful execution of the office, under Poor Relief Act, 1819 (c. 12). The condition of this bond, which was in the usual form, recited that Act, & that R. had been duly nominated & elected at the annual salary of £27. R. then proceeded to perform the duties of the office. In Mar. 1816, at a vestry duly held, a resolution was come to, that the permanent overseer's salary, meaning R.'s, should be raised from £27 to £35 a year, including all other extra charges. In June, 1816, a warrant of the appointment of R. as assistant overseer was signed & sealed by two justices of the peace. This warrant recited that R. had been nominated & elected in Mar. 1816, at the yearly salary of £35. Subsequently to June, 1816, R. had acted as assistant overseer, but had become a defaulter to a considerable amount:—*Held*: there never had been an appointment by the justices upon the nomination & election of Mar. 1815, at an annual salary of £27, upon which the bond had been given, inasmuch as the appointment was made in pursuance of the resolution of Mar. 1816, at the increased salary of £35; & therefore R. had never been duly appointed assistant overseer, & the sureties were not liable.—*HOLLAND v. LEA* (1851), 9 Exch. 430; 2 C. L. R. 532; 23 L. J. Ex. 122; 22 L. T. O. S. 334; 18 J. P. 201; 156 E. R. 181.

*Annotations*.—*Refd.* *North Western Ry. v. Whimray* (1851), 10 Exch. 77; *Stewart v. McKean* (1855), 21 L. J. Ex. 145. *Metd.* *Smart v. West Ham Union Grdms.* (1855), 10 Exch. 567.

treasurer, while B. continued in his office. C. received moneys for which he did not account, & B. sued A. upon the bond. B. held his commission as treasurer from the govt. from the execution of the bond to Oct. 10, 1846; & from that time to Aug. 16, 1849; in consequence of a change made in the mode of appointment, he held his office under an election of the municipal

council of the western district:—*Held*: the surety was liable during the whole time the deputy was serving, without reference to the mode of B.'s appointment.—*BABY v. BABY* (1851), 8 U. C. R. 76.—*CAN.*

*o.* — — —.]—A surety, for the due performance of B.'s duties as treasurer of a district, was not liable

**1271. Change in tenure—Annual office to office during pleasure—By statute—Change provided for by agreement.**—*OSWALD v. BERWICK-UPON-TWEED CORPN.*, No. 401, *ante*.

**1272. — — — — —.]**—A bond executed before the passing of 6 & 7 Vict. c. 89, by the sureties of P., treasurer of a borough, was subject to a condition by which, after reciting that P. had been elected treasurer under 5 & 6 W. 1, c. 76, it was provided that the bond should be void if P. should account for moneys that might come to his hands as treasurer, "whether by virtue of his present or any subsequent appointment to the said office, according to the directions & true intent & meaning of the said statute, & in every other respect act in strict conformance with the same, & all other laws & regulations now or hereafter to be in force touching the said office of treasurer, or the person or persons performing or liable to perform the duties thereof":—*Held*: the sureties were liable for misconduct of P. after the tenure of the office had been altered by 6 & 7 Vict. c. 89, from an annual office to an office held during pleasure.—*DARTMOUTH CORPN. v. SILLY* (1857), 7 E. & B. 97; 26 L. J. Q. B. 90; 28 L. T. O. S. 263; 21 J. P. 518; 3 Jur. N. S. 431; 5 W. R. 255; 119 E. R. 1181.

*Annotation*.—*Refd.* *Cambridge Corp'n. v. Dennis* (1858), E. B. & E. 660.

**1273. — — — — —.]**—The condition of a bond recited that S. had been appointed, under 5 & 6 W. 4, c. 76, treasurer to a borough; & declared that it had been agreed that the obligor should join with S. in the bond for the due performance of the office; & the condition was declared to be that, if S. should duly perform the office according to the provisions of the said statutes, & of such statutes as might be thereafter passed relating to the said office, the bond should be void, otherwise, etc. In a declaration by the obligee against the obligor, it was averred that, under the appointment in the condition mentioned, & divers subsequent annual appointments in every successive year, S. continued to be treasurer from the time of the execution of the bond till 6 & 7 Vict. c. 89, passed, when S., in accordance with the last-mentioned Act, was appointed treasurer, & held office during the pleasure of the council till his death; & that the office, at S.'s last appointment, & until his death, continued, in its nature, functions & duties, to be the same office as that mentioned in the condition. A breach was then assigned, alleging a malversation by S., while he remained treasurer as aforesaid not stated to have occurred within the year from his first appointment, but, to wit, on a day named, which was subsequent to the appointment under 6 & 7 Vict. c. 89: *Held*: declaration bad on demurrer. For under 5 & 6 W. 1, c. 76 (s. 58), the appointment mentioned in the condition was for one year only; & the liability of the obligor could not extend to the holding under 6 & 7 Vict. c. 89, which makes the office to be an office held during the pleasure of the council.—*CAMBRIDGE CORPN. v. DENNIS* (1858), E. B. & E. 660; 27 L. J. Q. B. 474; 31 L. T. O. S. 199; 22 J. P. 371; 5 Jur. N. S. 265; 6 W. R. 653; 120 E. R. 657.

for any defalcations by B. after his election by the municipal council.—*It. v. HALL* (1851), 1 C. P. 406.—*CAN.*

*p.* — — — *Appointed treasurer for new county.*—*COUNTY OF ONTARIO CORPN. v. PAXTON* (1876), 27 C. P. 104.—*CAN.*

*q.* *Statutory change in payment of fees—Subsequent to giving of bond.*—

*Sect. 2.—Discharge from liability: Sub-sect. 3, A. (b), iii. & iv., & B. (a).]*

**1274. — Variation of time for notice—To terminate employment.]—**SANDERSON *v.* ASTON, No. 1208, *ante*.

**1275. Transfer to new district—On re-appointment to same duties.]—**ABINGTON *v.* JEANS, No. 1204, *ante*.

**1276. — ]—**By an order of the Poor Law Comrs. plffs., guardians of a Union, were directed to appoint collectors of the poor rates of such of the several parishes in the Union as plffs. might deem to require a collector; & every person appointed a collector was required to give security for the due performance of the duties of his office. In the interval between this order & the passing of 13 & 14 Vict. c. 90, which regulates the collection of poor rates assessed upon the owners of small tenements in parishes, plffs., in pursuance of the order, appointed several persons as collectors of the poor rates of P., one of the parishes in the Union. Subsequently to that Act, & to its adoption by the parish of P., plffs. determined to appoint an additional collector; & one of those originally appointed having resigned, advertised that they were about to appoint "two persons to be collectors of the poor rates of the parish of P., to one of whom" would be assigned a collection of such rates from the owners of small tenements." W., in answer to the advertisement, sent in the following written application: "There being two collectors of poor rates about to be appointed for the parish of P., may I offer myself as a candidate for one of them?" Plffs. afterwards elected W. & another person, by a resolution which declared that the latter was elected in the place of the retiring collector, & W. for the purpose of collecting the rates from the owners of small tenements. Both appointments were approved of by the Poor Law Board. Deft. then executed a bond as surety for W., which after reciting the order of the Poor Law Comrs., & that W. had been "duly appointed to be a collector under the said order," was conditioned for the faithful discharge by W. of his duties "during his continuance in the said office of collector." W. entered on his duties & for some years collected the poor rates assessed upon the owners of small tenements in P. One of the previously appointed collectors, who collected all the poor rates in L., a district of P., then resigned, & plffs., on W.'s application, transferred him to that district. No new bond was then executed. W. afterwards committed defalcations, in respect of which plffs. now sued deft., as surety, upon the bond executed by him:—*Held*: deft. was liable for that W. was appointed, in the first instance, as collector of the poor rates of P. generally, not of the poor rates payable by the owners of small tenements in P. exclusively; so that his transfer to the L. district was not an appointment of him to a fresh office, or such an alteration in his duties as to discharge his surety from further liability.—*PORTSEA ISLAND UNION GUARDIANS v. WHILLIER*

*Held*: the sureties to a bond for the performance of the duties, etc., of registrar, being the form of bond prescribed by the Act in force prior to the introduction of the provisions giving to municipalities a share in the fees, were not liable for the non-payment over of such share.—*CORPUS OF MIDDLESEX CORP. v. SMALLMAN* (1891), 20 Q. R. 487.—*CAN.*

**PART IX. SECT. 2, SUB-SECT. 3. — A. (b) iv.**

*r. Agent becoming partner — After guarantee.]—*A person became surety

for another for the due discharge of his duty as agent in the purchase of wheat for a mercantile firm. Afterwards the agent & his principals entered into an agreement for partnership, & during the continuance thereof he became indebted to his partners in the sum of £750; & the surety, having been called upon, executed a confession of judgment for the amount of his principal's indebtedness, in ignorance, as he alleged, of the fact that the agency had ceased & a partnership been formed. Upon a bill filed to enforce the judgment,

(1860), 2 E. & E. 755; 29 L. J. Q. B. 150; 2 L. T. 211; 24 J. P. 678; 6 Jur. N. S. 887; 8 W. R. 493; 121 E. R. 283.

*Annotation*:—*Reid*, Skillett v. Fletcher (1866), Har. & Ruth. 197.

**1277. Clerk undertaking additional liability—On discount losses—Increased salary—Breach of original duties.]—**A. became surety for B.'s conduct as a clerk in a bank. B. was subsequently appointed to a better situation in a branch of the same bank, & A. extended his suretyship to this new situation. B. afterwards, while remaining in the same situation, undertook, on having his salary raised, to become liable to one-fourth of the losses on discounts. No communication of this new arrangement was made to A. B. allowed a customer considerably to overdraw his accounts, & thereby the bank lost a sum of money:—*Held*: the surety could not be called on to make good this loss, though it fell within the terms of the original agreement, as the fresh arrangement was the substitution of a new agreement for the former one, & A. was thereby discharged.—*BONAR v. MACDONALD* (1850), 3 H. L. Cas. 226; 14 Jur. 1077; 10 E. R. 87, H. L.

*Annotations*:—*Consid.* Pybus v. Gibb (1856), 6 E. & B. 902; Skillett v. Fletcher (1867), L. R. 2 C. P. 469. *Reid*, Steward v. McKean (1855), 21 L. J. Ex. 145.

#### iv. Debtor Member of a Partnership.

**1278. Partner admitted after guarantee given.]—**If A. become bound to B. under condition that C. shall truly account to B. for all sums of money received by C. for B.'s use, & C. afterwards, with B.'s knowledge, takes D. as his partner, the guarantee does not extend to sums of money received by C. for B.'s use, after the formation of the partnership.—*BELLAIRS v. EBSWORTH* (1811), 3 Camp. 53, N. P.

*Annotations*:—*Consid.* Mills v. Alderbury Union (1819), 3 Exch. 590. *Reid*, London & Sec. Co. v. Bold (1814), 6 Q. B. 514; Montefiore v. Lloyd (1863), 15 C. B. N. S. 203; *Re* Phillips, *Ex p.* Phillips (1863), 9 L. T. 522; Leathley v. Spyer (1870), L. R. 5 C. P. 595.

*Compare* No. 406, *ante*.

**1279. — ]—**BANK OF BRITISH NORTH AMERICA *v.* CUVILLIER, No. 388, *ante*.

**1280. — Though contemplated before—Knowledge of surety.]—**Deft. executed a bond as surety to an insurance co. for the fidelity of A., who was appointed an agent of the co. at Adelaide, & who was about to & afterwards did enter into partnership (as merchants) with B., also an agent of the co. at that place. The condition of the bond was that, if A., his heirs, exors., etc., should well & truly pay & account for all moneys received by him, the obligation should be void:—*Held*: (1) deft. was not responsible under this bond for moneys received by the firm of A. & B., notwithstanding he was aware at the time he signed the bond that A. was about to become partner with B.; (2) the surrounding or "co-existing" circumstances were admissible for the purpose of explaining what might be ambiguous in the condition.—*MONTEFIORE v. LLOYD* (1863), 15

against the surety, the ct. directed a reference to ascertain what, if any, portion of the debt for which the assignment was given arose in respect of dealings during the agency, reserving further directions & costs; or, if plffs. should decline this reference, then that the bill should be dismissed with costs.—*GOODERHAM v. BANK OF UPPER CANADA* (1862), 9 Gr. 39.—*CAN.*

*s. Partnership dissolved — Liability for drafts after dissolution.]—*A bond was granted to a bank by a co. & two cautioners binding themselves

C. B. N. S. 203; 3 New Rep. 82; 33 L. J. C. P. 49; 9 L. T. 330; 9 Jur. N. S. 1245; 12 W. R. 83; 143 E. R. 761.

*Annotation*:—*As to* (2) *Folld.* Leathley v. Spyer (1870), L. R. 5 C. P. 595.

**1281. Retirement of member of partnership—Where whole firm constituted debtor.]—**Debt on bond against a surety. The condition recited, that the Chancellor, Masters, & Scholars of the University of Cambridge had appointed B., C. & J. their agents for the sale of books printed at their press in the university, & that deft. had offered to enter into a bond with them as a surety; & it was conditioned, that if the said B., C. & J. & the survivors & survivor of them, & such other person & persons as should or might at any time or times thereafter, in partnership with them or any or either of them, act as agent or agents of the said Chancellor, etc., or their successors, for the sale of books as aforesaid, did & should duly account to the said Chancellor, etc., & their successors, for all books, delivered or sent to them or any or either of them for sale as aforesaid, & should pay all moneys which should become payable to the said Chancellor, etc., in respect of such sale, then the obligation to be void, etc.:—*Held*: by the retirement of J. from the partnership of B., C. & J., deft., as their surety, was discharged from all further liability on this bond.—*CAMBRIDGE UNIVERSITY v. BALDWIN* (1839), 5 M. & W. 580; 151 E. R. 216.

### B. Creditor.

#### (a) In General.

*See* Mercantile Law Amendment Act, 1856 (c. 97), s. 4; Partnership Act, 1890 (c. 39), s. 18.

**1282. Increase in number—Addition of partner.]—**WRIGHT v. RUSSEL, No. 1291, *post*.

**1283. ———.]—**(1) A guarantee of moneys advanced by a firm, consisting of F. & co. will not extend to a new firm in which H. is introduced as a partner.

(2) Payments made by the principal after the alteration of the firm, & in transactions with him, are applicable to the extinction of the balance due to the old firm at the date of the alteration.—*SEIERS v. HOUSTON* (1829), 4 Bli. N. S. 515; 5 E. R. 183, H. L.

*Annotation*:—*Generally.* *Refd.* Bank of Scotland v. Christie (1841), 8 Cl. & Fin. 211.

**1284. ———.]—**Securities to a banking firm for a current balance cease on the change of the firm by the admission of a new partner, & if the account be carried on by the new firm subsequent payments by debtor will be applied in the first instance exclusively in satisfaction of the balance due at the date of the admission of the new partner.—*EYTON v. KNIGHT* (1838), 2 Jur. 8.

**——— Effect of payment after addition.]—***See* Sect. 1, sub-sect. 1, *ante*.

**1285. Amalgamation of companies—Banks.]—**WILSON v. CRAVEN, No. 665, *ante*.

**1286. ———.]—**BRADFORD OLD BANK v. SUTCLIFFE, No. 483, *ante*.

**1287. Retirement from partnership.]—**A promise in writing directed to A., B. & C., a house in trade, to pay for goods to be furnished to another cannot be enforced in an action by B. & C. to recover the value of goods furnished after A. had withdrawn

from the partnership.—*MYERS v. EDGE* (1797), 7 Term Rep. 254; 101 E. R. 960.

**1288. ——— Intention to continue guarantee.]—**A security to a firm continued after an alteration in the members of it, upon the construction of a letter raising an agreement to that effect.—*Re CARILLI, Ex p. MARSH* (1815), 2 Rose, 240, L. C. *Annotation*:—*Refd.* *Re* Burkill, *Ex p. Nettleship* (1811), 5 Jur. 738.

**1289. ———.]—**A. wishing to obtain credit with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly & severally promised to pay the bankers or order £300. The bankers gave A. credit in his pass-book for £300 on account of the note, & charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house a balance was struck between the old & new firm, & the promissory note was delivered to the new firm, but not indorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually:—*Held*: (1) the note being payable to the five members of the banking-house or order, & being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking house; (2) an action on the note, the same not having been indorsed, was properly brought in the name of the payees of the note; (3) the note was not discharged by reason of A. at one time having in the hands of the banker a balance exceeding in amount the sum secured by the note; (4) the payment of interest within six years by A. on the note was evidence of an acknowledgment by all the joint makers of the note, so as to take the case out of Stat. Limitations.—*PEASE v. HIRST* (1829), 10 B. & C. 122; L. & Welsb. 81; 5 Man. & Ry. K. B. 88; 8 L. J. O. S. K. B. 94; 109 E. R. 396. *Annotations*:—*As to* (1) *Refd.* Dry v. Davy (1839), 10 Ad. & El. 30. *As to* (2) *Refd.* Dry v. Davy (1839), 10 Ad. & El. 30. *As to* (3) *Refd.* Henmker v. Wigg (1813), Dav. & Mer. 160.

**1290. ———.]—**The following guarantee was given to the firm of M. & D., the actual members of which, at the time, were M., D., & N.: "G. is desirous of commencing business in your line, & wants the usual credit for six months: if you think well to supply him, I will be answerable for the amount of £100." *Held*: on N. withdrawing from the firm (which continued under the names of M. & D.) the guarantee ceased, no intention appearing on the instrument that the responsibility should continue after such change in the partnership.—*DRY v. DAVY* (1839), 10 Ad. & El. 30; 2 Per. & Dav. 219; 8 L. J. Q. B. 209; 3 Jur. 315; 113 E. R. 12.

**1291. ——— Renewal of promissory note.]—**BONSER v. COX, No. 516, *ante*.

**1292. ———.]—**(1) By the conditions attached to a contract of indemnity against losses in trade, the guarantee became void on the death or retirement from trade of the person guaranteed:—*Held*: this condition applied to the death or retirement of one of two partners guaranteed; & therefore a plea alleging such death of the partner was an answer to an action against the co-partner by the guarantors for the subscription or annual payments agreed to be paid by the assured.

(2) Deft. pleaded, on equitable grounds, to an

to make payment of whatever sums A. P. should draw out, etc.:—*Held*: although A. P. was a partner of the co. which was afterwards dissolved, yet the cautioners were liable for all sums drawn by him after the dissolu-

tion.—*PATERSON v. CALDER* (1808), 14 Fac. Coll. 235.—*SCOT*.

### PART IX. SECT. 2, SUB-SECT. 3.—B. (a).

#### t. Retirement from partnership —

*Assignment of debts to new firm—Advances to debtor continued by company.*—*ELTON, HAMMOND & Co. v. NELSON* (1812), 16 Fac. Coll. 609.—*SCOT*.

**Sect. 2.—Discharge from liability: Sub-sect. 3, B. (a) & (b), & (c).]**

action for such payments, & also for a certain increased premium, that by certain printed rules & regulations delivered to him as the rules & regulations under & subject to which the agreement for guarantee was to be made, the amount of subscription payable by the assured was to be increased at a certain specified percentage rate, according to the amount of admitted claims in the previous year, & that debt. entered into the contract upon the basis & faith of such rules & regulations; but that the contract did not contain them, & other & much less advantageous rules, with other rates, were substituted, of which debt. had no notice:—*Held*: the plea was bad, as the facts stated would not relieve debt. from the performance of the contract, but would only entitle him to have it reformed.—*SOLVENCY MUTUAL GUARANTEE CO. v. FREEMAN* (1861), 7 H. & N. 17; 31 L. J. Ex. 197; 158 E. R. 374.

*Annotation*:—*Generally*, *Mentd.* *Harvey v. Municipal Permanent Investment Bldg. Soc.* (1881), 26 Ch. D. 273.

**1293. Weekly payment to wife under separation deed.—Subsequent divorce proceedings by wife.]—**

(1) By a separation deed reciting that differences had arisen between the husband & wife, in consequence of which they had agreed to live apart, debt. became a surety for the payment by the husband to pltf., as trustee for the wife, of a certain weekly sum during the joint lives of the husband & wife. In an action against debt., as surety, for arrears of the weekly sum:—*Held*: a plea setting out the deed, & alleging that debt. became a party to it to prevent any public exposure, that the wife had subsequently commenced a suit for a divorce, & that the marriage had been dissolved, was bad.

Here debt. became surety for the payment of a weekly sum to the wife: the payment of the weekly sum is not altered: the only alteration is in her ceasing to be the wife of the principal (*BLACKBURN, J.*).

(2) Where there is a surety for a person in a particular situation & the situation is altered, even if the liabilities are less the surety is discharged (*BLACKBURN, J.*).—*GRANT v. BUDD* (1871), 30 L. T. 319; 22 W. R. 511.

*Annotation*:—*As to* (1) *Consd.* *Fearon v. Aylesford* (1881), 12 Q. B. D. 539.

**Fidelity guarantees.]—See Sub-sect. 3, B. (b), post.**

**Death of creditor.]—See Sub-sect. 11, C. (a), post.**

**(b) Fidelity Guarantees.**

**1294. Alteration in number of creditors—Increase to partnership.]—**Where a bond is given by sureties for the honesty & fidelity of a broad clerk to a brewer, & the obligee afterwards takes a partner without the knowledge of the sureties, they shall not be answerable for the clerk's fidelity to such partnership.—*WRIGHT v. RUSSEL* (1771), 3 Wils. 530; 2 Wm. Bl. 934; 95 E. R. 1195.

*Annotations*:—*Distd.* *Barclay v. Lucas* (1783), 3 Doug. K. B. 321. *Folld.* *Strange v. Lee* (1803), 3 East, 481. *Refd.* *Myers v. Edge* (1797), 7 Term Rep. 254.

**1295. ———.]—**Deft. entered into a bond to pltf., reciting that pltf. at the recommendation of the obligor had agreed to take P. into their service & employ, as a clerk in their shop & counting-house, & the condition was, that if P.

should faithfully account for, etc., to pltf. all such sums as he should receive in the service of pltf. then, etc. Pltf. afterwards took B. as a partner into their business:—*Held*: debt. was liable for money embezzled by P. after the new partnership.—*BARCLAY v. LUCAS* (1783), 3 Doug. K. B. 321; 1 Term Rep. 291, n.; 99 E. R. 676.

*Annotations*:—*Distd.* *Barker v. Parker* (1786), 1 Term Rep. 287. *Consd.* *Strange v. Lee* (1803), 3 East, 481. *Expld.* *Dance v. Girdler* (1804), 1 Bos. & P. N. R. 31; *Metcalf v. Bruin* (1810), 12 East, 400. *Consd.* *Backhouse v. Hall* (1865), 6 B. & S. 507. *Refd.* *Weston v. Barton* (1812), 4 Taunt. 673.

**1296. Death of creditor—Continuation of employment by executors—Effect on liability.]—**A bond with condition that a clerk shall serve faithfully & account for all money, etc., to the obligee & his exors., does not make the obligor liable for money received by the clerk in the service of the exors. of such obligee, who continue the business & retain him in the same employment.—*BARKER v. PARKER* (1786), 1 Term Rep. 287; 99 E. R. 1098.

*Annotations*:—*Folld.* *Strange v. Lee* (1803), 3 East, 481. *Refd.* *Liverpool Water Works Co. v. Atkinson*, (1805), 6 East, 507.

**1297. Subsequent incorporation of creditors—Previously governors of a society—No default before incorporation.]—**A bond was given to A., B., C., etc., payable to them & their successors, as the governors of the Society of Musicians, conditioned to secure H.'s faithfully accounting with them & their successors, governors, etc., as their collector; afterwards the society was incorporated by letters patent, at which time H. had duly accounted for all moneys collected by him, but after the incorporation received money for which he did not account:—*Held*: the obligor of the bond was not liable for such default of H. in an action on the bond.—*DANCE v. GIRDLER* (1801), 1 Bos. & P. N. R. 31; 127 E. R. 370.

*Annotations*:—*Consd.* *Edwards v. Grand Junction Ry.* (1836), 1 My. & Cr. 650. *Refd.* *Re Carlisle Petn.* (1852), 20 L. T. O. S. 156; *Backhouse v. Hall* (1865), 34 L. J. Q. B. 111.

**1298. ——— Committee of Lloyd's—Rights vested in corporation by statute.]—***LOYD'S v. HARPER*, No. 571, ante.

**1299. Creditors public officials—Holding office for definite period—Effect of termination of office.]—**A. having, by order of vestry, been appointed to the office of collector of poor & church-rates, in the parish of X., became bound with sureties to the then existing churchwardens & overseers of the poor of the said parish, subject to a condition for making void such bond, on his duly accounting & paying over to such existing churchwardens & overseers, or their successors, all such sums as he should receive as such collector, or as should come to his hands, pursuant to, & in the execution of, his said office:—*Held*: the office of churchwardens & overseers being annual, the office of collector partook of the same character, & the liability of the sureties under such bond did not extend to moneys received by the collector, on account of any year subsequent to that for which the obligee continued in office.

*Scmble*: the ct. will take notice of the duration of an office, which under statute has continuance for a limited period only, without the same being specially pleaded.—*LEADLEY v. EVANS* (1824), 2 Bing. 32; 9 Moore, C. P. 102; 2 L. J. O. S. C. P. 108; 130 E. R. 216.

**1300. ———.]—**The subordinate officers appointed under the St. Pancras Vestry Act, 1819

**PART IX. SECT. 2, SUB-SECT. 3.—B. (b).**

**1294 l. Alteration in number of creditors—Increase to partnership.]—***NEEL COMAL MOOKERJEE v. BIPRO DASS MOOKERJEE* (1901) 1 L. R. 28 (Cal. 507—TND)

(c. 39), s. 19, by the select vestry, are not annual officers, but hold their offices during the pleasure of the vestry. Therefore, the bonds given by them to the directors of the poor, who are annual officers under s. 57, continue in force after the directors to whom they were given have gone out of office.—*M'GAHEY v. ALSTON* (1830), 1 M. & W. 386; 2 Gale, 40; 3 Nev. & M. M. C. 572; Tyr. & Gr. 705; 6 L. J. Ex. 29; 150 E. R. 481.

**1301. Creditor a company—Unincorporated—Change in individual members.**—A bond of indemnity given to the trustees of a public unincorporated insurance co., conditioned for the good conduct of a clerk while in the service of the co., remains in full force during the period the clerk continues to serve the co., although there be changes among the individual members of whom the co. is composed.—*METCALFE v. BRUIN* (1810), 2 Camp. 422, N. P.; *subsequent proceedings*, 12 East, 400.

*Annotations*:—*Consd. Leadley v. Evans* (1821), 2 Bing. 32; *Backhouse v. Hall* (1865), 6 B. & S. 507.

**1302. — Subsequent amalgamation with other company—Not increasing duties of debtor.**—Debt on bond given by G., & debt. & another, as his sureties, to the London & Croydon Ry. Co., for the due performance by G. of the duties of chief clerk to the booking-office at a railway station. The condition was, that if G. should render to the London & Croydon Ry. Co., or to the committee for managing the London terminus of the London & Croydon, London & Brighton, & South Eastern Railways, a true account of all receipts & payments, & should pay to the Croydon Co., or to the committee, all sums received by him on account of the co. or committee, also such sums as he should receive from the booking clerks, or on account of the co. or committee, the bond was to be held void. Breaches were assigned in the replication. Upon the assessment of damages after judgment for pltf. upon demurrer, the breach relied upon was that G. did not pay over to the co. what he had received from the booking clerks. It appeared that instead of making up his accounts in the evening of each day, G. had allowed the clerks to be in arrear, & had balanced the accounts on the following day by appropriating a portion of that day's receipts to the deficiency of the previous day, but had in fact paid over all that he had received:—*Held*: (1) this was a breach of the condition, for he had not paid it over duly; (2) the opening an additional line, whereby the duties of the clerks were increased, did not affect the liability of his sureties in respect of the duties as to the original lines specified in the bond & condition.—*LONDON, BRIGHTON & SOUTH COAST RY. CO. v. GOODWIN* (1849), 3 Exch. 736; 18 L. J. Ex. 337; 13 L. T. O. S. 74; 151 E. R. 1012; *previous proceedings*, 3 Exch. 320.

*Annotations*:—*As to (2) Refd. Davis v. Cary* (1850), 15 Q. B. 418; *Eastern Union Ry. v. Cochrane* (1853), 9 Exch. 197.

**1303. — — — — —**—Deft., by bond, became surety for the honesty & good conduct of a clerk to the Eastern Union Ry. Co. That co. afterwards, by Act of Parliament, became amalgamated with the Ipswich & Bury Ry. Co., under the name of the Eastern Union Ry. Co., present pltf. By sect. 10 of Amalgamating Act, "all conveyances, contracts, agreements, mtges., bonds, covenants, & securities made or entered into before the granting of such certificate to, with, in favour of, or by or for the dissolved cos., or either of them, or any person duly authorised on their behalf, shall, immediately after the granting of such certificate, be & remain as good, valid & effectual in favour of, & against,

& with reference to the new co., & may be proceeded on & enforced in the same manner to all intents & purposes as if the last-mentioned co. had been a party to & executed the same, or had been named or referred to therein instead of the persons, co. or party actually named therein respectively":

—*Held*: debt., the surety, was liable to pltf., the amalgamated co., in respect of a breach of the bond committed by the clerk after the amalgamation.—*EASTERN UNION RY. CO. v. COCHRANE* (1853), 9 Exch. 197; 7 Ry. & Can. Cas. 792; 2 C. L. R. 292; 23 L. J. Ex. 61; 22 L. T. O. S. 104; 17 Jur. 1103; 2 W. R. 43; 156 E. R. 81.

**1304. — Insurance company subsequently dissolved—Business transferred to new company—Liability to new company.**—A sum of money was borrowed from an insurance co., & a bond was given to secure the repayment of the money. The borrower at the same time insured his life as a further security; & the bond extended to the payment of the premiums for keeping up the policy. The insurance co. having ceased to carry on business was dissolved, & the affairs being wound up, the co. transferred, amongst other things this bond & policy to another insurance co. No premiums were paid to the second co., & the policy was allowed to drop. The surety in the bond died, & the second insurance co. claimed to be creditors against his estates for the amount of premiums unpaid, on the ground that the policies ought to be kept on foot, until the money due upon the bond had been paid:—*Held*: as regarded the premiums, this was not such a contract as the assignees of the first insurance co. could enforce, although they had a good claim against the estate of the surety *quoad*, the amount secured by the bond.—*ATKINSON v. GYLBY* (1852), 21 L. J. Ch. 818; *on appeal*, 2 De G. M. & G. 670, L. J.

**1305. — Subsequent change in name—Statute saving pre-existing rights.**—18 & 19 Vict. c. 133, s. 12, enacts that no alteration made by this Act in the name of any co. shall prejudice or affect any right which previously to such alteration has accrued to such co., etc., but every such co. shall be entitled to all such remedies as they would have been entitled to if no such alteration had been made:—*Held*: the rights of a co. which had obtained a certificate of complete registration with limited liability under the above Act, against a surety on a bond entered into with them for the faithful service of a clerk or agent, in respect of defalcations since the date of such certificate, remained unaffected by their change of name.—*GROUX'S IMPROVED SOAP CO., LTD. v. COOPER* (1860), 8 C. B. N. S. 800; 141 E. R. 1380.

#### C. Surety.

**1306. Surety originally a principal debtor—Change of status known to creditor—Time given after knowledge.**—A. & B., partners in trade, executed a joint & several bond to C. A. died. B. took a new partner, D. The new firm, by deed, covenanted with the exors. of A. to assume the debts of the old firm, & to indemnify them, & C. was made acquainted with the fact that the new firm had become the principal debtors. Before the time at which the bond was payable, C. unknown to the exors. of A. but without any intention of releasing A.'s estate, agreed with B. & D. that the payment of the bond should be suspended for three years:—*Held*: C. knowing that the estate of A. was liable as surety only, the original character of the estate of A. as a principal, was changed into that of surety; & such estate was, by the giving of time by C. to the new firm,

**Sect. 2.—Discharge from liability: Sub-sect. 3, C.; sub-sect. 4, A. (a).]**

discharged from all liability to C. in respect of such bond. —*PASHELLER v. HAMMETT* (1832), 2 Coop. temp. Cott. 522; 10 Bli. N. S. 576, n.; 1 L. J. Ch. 204; 47 E. R. 1281; on appeal, sub nom. *OAKELEY v. PASHELLER* (1836), 10 Bli. N. S. 518, H. L.

*Annotations: Consd.* *Oakford v. European & American Steam Shipping Co.* (1863), 1 Hem. & M. 182. *Expld. & Apld.* *Wilson v. Lloyd* (1873), L. R. 16 Eq. 60. *Consd.* *Overend, Gurney & Co.'s Liquidators v. Oriental Financial Corpn.'s Liquidators* (1871), L. R. 7 H. L. 348; *Swire v. Redman* (1876), 1 Q. B. D. 536; *Rouse v. Bradford Banking Co.*, [1894] A. C. 586. *Refd.* *Bailey v. Edwards* (1861), 4 B. & S. 761. *Mentd.* *McTaggart v. Watson* (1836), 10 Bli. N. S. 618; *Nanson v. Gordon* (1876), 31 L. T. 401.

**1307. ————.] —OVEREND, GURNEY & Co. (LIQUIDATORS) v. ORIENTAL FINANCIAL (LIQUIDATORS), No. 1341, post.**

**1308. ————.]** Where a member of a firm which is under a continuing contract retires with an indemnity, the continuing partners are his agents for carrying on the contract; &, although after notice of the retirement the retiring partner is in a sense a surety on the principle of *Oakeley v. Pasheller* (1836), 10 Bli. N. S. 548, that authority will not be extended so far as to discharge him from the contract by reason of acts of the continuing partners fairly within the scope of their authority in carrying out the contract.

Continuing partners under such a contract which, *inter alia*, gave the firm the power of appointing an arbitrator in case of dispute, entered into an agreement by which they waived a very doubtful point of construction on the original contract, & referred differences to arbitrators, one of whom was selected by themselves instead of by the firm as constituted at the date of the contract: *Held*: this was not such a variation of the original contract as to discharge the retired partner. —*OAKFORD v. EUROPEAN & AMERICAN STEAM SHIPPING CO., LTD.* (1863), 1 Hem. & M. 182; 2 New Rep. 103; 9 L. T. 15; 1 Mar. L. C. 370; 71 E. R. 80.

*Annotations: Consd.* *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32. *Refd.* *Swire v. Redman* (1876), 1 Q. B. D. 536.

**1309. ————.] —WILSON v. LLOYD, No. 1557, post.**

**1310. ————.]**—Where two or more are indebted as principals & it is afterwards agreed between them that as between themselves one shall

be a surety only, & this agreement is made known to the creditor, the rule as to the discharge of a surety by giving time to the principal debtor applies.

Applt. & others being in partnership a deed of dissolution was made whereby applt. assigned his interest to the other partners, who covenanted with him to pay the partnership debts & to indemnify applt. against them, with a proviso that he should not be entitled to require them to pay any of the debts so long as he was kept indemnified. Among the debts was an overdraft of £50,000 due to resps., a banking co. After the dissolution, the terms of which were made known to resps., a transaction was entered into between the new firm & resps. whereby the new firm were allowed for a limited period to increase the overdraft to £53,000:—*Held*: there was no agreement to give time to the new firm or to alter the relation & resps. had not released applt.

Time is only given within the meaning of the rule if there is a binding agreement arrived at for good consideration (*LORD HERSHELL, C.*).

Where there is a contract with two persons, one as principal & the other as surety, & time is given to the principal without the assent of the surety, & without the rights against the surety being reserved, the right against the surety is extinguished (*LORD HERSHELL, C.*).—*ROUSE v. BRADFORD BANKING CO.*, [1894] A. C. 586; 63 L. J. Ch. 890; 71 L. T. 522; 43 W. R. 78; 6 R. 349, H. L.

*Annotation:—Appld.* *Goldfarb v. Bartlett & Kremer*, [1920] 1 K. B. 639.

**1311. ———— Change of status unknown to creditor.] —OAKELEY v. PASHELLER, No. 1374, post.**

**1312. Surety becoming principal—By agreement with creditor.]**—(1) Judgment having been obtained against B., a surety, he entered into a new arrangement with the creditor (irrespective of the principal debtor), by which execution was not to issue while he kept up certain policies for securing the debt:—*Held*: B. became principal, & not surety, by the new arrangement, & no subsequent dealing between the creditor & principal debtor would annul it.

(2) The creditor having afterwards taken the principal debtor in execution, & discharged him without payment:—*Held*: B. was not thereby released.—*READER v. LOWNDEN* (1857), 23 Beav. 361; 26 L. J. Ch. 793; 30 L. T. O. S. 28; 3 Jur.

## PART IX. SECT. 2, SUB-SECT. 3.—C.

**1308 i. Surety originally principal** *Change of status known to creditor.]* *Sumble*: where after a right of action accrues to a creditor against two or more persons he is informed that one of them is or has become a surety only, & after that he gives time to the principal debtor, without the consent & knowledge of the surety, he thereby discharges the surety, even though he may not have assented or been a party to the change of relationship between them. —*BAILEY v. GRIFFITH* (1877), 40 U. C. R. 418.—*CAN.*

**1308 ii. ————.]**—Where sureties for a debt gave to the creditor a second mtge. on land as an additional security, & foreclosure proceedings were taken by the first mtgee.:—*Held*: the fact of two co-debtors changing their position so as to make one of them as between themselves a surety, would not affect the creditor without his consent. —*JONES v. DUNBAR* (1881), 32 C. P. 136.—*CAN.*

**1308 iii. ————.]**—When two or more persons bound as full debtors arrange, either at the time the debt was contracted or subsequently, that *inter se* one of them shall only be liable as a

surety, the creditor after he has had notice of the arrangement, must do nothing to prejudice the interests of the surety in any question with his co-debtor. —*IMPERIAL BANK OF CANADA v. HILL*, [1917] 1 W. W. R. 1299; 10 Sask. L. R. 47; 33 D. L. R. 218.—*CAN.*

**a. ————.]**—Where two joint debtors entered into an arrangement between themselves by which, *inter se*, one of them became the principal & the other the surety to the knowledge of the creditor, who afterwards, by taking a bill of Exchange, gave time to him who had so become the principal:—*Held*: the surety was discharged, & the above facts constituted a good answer, by way of equitable defence, to an action subsequently brought by the creditor against the surety, although the relation of principal & surety did not subsist at the time of the original contract.—*MAINGAY v. LEWIS* (1870), 1 R. 5 C. L. 229.—*IR.*

**b. Judgment by mistake—Substitution of surety.] —HUTCHINSON v. BABY** (1857), 2 P. R. 126.—*CAN.*

**c. Surety becoming principal — Taking bond from original debtor—**

*Discharge of co-sureties.]*—W. being indebted to H.; G., B., & plff., C., in 1847 entered into a bond to secure the debt, which bond becoming due was forfeited. Plff. gave his bond to D., who held the claim of H., to secure the debt; he in 1852, after payment of the first instalment, took from W. his bond to secure the same debt. Upon an action brought against B., one of the original co-sureties:—*Held*: by the payment of the original debt plff. had put himself in the position of principal debtor, & the taking the bond operated to the prejudice of his co-sureties, inasmuch as he could not, at any moment, be put in motion against the original debtor; & therefore the co-sureties were released.—*CAMERON v. BOULTON* (1860), 9 C. P. 537.—*CAN.*

**d. Covenant by sureties—To be considered as principal debtors—As regards creditor.]**—Appls., in becoming sureties to resp. bank, covenanted that, though as respects the principal debtor they should be considered as sureties only, yet as regards the bank they should "be considered as principal debtors," so as not to be exonerated from liability by any dealings between



N. S. 877; 53 E. R. 142; on appeal, 30 L. T. O. S. 110, L. JJ.

**In bills of exchange.**—See **BILLS OF EXCHANGE**, Vol. VI., pp. 405-408, Nos. 2637-2653.

**Death of surety.**—See Sect. 2, sub-sect. 11, C. (c), post.

#### SUB-SECT. 4.—AGREEMENT TO GIVE TIME TO PRINCIPAL DEBTOR.

##### A. Essential Characteristics of Agreement.

###### (a) In General.

**1313. Contract must be binding.**—Between creditor & debtor.]—**SAMUEL v. HOWARTH**, No. 1329, post.

**1314.** ———.]—**BANK OF IRELAND v. BERESFORD**, No. 1373, post.

**1315.** ———.]—A ct. of equity will not relieve a surety by bond, upon the ground of the creditor having given time to the principal debtor, unless there has been an express & positive contract between them for that purpose.—**HEATH v. KEY** (1827), 1 Y. & J. 434; 148 E. R. 741.

**1316.** ———.]—A., & B., as his surety, made their joint promissory note for £250 payable to the manager of a banking co., as a security for advances made by the co. to A. After the note became due it was, without the consent of the surety, agreed between the co. & A., that the latter should execute & deliver to three persons as trustees of the co. a warrant of attorney to secure the £250 for which the joint note of A. & B. had been given & a further advance, upon which the trustees were to be at liberty to enter up judgment & issue execution forthwith for the sum due & costs. In an action against the surety upon the note, the jury having negatived a plea that the warrant of attorney was accepted on behalf of the co. in full satisfaction & discharge of the principal & interest due upon the note:—*Held*: the taking of the warrant of attorney from the principal debtor without the consent of the surety, did not discharge the latter, there having been no binding contract to give time to the former, though in point of fact the remedy had been delayed.

A surety is discharged from his debt, if his situation is altered for the worse, by the conduct of the creditor. The general class of cases is, where time has been given to the principal debtor, without the assent of the surety. This amounts to a legal fraud; it alters for the worse the position of the surety, because in case of failure of payment on the day, by the principal, he might have exerted himself to have compelled immediate payment. A mere voluntary abstinence from suing is not such a giving of time as will discharge the surety.—**BELL v. BANKS** (1841), 3 Man. & G. 258; 3 Scott, N. R. 497; Drinkwater, 236; 5 Jur. 486; 133 E. R. 1140; *sub nom.* **BELL v. SHUTTLEWORTH**, 10 L. J. C. P. 239.

*Annotations*:—**Mentl.** King v. Hoare (1844), 13 M. & W. 494; Chotwynd v. Allen, [1899] 1 Ch. 353; Isaacs v. Salbstein, [1916] 2 K. B. 139.

the bank & the principal debtor, which would otherwise have that effect:—*Held*: applicants became liable as principals to the bank immediately on the default of the principal debtor, & were not discharged by reason of time having been given to him.—**HODGES v. DELHI & LONDON BANK** (1900), L. R. 27 Ind. App. 168.—**IND.**

#### PART IX. SECT. 2. SUB-SECT. 4.—A. (a).

**1313 i. Contract must be binding.**—Between creditor & debtor.]—In order to succeed on the defence that time has

been given to the principal debtor, a surety must allege & prove a binding agreement to give time, or else such laches as amounts to fraud on the part of the creditor; & if the surety fails to allege in his defence or to disclose by affidavit of merits the facts necessary to support such a defence his statement of defence may be struck out & judgment entered for the plaintiff.—**TABACHNICK & ARNISON v. CHERNENKOFF**, [1923] 3 W. W. R. 59.—**CAN.**

**1313 ii.** ———.]—Since, in order to discharge the surety there must be a binding agreement by the creditor to

———.]—In order that the giving of time by a creditor to his principal debtor without the consent of a surety for the debt may have the effect of releasing the surety, there must be a binding contract to give time capable of being enforced, & the contract must be with the principal debtor. If the contract is made with a third party, for instance with a co-surety, the surety will not be released.

By a deed made in 1872, between a coal co. of the first part, six sureties of the second part, & a bank of the third part, the co. & the sureties jointly & severally covenanted with the bank to pay to the bank on demand the balance, not exceeding £25,000, for the time being due from the co. to the bank on their current account, with interest. In Nov. 1880, the following guarantee, addressed to, but not executed by, the bank, was executed by three of the six sureties & one L.: "In consideration of your continuing or giving an account . . . to the co. for one year from the date hereof, we, the undersigned, do hereby jointly & severally guarantee to you the due payment of all moneys & liabilities which are or have been or shall from time to time be owing to or incurred by you on account of the said co., it being agreed as follows:—1. That not more than £8,000 shall be ultimately recoverable hereunder; 3. This shall be a continuing security until a notice in writing under the hand of us or any of us to determine this security as to the person or persons signing such notice shall be given to you & to the other parties to this guarantee; 9. The security hereby given is in addition to the other securities held by you for the said account"; *Held*: the liability of the three sureties, who were not parties, was not released or determined by this guarantee. **CLARKIE v. BIRLEY** (1889), 41 Ch. D. 422; 58 L. J. Ch. 616; 60 L. T. 918; 37 W. R. 746.

———.]—**Bills of exchange.**—See **BILLS OF EXCHANGE**, Vol. VI., pp. 392, 393, Nos. 2570-2575.

**1318.** ———.]—**Parol agreement insufficient.**—It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. **DAVEY v. PRENDERGRASS** (1821), 5 B. & Ald. 187; 2 Chit. 336; 100 E. R. 1161; *subsequent proceedings, sub nom.* **PRENDERGAST v. DEVEY**, 6 Madd. 124.

*Annotations*:—**Consd.** **Whitcher v. Hall** (1826), 5 B. & C. 269. **Reid.** Price v. Edmunds (1830), 10 B. & C. 578; Cocks v. Nash (1832), 9 Bing. 341; Aldridge v. Harpo (1833), 10 Bing. 118; Blake v. White (1835), 4 L. J. Ex. Eq. 48; Michael v. Myers (1843), 6 Man. & G. 702; Parker v. Watson (1853), 8 Exch. 404; Greenough v. McClelland (1860), 2 L. T. 571. **Mentl.** Williams v. Gray (1850), 9 C. B. 739; Frank v. Edwards (1852), 8 Exch. 214.

**1319.** ———.]—If the exor. of the acceptor of a bill of exchange, orally promise to pay the holder out of her own estate, provided he forbear to sue, & the holder forbear to sue in consequence; the promise being void, the drawer of the bill is not discharged by the holder's having promised to give time, & having delayed to sue under such circumstances.—**PHILPOT v. BRIANT** (1828), 4 Bing. 717; 1 Moo. & P. 754; 6 L. J. O. S. O. P.

give the debtor time, it follows that mere passive inactivity or omission to press the debtor as distinguished from an agreement giving further time will not discharge the surety.—**GREAT WESTERN v. McDONALD** (1916), 33 W. L. R. 728; 9 W. W. R. 1182; 30 D. L. R. 573; 9 Sask. L. R. 99.—**CAN.**

**e. Whether surety must show pecuniary loss.**—A surety, relying on the giving of time by the creditor to the principal debtor as a defence on an action for the debt, must now show that he has suffered pecuniary



**Sect. 2.—Discharge from liability: Sub-sect. 4. A.**

182; 130 E. R. 945; *previous proceedings, sub nom.* PHILPOTT v. BRYANT (1827), 3 C. & P. 244, N. P. Annotation:—*Consd.* Oriental Financial Corp'n. v. Overend, Gurney (1871), 7 Ch. App. 145, n.

**1320. Contract must not be with stranger only—Time given by arbitrator.**—It is no plea to an action against sureties on a replevin bond, that the replevin cause was referred to an arbitrator, & that he, without the knowledge of the sureties, enlarged the time for making his award.—ALDRIDGE v. HARPER (1833), 10 Bing. 118; 3 Moo. & S. 518; 2 L. J. C. P. 274; 131 E. R. 850.

**1321. — Creditor & third party—Or co-surety.**—CLARKE v. BIRLEY, No. 1317, *ante*.

**— Bills of exchange.**—See **BILLS OF EXCHANGE**, Vol. VI., p. 393, Nos. 2576-2577.

**(b) Relation of Surety and Debtor.**

See Sect. 2, sub-sect. 3, C., *ante*.

**(c) Consideration.**

**1322. Necessity for.**—Where an obligee has put it out of his power to proceed against the principal debtor, he will be restrained from proceeding against the surety. Mere giving of time without any consideration will amount to nothing; but where no fixed periods for paying interest are stated in the bond, & the obligee pays interest by anticipation, to a particular time, that is sufficient to suggest a contract.—BLAKE v. WHITE (1835), 1 Y. & C. Ex. 420; 4 L. J. Ex. Eq. 48; 160 E. R. 171; *subsequent proceedings*, 5 L. J. Ex. Eq. 8. Annotation:—*Consd.* Tucker v. Laing (1856), 2 K. & J. 745.

**1323. —**—TUCKER v. LAING, No. 1325, *post*.

**1324. —**—ROUSE v. BRADFORD BANKING Co., No. 1310, *ante*.

**(d) Bills of Exchange.**

See **BILLS OF EXCHANGE**, Vol. VI., pp. 392-394, Nos. 2565-2583.

**B. What Constitutes Giving Time.****(a) In General.**

**1325. General rule.**—(1) A letter written by the agent of a bond creditor to the principal obligor, giving him eighteen months' further time to pay the bond debt, upon condition of his paying off at once the arrear of interest, & keeping down the interest to accrue in future:—*Held*: a mere promise without consideration, & not binding; & therefore the co-obligor, who had joined in the bond as surety only, was not thereby discharged.

(2) It is not every alteration of his position by the act of the creditor that discharges the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor.

(3) Where the creditor knew that the surety was negotiating a loan for the principal debtor, for the

purpose of paying off therewith the debt for which the surety was liable, & thus getting rid of such liability, & the creditor promised the debtor to give him further time, & this induced the surety to desist from his attempt to raise the money:—*Held*: the surety's liability to the creditor was not discharged.—TUCKER v. LAING (1856), 2 K. & J. 745; 69 E. R. 982.

**1326. Extension of credit—On bond.**—[Sureties] relieved which continued without their consent.—SAUNDERS v. CHURCHILL & SMITH (1813), Toth. 181; 21 E. R. 102.

**1327. —**—[A surety was relieved where the bond was continued twelve years without pltf.'s privity.—HARE v. MICHELL (1614), Toth. 182; 21 E. R. 162.

**1328. —**—[The heir of a surety, where the bond was continued without the privity of the surety, relieved.—MOILE v. ROBERTS (LORD) (1629), Toth. 182; 21 E. R. 162.

**1329. —**—(1) A. guaranteed the payment of any goods to be supplied by B. to C. between Apr. 2, 1814, & Apr. 2, 1815. Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade; & C. having accepted bills for the amount of the goods delivered, which B. permitted him to renew when payable without any communication to A. on the subject of such renewal:—*Held*: A. was discharged from his guarantee, by virtue of the rule that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety; & that, although it was proved that the renewal was given only in consequence of C.'s inability to pay, & that no injury could accrue to A.; the surety being himself the fit judge of what was or was not, for his own benefit.

The rule is that if a creditor without the consent of the surety gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor & the principal, not where the creditor is merely inactive (LORD ELDON, C.).

(2) The liabilities of sureties are governed by principles which have been settled in equity & are now adopted in cts. of law (LORD ELDON, C.).—SAMUELL v. HOWARTH (1817), 3 Mer. 272; 36 E. R. 105.

*Appld.* Reade v. Lowndes (1857), 23 Beav. 361. *Consd.* General Steam Navigation Co. v. Rolt (1860), 6 C. B. N. S. 550; Black v. Ottoman Bank (1862), 15 Moo. P. C. C. 472; Bailey v. Edwards (1864), 4 B. & S. 761; Oriental Financial Corp'n. v. Overend, Gurney (1871), 7 Ch. App. 142; Petty v. Cooke (1871), L. R. 6 Q. B. 790; Robinson v. Mollett (1875), L. R. 7 H. L. 802; Polak v. Everett (1876), 1 Q. B. D. 669; Clarke v. Birley (1889), 41 Ch. D. 422. *Refd.* Owen & Gutch v. Homan (1853), 4 H. L. Cas. 997; Strong v. Foster (1855), 17 C. B. 201; Watts v. Shuttleworth (1861), 7 H. & N. 353; Swire v. Redman (1876), 24 W. R. 1069; Ward v. National Bank of New Zealand (1883), 8 App. Cas. 755; Durham Corp'n. v. Fowler (1889), 22 Q. B. 1, 394.

**1330. —**—Deft. guaranteed the payment of porter to be delivered by pltf. to J.: the guarantee

loss as the reasonably direct & natural result of the creditor having given the extension of time.—BLACKWOOD v. PERKIVAL (1902), 22 C. L. T. 268, 331; 14 Man. L. R. 216.—CAN.

**PART IX. SECT. 2, SUB-SECT. 4.—A. (a).**

**1322 i. Necessity for.**—FAIR v. PEN-UELLY (1874), 34 U. C. R. 611.—CAN.

**1322 ii. —**—A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety; in order to have

such effect, there must be consideration.—DANODAR DAS v. MUHAMMAD HUSAIN (1900), 1 L. R. 22 All. 351.—IND.

**PART IX. SECT. 2, SUB-SECT. 4.—B. (a).**

**1326 i. Extension of credit—On bond.**—*Held*: the time given to one of two bondsmen, who was collector of a municipality, did not invalidate the bond as to the other on equitable grounds, such time, provided it was not extended beyond Mar. 1, being

within 18 Vict. c. 21, s. 3.—WHITBY MUNICIPALITY v. FLINT (1859), 9 C. P. 449.—CAN.

**i. — After judgment given against surety.**—Time given by a creditor to his principal after judgment recovered against the surety, does not discharge the surety.—DUFF v. BARRETT (1870), 17 Gr. 187.—CAN.

**ii. Postponement of replevin trial—Without consent of surety.**—CANNIFF v. BOBERT (1857), 6 C. P. 474.—CAN.

**h. Forbearance or indulgence shown to principal.**—A mere forbearance

contained no stipulation as to the credit to be given to J. The custom of pltf. was to give six months, & then, sometimes, to take a bill at two. Pltf. having, without the knowledge of deft., given J. eleven months' credit:—*Held*: Deft. was discharged from his guarantee.—*COMBE v. WOOLF* (1832), 8 Bing. 156; 1 Moo. & S. 211; 1 L. J. O. P. 51; 131 E. R. 300.

*Annotations*:—*Consd.* Howell v. Jones (1834), 4 Tyr. 518. *Refd.* Smith v. Winter (1838), 4 M. & W. 454; Croydon Gas Co. v. Dickinson (1876), 1 C. P. D. 707; Rouse v. Bradford Banking Co., [1894] 2 Ch. 32.

1331. —.]—*THE HARRIETT*, No. 1376, *post*.

1332. —.]—Two bankers carried on business under arts. of partnership providing that if at the end of five years for which the partnership was to continue, either partner should wish to carry on the business & should not take the share of the other at a valuation, the assets should be realised, the debts paid, & the surplus divided. Simultaneously with the execution of the arts. a surety for one of the partners entered into a bond to indemnify the other against all loss in respect of the partnership. The business of the bank was continued by the firm for more than a year after the expiration of the five years: *Held*: by this continuation the surety was discharged.—*SMALL v. CURRIE* (1854), 5 De G. M. & G. 111; 2 Eq. Rep. 638; 23 L. J. Ch. 716; 23 L. T. O. S. 18 Jur. 731; 43 E. R. 821, L. J.

1333. — *Bank overdraft*.]—*ROUSE v. BRADFORD BANKING CO.*, No. 1310, *ante*.

1334. *Reference to arbitration—Of replevin action*.]—Where deft. in an action of replevin entered into an agreement with pltf. to refer to arbn. a prior action of replevin between them, & then entered & standing for trial at the assizes, & also other matters in dispute between them but not the second replevin suit & that all proceedings should in the meantime be stayed till the award should be made, & which was stipulated to be published by a future certain time, but afterwards further enlarged by pltf. & deft., all without the concurrence or privity of the surety in the replevin bond, whereby, in point of fact, the suit was delayed, & the surety placed in a different situation by the delay which might have been prejudicial to him whether it actually turn out to have been so or not:—*Held*: to affect the conscience of deft. in equity; & therefore the ct. granted a perpetual injunction to restrain him from proceeding against the surety, on an assignment of the replevin bond, obtained upon a return of *eioignment*.—*BOWMAKER v. MOORE* (1819), 7 Price, 223; Dan. 264; 146 E. R. 954, Ex. Ch.

*Annotations*:—*Apld.* Archer v. Hale (1828), 4 Bing. 461. *Consd.* The Harriet (1811), 1 Wm. Rob. 182. *Refd.* Smith v. Winter (1838), 4 M. & W. 454; Michael v. Myers (1843), 6 Man. & G. 702.

1335. —.]—In an action of replevin, it was agreed between pltf. & deft., without the knowledge or concurrence of the sureties in the replevin bond, that the cause, & all matters in difference between them, should be referred to an arbitrator, & that the replevin bond should stand as a security for such sum as should be found to be due:—*Held*: the sureties were discharged.—*ARCHER v. HALE* (1828), 4 Bing. 164; 1 Moo. & P. 285; 6 L. J. O. S. C. P. 79; 130 E. R. 816.

*Annotations*:—*Consd.* Aldridge v. Harper (1833), 10 Bing. 118. *Refd.* The Harriet (1842), 1 Notes of Cases 325; Bonar v. MacDonald (1850), 3 H. L. Cas. 226; Giddins v. Dodd (1856), 20 J. P. 560.

or indulgence shown to the principal debtor has never been held to discharge the surety.—*THOMPSON v. McDONALD* (1859), 17 U. C. R. 304. —

1336. *Custom of trade*.]—*COMBE v. WOOLF*, No. 1330, *ante*.

1337. —.]—*HOWELL v. JONES*, No. 1313, *post*.

1338. *Acceptance of interest on debt—In anticipation*.]—*BLAKE v. WHITE*, No. 1322, *ante*.

1339. *Debt made payable by instalments—Under composition deed*.]—*WILSON v. LLOYD*, No. 1557, *post*.

1340. *Consent to judgment—Debt & costs payable by instalments*.]—*TATUM v. EVANS*, No. 1242, *ante*.

(b) *Further Security taken from Principal Debtor*.

1341. *General rule*.]—(1) If, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, & after that, he gives time to the principal debtor, without the consent & knowledge of the surety, the rule as to the discharge of the surety applies.

M. brought to G. (a discount co.) certain bills, which bore on them the acceptances of F. Co. M. was in fact the agent of A. Co. (an American co.), & he & this American co. had obtained the acceptances for their own accommodation, & on payment of a commission in respect of such acceptances. The bills were not paid, but renewed. M. gave G. Co. his own guarantee & that of the American co. that these renewed bills should be paid at maturity. These renewed bills were not paid. G. Co. gave, on Apr. 6, 1866, notice of dishonour to all the parties whose names were on the bills. On Apr. 9 the solr. of F. Co. gave full information to the G. Co. that M. was the real principal on the bills, which had been accepted by F. Co. merely for his accommodation. The manager of the G. Co. said he should see M. in the afternoon. M. afterwards gave, as collateral security, to G. Co. bills to a much larger amount, drawn on one L., & G. Co. entered into an arrangement with M. not to sue on the old bills if the bills on L. should be paid. Nothing farther was done in the matter for some months. These last bills were not paid, & G. Co. afterwards brought an action against F. Co. to recover the amount of the bills originally accepted by F. Co. F. Co. filed a bill to restrain the action:—*Held*: the action must be restrained, for G. Co. with a knowledge of the real character of F. Co.'s acceptances, had given time to M., whom they knew to be the real principal on the bills, & had so discharged F. Co.

(2) Mere giving of additional security, by a principal, will not discharge a surety, but if the giving of such security is really a consideration for giving time to the principal, it will do so.

(3) *Seemle*: to reserve a creditor's right against a surety there must be a distinct expression of intention to reserve it.

(4) A promise to pay on demand bills, upon their reaching maturity, given not upon the face of the bills themselves but by a collateral writing is binding to all intents & purposes on the giver of it.—*OVEREND, GURNEY & CO. (LIQUIDATORS) v. ORIENTAL FINANCIAL CORP. (LIQUIDATORS)* (1871), L. R. 7 H. L. 318; 31 L. T. 322, H. L.; *affg.* S. C. *sub nom.* ORIENTAL FINANCIAL CORP. v. OVEREND, GURNEY & CO. (1871), 7 Ch. App. 112, L. C.

to (1) *Apld.* Rouse v. Bradford Banking Co., [1894] A. C. 586. *Refd.* Swire v. Rodman (1876), 1 Q. B. D. 536; Duncan, Fox v. North & South Wales

k. *Acceptance of interest on debt*.]—*PUNCHARD v. GHOSE v. DALY* (1875), 15 B. L. R. 331.—*IND.*

1. *Accommodation notes given by*

principal debtor—*Without consent of surety*.]—*AGRICULTURAL INSURANCE CO. v. SARGANT* (1896), 26 S. C. R. 29.—*CAN.*

**Sect. 2.—Discharge from liability: Sub-sect. 4, B. (b), (c), (d) & (e).]**

Bank (1880), 6 App. Cas. 1. *As to* (2) *Appl. Searles v. Finch & Day* (1891), 7 T. L. R. 253. *As to* (3) *Appl. Clarke v. Birley* (1889), 41 Ch. D. 422.

**1342. Bill of exchange or promissory note.]—**Oblige in a bond with a surety without communication with the surety takes [promissory] notes from the principal, & gives further time: the surety is discharged.—*REES v. BERRINGTON* (1795), 2 Ves. 540; 30 E. R. 765, L. C.

**Annotations:—** *Consol. Law v. East India Co.* (1799), 4 Ves. 824; *The Vreede* (1811), 1 Dods. 1; *Newton v. Chorlton* (1853), 2 Drew. 335. *Appl. Polak v. Everett* (1876), 1 Q. B. D. 660. *Refd. Tyson v. Cox* (1823), *Turn. & R.* 395; *Price v. Edmunds* (1830), 10 B. & C. 578; *McPagnart v. Watson* (1836), 10 Ill. N. S. 618; *The Hardlett* (1842), 1 Wm. Rob. 182; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 660; *Sanderson v. Aston* (1873), 42 L. J. Ex. 61; *Holme v. Brunsell* (1878), 3 Q. B. D. 495; *Bolton v. Salmon*, [1891] 2 Ch. 48; *Greenwood v. Francis*, [1899] 1 Q. B. 312; *London General Omnibus Co. v. Holloway*, [1912] 2 K. R. 72; *Egbert v. National Crown Bank*, [1918] A. C. 903.

**1343. —**J.—B. in Jan. 1825, gave the following guarantee to A., a banker: "Please to open an account with, & honour the cheques of C. on Mill Account, for whom I will be responsible." The account was accordingly opened, & advances were made by A. It appeared to be the mode of dealing at the bank for the customers to give acceptances occasionally for the balance of their accounts. In Feb. 1827, A. ceased to make advances. In Oct. 1827, a payment into the bank was made by B. In Feb. 1828, & not before, A. took B.'s acceptance at three months for the amount of his balance. It did not appear that B. had actual knowledge of the course of business at the bank, although he was solr. to the bankers:—*Held*: taking the acceptance was a giving of time to the debtor, & B., the surety, was thereby discharged.—*HOWELL v. JONES* (1831), 1 Cr. M. & R. 97; 4 Tyr. 548; 3 L. J. Ex. 255; 149 E. R. 1009.

**1344. —**J.—Plff. signed an agreement with an agent of deft., on Sept. 29, that on deft.'s entering into an agreement to pay the debt, part in iron within a month, & the remainder by bill at two months, the action should be discontinued; & deft. was to call on plff. on the following day, to enter into an agreement. He never did so call. On Oct. 8, plff. gave notice to deft. that he held himself disengaged from the agreement, & should proceed with the action forthwith. On Oct. 20, deft. delivered to plff., & the latter received, two bills of exchange for the greater portion of the debt. He did not deliver any iron, & became bkpt. on Nov. 6:—*Held*: there was not a giving of time to deft., so as to discharge the bail.—*VERNON v. TURNLEY* (1836), 1 M. & W. 316; 2 Gale, 81; Tyr. & Gr. 421; 5 L. J. Ex. 115; 150 E. R. 451.

**1345. —**J.—A creditor took, as security for his debts, bills of exchange drawn & indorsed by a surety, & accepted by the principal debtor. After those bills were dishonoured the creditor drew accommodation bills on, & which were

accepted by, the principal debtor, but were paid by the drawer when at maturity. On a bill filed by the surety to restrain an action subsequently brought against him on the bills which had been dishonoured the ct. allowed the action to proceed, but stayed execution. *Qu.*: whether the surety was discharged by the subsequent transactions which, without his knowledge, took place between the creditor & the principal debtor.—*MACKINTOSH v. WYATT* (1844), 3 Hare, 562; 67 E. R. 504.

**Annotation:—** *Refd. Cooper v. Evans* (1867), L. R. 4 Eq. 45.

**— New bill taken.]—***See* **BILLS OF EXCHANGE**, Vol. VI., pp. 394, 395, Nos. 2586–2587.

**1346. Mortgage from debtor.]—**Creditor, having among other securities a bond with a surety, taking a mtge. from the principal debtor, & agreeing to receive the residue by instalments, secured by warrant, etc., without prejudice to any security he now holds, injunction granted against suing the surety.—*BOULTBEE v. STUBBS* (1811), 18 Ves. 20; 31 E. R. 225, L. C.

**Annotations:—** *Consol. Bank of Ireland v. Beresford* (1818), 6 Dow. 233. *Refd. Terry v. Parker* (1837), 6 Ad. & El. 502; *Kearsley v. Cole* (1816), 16 M. & W. 128; *Owen v. Homan* (1851), 3 Mac. & G. 378; *Tucker v. Laing* (1856), 2 K. & J. 745; *Batson v. Gosling* (1871), L. R. 7 C. P. 9.

**1347. — Intended to be principal security—***Executed after collateral security taken.]—*Plffs. lent M. £650 on the security of a mtge. of certain property, with a covenant by M. to repay the £650, with interest at 25 per cent., on June 22, 1864; & as the mtge. was not a sufficient security for more than £500, the loan was made on the further security of the promissory note of M. & two sureties for £150, payable on demand, with interest at £4 10s. per cent. The promissory note, which it was agreed between plffs. & M. should be a collateral security to the mtge. deed, was made & given to plffs. on Dec. 7, 1863, when £150, part of the loan, was advanced to M.; but the mtge. deed was not executed until Dec. 22, 1863. The deed contained no reference to the note, & the sureties who signed the note were not parties to the deed:—*Held*: the debt secured by the note did not merge in the deed, & though the remedy on the covenant could not be enforced before June 22, 1864, time was not given to M. so as to discharge the liability of the sureties on the note.—*BOALER v. MAYOR* (1865), 19 C. B. N. S. 76; 34 L. J. C. P. 230; 12 L. T. 457; 11 Jur. N. S. 565; 13 W. R. 775; 141 E. R. 714.

**Annotations:—** *Refd. Stamps Comr. v. Hope*, [1891] A. C. 476. *Mentd. Westmoreland Green & Blue Slate Co. v. Feilden*, [1891] 3 Ch. 15.

**1348. — Consolidated with prior mortgage—***Payment at later date.]—*By a covenant in a mtge. deed, dated Sept. 4, 1857, the mtgor. covenanted & deft. covenanted as his surety for the payment of the mtge. debt of £450 to the mtgee. on Mar. 4, 1858. By a deed, dated Dec. 15, 1884, the above-mentioned mtge. & various other mtges., including other property, given by the mtgor. were consolidated, plff. advancing the total sum of £3,200 for payment to the various mtgees. of the amounts

alive as against creditors by the filing of a renewal statement within thirty days before the expiration of the term of one year from the registration. One of the makers of the note, P., being a solr., was consulted by B., & advised B. to take a new chattel mtge., payable at a later date, which B. did. B. having died, his execs. brought an action on the note:—*Held*: the makers of the note, being sureties for T., were released by the creditor B., granting time to the debtor, when the second chattel mtge. was taken.—*BRAYNS v.*

**PART IX. SECT. 2, SUB-SECT. 4.—**  
**B. (b).**

**1342 i. Bill of exchange or promissory note.]—**Defts., W. & O'N., being in partnership, gave a promissory note & an I.O.U. to plff. for the amount of the firm's indebtedness. The partnership was dissolved, & an agreement entered into between the partners, that O'N. should pay all liabilities. Plff., being aware of this arrangement, took from O'N. his separate promissory note, extending the time for payment:—*Held*: W. had become a surety only

for the debt, & he had been released by the giving of time to O'N.—*MUNRO v. O'NEIL* (1884), 1 Man. L. R. 245.—*CAN.*

**m. Mortgage from debtor—***Payment at later date.]—*B. lent T. \$2,700 upon the security of a chattel mtge. upon T.'s stock in trade; & three other persons made a promissory note for \$1,000 for the accommodation of T., payable to B., & expressed on its face to be given as "collateral security to" the chattel mtge. The chattel mtge. was duly registered, but was not kept

of their respective debts, & taking assignments of such debts & the mtgd. properties, "with the full benefit of the covenants" contained in the respective mtge. deeds; & the mtgor. covenanted with pltf. for the payment of £3,200 on Jan. 19, 1885. Deft. was not a party to such last-mentioned deed:—*Held*: the covenant in that deed necessarily implied that principal debtor could not be sued for the £450 due under the covenant in the deed of 1857 before Jan. 19, 1885, & consequently there had been a giving of time to principal debtor by which deft. as surety was discharged from liability.—*BOLTON v. BUCKENHAM*, [1891] 1 Q. B. 278; 60 L. J. Q. B. 261; 64 L. T. 278; 39 W. R. 203, C. A.

*Annotation*.—*Refd.* Bolton v. Salmon, [1891] 2 Ch. 48.

1349. — — — — —.]—*BOLTON v. SALMON*, No. 1223, *ante*.

1350. — Assignment of goods—Recital in assignment of existing debt.]—Where B. being indebted to A., procured C., to join with him in giving a joint & several promissory note for the amount, & afterwards having become further indebted, & being pressed by A., for further security, by deed (reciting the debt, & that for a part a note had been given by him (B.) & C., & that A. having demanded payment of the debt, B. had requested him to accept a further security) assigned to A., all his household goods, etc., as a further security, with a proviso, that he should not be deprived of the possession of the property assigned until after three days' notice:—*Held*: this deed did not extinguish or suspend the remedy on the note, but A. might, notwithstanding the deed, sue C. at any time. *TWOPIENNY v. YOUNG* (1821), 3 B. & C. 208; 5 Dow. & Ry. K. B. 259; 107 E. R. 711.

*Annotations*.—*Apld.* Bell v. Banks (1811), 3 Man. & 258. *Refd.* *Ex p.* Christy (1832), 2 Deac. & Ch. 258. Bell v. Shuttleworth (1811), 10 L. J. C. P. 239; *Ex p.* Pennell (1811), 2 Mont. D. & De G. 273; Ansell v. Baker (1840), 15 Q. B. 20; Owen v. Homan (1851), 3 Mac. & G. 378; Price v. Moulton (1851), 10 C. B. 561; Newton v. Chorlton (1853), 10 Hare. 616; Bingham v. Corbitt (1863), 11 W. R. 232; Oriental Financial Corp. v. Overend, Gurney (1871), 7 Ch. App. 115, n.; Stamps Comr. v. Hope, [1891] A. C. 476. *Mentd.* Westmoreland Green & Blue Slate Co. v. Fielden (1891), 65 L. T. 128.

1351. Warrant of attorney.]—*SYLVESTER v. ANTHONY*, No. 1217, *ante*.

1352. Fresh bond—For larger sum.]—*EYRE v. EVERETT*, No. 1438, *post*.

1353. — — — — —.]—A father gave a bond to secure the repayment, within four years, of a simple contract debt due by his son. The father died, & the creditor commenced proceedings against his estate for the recovery of the bond debt, but subsequently took a fresh bond from the son, who was the father's heir-at-law, & from the personal representative of the father, conditioned for paying the same debt by instalments; the creditor, at the same time, retaining the original bond:—*Held*: the original bond was discharged,

first, on the ground that the father was only surety for the son, & that the creditor, by giving time to the principal debtor, had discharged the surety; & secondly, because the second bond must be considered, under the circumstances, as having been given in satisfaction of the first.

Suppose between living parties that A. owes B. a debt & C. gives his bond for the payment of it at a particular time, without any agreement that the original contract shall be given up. It is argued that upon the bond being given, the debt is merged in that security. I do not agree with that doctrine. The rule of an obligation of a higher nature merging inferior obligations only exists as to contracts between the same parties (*LORD ABINGER, C.B.*).—*CLARKE v. HENTY* (1838), 3 Y. & C. Ex. 187; 2 Jur. 918; 160 E. R. 667. \*

(c) *Cognovit taken from Debtor.*

*See, now*, R. S. C., Ord. 41, rr. 9, 10.

1354. Whether bail discharged.]—*HODGSON v. NUGENT* (1793), 5 Term Rep. 277; *BOWSFIELD v. TOWER* (1812), 4 Taunt. 456; *CROFT v. JOHNSON* (1814), 5 Taunt. 319; *HULME v. COLES* (1827), 2 Sim. 12; *STEVENSON v. ROCHE* (1829), 9 B. & C. 707; *SURMAN v. BRUCE* (1834), 10 Bing. 431; *HANNINGTON v. BEARE* (1835), 4 Dowl. 256; *WHITFIELD v. HODGES* (1836), 1 M. & W. 679.

(d) *Debt made payable by Instalments.*

1355. Surety discharged -- Unless party to arrangement.]—If pltf. accepts from the principal deft. a *cognovit* whereby he gives him time for payment by instalments, he thereby discharges the bail, unless they are parties to the arrangement.—*BOWSFIELD v. TOWER* (1812), 4 Taunt. 456; 128 E. R. 407.

1356. — — — — —.]—If pltf. takes a *cognovit* payable by instalments, & postponing the payment of any instalment to a later date than the time when pltf. could, with diligence, have obtained judgment & execution, the bail are discharged.—*CROFT v. JOHNSON* (1814), 5 Taunt. 319; 1 Marsh. 59; 128 E. R. 712.

(e) *Non-Enforcement of Payment by Creditor.*

1357. Inability to enforce payment Through own conduct.]—The neglect of the obligee to give notice to the surety, that the principal had made default, does not discharge such surety; but if the obligee, without the privity of the surety, enter into an engagement with the obligor, & deprive himself of the power of suing him, whereby the surety is prevented from coming into a ct. of equity for relief, he is then discharged; but not otherwise.—*ORME v. YOUNG* (1815), as reported in Holt, N. P. 84, N. P.

*Annotations*.—*Apld.* Combe v. Woolf (1832), 8 Bing. 156. *Refd.* Goring v. Edmunds (1829), 6 Bing. 91; Howell v. Jones (1831), 4 Tyr. 518; Bailey v. Edwards (1861), 4 B. & S. 761.

*PETERSON* (1920), 47 O. L. R. 298; 52 D. L. R. 429; 18 O. W. N. 75.—*CAN.*

n. — — — — —.]—C., being indebted to a bank on foot of the overdraft, indorsed to the bank a bill of exchange for £2,000, accepted by deft., & payable three months after date. Before the bill arrived at maturity, C., without deft.'s knowledge, executed a deed of mtge. to the bank to secure the sum of £8,800, which was the total amount then due by him, on foot of his overdraft. The deed recited a previous equitable mtge. by deposit by C., to secure overdrafts of his current account, & contained a covenant by C. for the payment of

the principal sum of £8,000, & interest, on a day three months subsequent to the date of the mtge.—*Held*: the taking of the mtge. by the bank constituted a giving of time to the principal debtor.—*MUNSTER & LKINSTER BANK v. FRANCE* (1889), 24 L. R. Ir. 82.—*IR.*

PART IX. SECT. 2, SUB SECT. 4.—  
B. (c).

o. *Cognovit taken from principal & sureties.*—After a *cognovit* given by the principal & his sureties jointly, the ct. will not set aside a judgment entered against all because time been given to the principal without

the consent of the sureties.—*MOWAT v.* (1849), 3 Ont. Dig. 5720.—*CAN.*

p. *Sale of timber—Before covenanted time.*—Where a surety covenanted to pay advances made by the creditors of the principal to him on a certain day, or so soon as certain timber should be sold at Quebec; & before the time appointed arrived, & whilst the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal debtor a confession of judgment, & sued out execution thereon, under which the timber was sold:—*Held*: this discharged the surety.—*DICKSON v. McPHERSON* (1852), 3 Gr. 186.—*CAN.*

**Sect. 2.—Discharge from liability: Sub-sect. 4, B. (e) & (f), & C. (a) & (b) i.]**

**1358. ——— Honorary obligation only.]—**A mere honorary obligation on the part of pltf. not to press deft. for payment of debt & costs, is not such an indulgence to him as will release his bail.

If pltf., by an agreement with deft., expedites his remedy against him, the bail are not thereby released.—**LADBROOK v. HEWETT** (1832), 1 Dowl. 488.

**1359. ———.]—HOLL v. HADLEY**, No. 454, ante.

**1360. ———.]—**The obligor in a bond for £1,000, & his partner in business, became insolvent, & they made a composition with their creditors, which the obligee in the bond guaranteed, & he then promised the obligor to relinquish his debt on the bond. The compromise with the creditors could not have been carried out if the obligee had attempted to enforce his bond:—**Held:** the transaction between the obligor & obligee amounted to such a contract as would have the effect of giving time to the principal, & the sureties in the bond were discharged.—**CROSS v. SPRIGG** (1850), 2 Mac. & G. 113; 2 H. & Tw. 233; 19 L. J. Ch. 528; 15 L. T. O. S. 322; 14 Jur. 634; 42 E. R. 44, L. C.; *affg.* (1849), 6 Haro, 552.

**Annotations:—****Refd.** Major v. Major (1852), 1 Drew. 165. **Mentd.** Peace v. Hains (1853), 11 Haro, 151; Knapp v. Burnaby (1860), 2 L. T. 83; Yeoman v. Williams (1865), 1 L. T. 1 Eq. 184; Luxmoie v. Clifton (1867), 17 L. T. 160; *Re* Milnes, Milnes v. Sherwin (1885), 53 L. T. 531; *Re* Applebee, Leveson v. Beales, [1891] 3 Ch. 422; *Re* Pink, Pink v. Pink, [1912] 1 Ch. 498; *Re* Tinline, Elder v. Tinline (1912), 56 Sol. Jo. 310.

**1361. ———.]—LAWRENCE v. WALMSLEY**, No. 478, ante.

**1362. ———.]—PRICE v. KIRKHAM**, No. 1114, post.

**1363. ———.]—SWIRE v. REDMAN**, No. 941, ante.

**Omission to enforce payment—Laches.]—See** Sub-sect. 7, B. (a) ii., post.

**(f) Bills of Exchange.**

**See** **BILLS OF EXCHANGE**, Vol. VI., pp. 301-307, 401-404, Nos. 2581-2598, 2622-2636.

**PART IX. SECT. 2, SUB-SECT. 4.—**  
**C. (a).**

**1364 i. Surety discharged.]—ROSS v. BURTON** (1848), 4 U. C. R. 357.—**CAN.**

**1364 ii. ———.]—HOWKE v. MILLS** (1860), 10 C. P. 191.—**CAN.**

**1364 iii. ———.]—KERR v. CAMERON** (1860), 19 U. C. R. 366.—**CAN.**

**1364 iv. ———.]—HOOKER v. GAMBLE** (1862), 12 C. P. 512.—**CAN.**

**1364 v. ———.]—AUSTIN v. GIBSON** (1879), 4 A. R. 316.—**CAN.**

**1364 vi. ———.]—LE JEUNE v. SPARROW** (1893), 1 Terr. L. R. 381.—**CAN.**

**1364 vii. ———.]—**Pltfs. sued deft. on four promissory notes made by a partnership firm composed of deft. & D. When the firm was dissolved D. took over the business & continued it, & agreed with deft. that he, D., would discharge the existing liabilities. Pltfs. had notice that following the terms of dissolution, D. was taking over the partnership assets & assuming all liabilities, & being aware of this, they gave D. time by taking his personal promissory notes for the debt represented by the four notes, sued on, though not in substitution therefor:—**Held:** in such circumstances, deft. was discharged by pltfs. having given D. time.—**WATSON**

**CO. v. BOWSER** (1911), 16 W. L. R. 505; 21 Man. L. R. 21.—**CAN.**

**1364 viii. ———.]—**A vendor of land assigned his interest in the land & in the agreement of sale & gave a bond to his assignee with respect to the payments under the agreement of sale:—**Held:** this bond was a guarantee of payment & an extension of time given by the obligee to the purchaser operated to discharge the liability under the bond.—**WESTMINSTER TRUST v. HAND & BRENNER**, [1920] 1 W. W. R. 433; [1920] 3 W. W. R. 488; 51 D. L. R. 244.—**CAN.**

**1364 ix. ———.]—**A mtgee. without the surety's knowledge, gave the mtgor. an extension of time for payment of an instalment of the mtgee.:—**Held:** the surety was thereby discharged from liability as to that instalment.—**WILSON v. CRISTALL** (1922), 63 D. L. R. 187; 17 Alta. L. R. 370; [1922] 1 W. W. R. 153.—**CAN.**

**1364 x. ———.]—GOVERNOR & CO. OF BANK OF IRELAND v. BERESFORD** (1818), 6 Dow. 233.—**IR.**

**1364 xi. ———.]—**Deft., amongst other signatories, signed an instrument whereby, in consideration of pltfs. advancing to P. & R. £140, he, jointly & severally with the other signatories, undertook to pay pltfs. the sum, with

**C. Effect of Agreement.**

**(a) General Rule.**

**1364. Surety discharged.]—**So if two be jointly & severally bound to pay money, & the obligee will give longer day, or other favour, to the one, & then will sue the other for the debt, he which is sued shall sue in Chancery.—**ANON.** (1469), Cary, 1; 21 E. R. 1.

**1365. ———.]—**(1) A creditor giving the principal debtor further time for payment, releases the surety.

(2) A surety generally, may come into this ct. & apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money & deliver him from the obligation (**LORD THURLOW, C.**).—**NISBET v. SMITH** (1789), 2 Bro. C. C. 579; 20 E. R. 317.

**Annotations:—****As to** (1) **Refd.** Law v. East India Co. (1799), 4 Ves. 824; The Vreede (1811), 1 Dods. 1. **As to** (2) **Refd.** Ascherson v. Trodegar Dry Dock & Wharf Co., [1909] 2 Ch. 401. **Generally, Refd.** *Re* Giles, Jones v. Pennfather, [1896] 1 Ch. 956.

**1366. ———.]—BURKE'S CASE** (circa 1780), cited 2 Bos. & P. 62; 126 E. R. 1157.

**Annotations:—****Fold.** *Re* Renton, *Ex p.* Glendinning (1819), Buck, 517. **Consd.** Owen v. Honnan (1850), 13 Beav. 196. **Refd.** English v. Darley (1800), 2 Bos. & P. 61; *Ex p.* Gifford (1802), 6 Ves. 805; Boulbee v. Stubbs (1811), 18 Ves. 20.

**1367. ———.]—THE VREEDF**, No. 1419, post.

**1368. ———.]—**Giving time to the principal discharges the surety (**LORD MANSFIELD, C.J.**).—**PENTUM v. POCKOCK** (1813), 5 Taunt. 192; 1 Marsh. 14; 128 E. R. 660

**Annotations:—****Refd.** Price v. Edmunds (1830), 10 B. & C. 578; Nichols v. Norris (1831), 3 B. & Ad. 41; *Re* Black & Cope, *Ex p.* Frew (1853), 1 Bankr. & Ins. R. 156; Strong v. Foster (1855), 17 C. B. 201. **Mentd.** Bank of Ireland v. Beresford (1818), 6 Dow. 233; *Re* Renton, *Ex p.* Glendinning (1819), Buck 517; Cowper v. Godmond (1833), 2 L. J. C. P. 162; Simpson v. Clarke (1835), 2 Cr. M. & R. 342; Manley v. Boycot (1853), 2 E. & B. 46; Edwin v. Lancaster (1865), 6 B. & S. 571.

**1369. ———.]—MELVILL v. GLENDINING**, No. 1392, post.

**1370. ———.]—SAMUELL v. HOWARTH**, No. 1329, ante.

**—HAWKSHAW v. PARKINS**, No.

1504, post.

**1372. ———.]—**Giving time to the principal, the grantee of an annuity exonerates the surety from

the usual rate of bank interest, within six months from the date of the instrument. Pltfs. subsequently advanced to P. & R. the sum agreed upon, asking from them promissory notes or the payment thereof, which notes were renewed from time to time without the express consent of deft.:—**Held:** the instrument was a guarantee, & pltfs. had not discharged the *onus* of proving consent by deft. to the giving of time to the principal debtors, & deft. was entitled to a direction at the trial.—**PROVINCIAL BANK OF IRELAND v. FISHER**, [1919] 2 J. R. 249.—**IR.**

**1364 xii. ———.]—**A surety is discharged from his liability to pay the debt of another by the party to whom the debt is due, giving time to the principal debtor without the knowledge & concurrence of the surety.—**ATTWOOD & HAYNES v. LILLY** (1818), 1 Nfld. L. R. 98.—**NFLD.**

**1364 xiii. ———.]—**When a party has become a guarantee for a debt payable specifically at a given time, if the creditor give time without the cautioner's concurrence, this liberates the cautioner, because it is an alteration of the contract.—**RICHARDSON v. HARVEY** (1853), 1 W. R. 419.—**SCOT.**

**1364 xiv. ———.]—FORSYTH v. WIRHART** (1859), 21 Duml. (Ct. of Sess.) 449; 31 Sc. Jur. 248.—**SCOT.**

past, as well as future, arrears.—*Eyre v. BARTROP* (1818), 3 Madd. 221; 56 E. R. 491.

**Annotations.**—*Consd.* Watts v. Shuttleworth (1861), 7 H. & N. 353. *Distd.* Croydon Commercial Gas Co. v. Dickinson (1876), 2 C. P. D. 46. *Refd.* Whitcheer v. Hall (1826), 5 B. & C. 269; The Harriett (1842), 1 Wm. Rob. 182; Bonar v. McDonald (1850), 3 H. L. Cas. 226; Hiddins v. Dodd (1856), 20 J. P. 580.

**1373.** —. —.]—Comrs. under an Act of Parliament, for giving money by way of loan to merchants, etc., make an advance for A. who, along with B. as his surety, became bound to repay within a limited time. A. obtained from the comrs. several extensions of the time of payment without the privity or knowledge of B. his surety, & at length became bkpt. without having paid. Bill to restrain proceedings at law against the surety; the obligation being discharged upon the indulgence granted without his privity or knowledge. Decreed accordingly.

With respect to principal & surety in a bond, where the creditor enters into an agreement or binding contract with the principal debtor to give him further time, without the concurrence of the surety, the surety is discharged (LORD ELDON, C.).—*BANK OF IRELAND v. BERESFORD* (1818), 6 Dow. 233; 3 H. R. 1156, II. L.

**Annotations.**—*Consd.* Archer v. Hale (1828), 1 Bing. 464; Owen v. Homan (1840), 13 Beav. 196. *Refd.* *Re Black, &c. v. Graham* (1854), 5 De G. M. & G. 356; Strong v. Foster (1850), 17 C. B. 201; Rouse v. Bradford Banking Co., [1891] 2 Ch. 32.

**1374.** —. —.]—R. & S., partners in trade, executed in the year 1811, four joint & several bonds to O., to secure re-payment of £10,000, advanced to them by his acceptance & payment of four bills of exchange, amounting together to that sum. Two of the bonds were made payable in 1817, & two in 1818. S. died early in 1815, & his exors. agreed with R. & with K., who was then in partnership with R., in place of S., that R. & K., in consideration of the outstanding debts & effects of the former partnership, would pay certain sums to the exors., & would also indemnify S.'s estate against certain scheduled debts, including these bonds. No notice of that agreement was given to O. He continued to receive interest on the bonds from the new firm as well after as before they became due; & the annual accounts which they furnished to him contained an account of the dividends due to him on £17,000 stock, which he lent to the new firm. From O.'s correspondence with that firm in 1820, it appeared that he had, in 1817, given them three years' further time for payment of the bonds, & that, in 1820, he gave twelve months' further time. These indulgences were granted without consent of S.'s exors. In 1823, O. took from R. & K. a collateral security for payment of the debt, expressly reserving his right against S.'s estate in respect of the bonds, but concealing that arrangement from S.'s exors. In 1829, O.'s exors., to whom he had assigned the bonds before his death, applied for payment of them to S.'s exors., who thereupon filed their bill, praying that it might be declared that their testator's estate was discharged from the bonds:—*Held*: the indulgence granted by O., for payment of the bonds in 1817, without consent of S.'s exors., had the effect of discharging his estate.

The principle of law is that, where a creditor gives time to the principal debtor, there being a surety to secure payment of the debt, it does so without consent of or communication with the

surety he discharges the surety from liability (LORD LYNDRHURST).—*OAKELEY v. PASHELIER* (1836), 10 Bli. N. S. 548; 4 Cl. & Fin. 207; 6 E. R. 102, H. L.; *aff. S. C. sub nom. PASHELIER v. HAMMETT* (1832), 1 L. J. Ch. 204.

**Annotations.**—*Consd.* Oakford v. European & American Steam Shipping Co. (1863), 1 Hem. & M. 182; Oriental Financial Corp'n v. Overend Gurney (1871), 7 Ch. App. 142. *Apld.* Wilson v. Lloyd (1873), L. R. 16 Eq. 60. *Expld.* Overend, Gurney v. Oriental Financial Corp'n. (1874), L. R. 7 H. L. 318. *Distd.* Suisse v. Redman (1876), 1 Q. B. D. 336. *Apld.* Rouse v. Bradford Banking Co., [1891] A. C. 586. *Refd.* McTaggart v. Watson (1836), 10 Bli. 618; Bailey v. Edwards (1864), 4 B. & S. 761. *Mentd.* Nanson v. Gordon (1876), 31 L. T. 401.

**1375.** —. —.]—*BELL v. BANKS*, No. 1316, *ante*.

**1376.** —. —.]—Liability of sureties of a bkpt. owner discharged by reason of an arrangement between the parties in the cause to waive the reference to the Registrar & Merchants, & to settle the amount of damage by agreement, held to be a deviation from the original contract by which the sureties were bound.

If a man be a surety for another for a sum payable at a given time, & the creditor, or person to whom the money is due, extends the credit beyond the term originally agreed upon, & this without the knowledge & consent of the bail or surety, the so doing is "giving time," upon this plain principle, that he became surety for the performance of a given contract, & for that only, & that he cannot be made responsible for the breach of another & a different contract: for an altered contract is another contract. Legal consequence of giving time is that the surety exonerated (DR. LUSHINGTON).—*THE HARRIETT* (1812), 1 Wm. Rob. 182; 1 Notes of Cases 325; 3 L. T. 419; 6 Jur. 197.

**1377.** —. —.]—*PETTY v. COOKE*, No. 1139, *ante*.

**1378.** —. —.]—*If rights against surety not reserved.*—*DAVIES v. STAINBANK*, No. 763, *ante*.

**1379.** —. —.]—*ROUSE v. BRADFORD BANKING CO.*, No. 1310, *ante*.

#### (b) Exceptions to General Rule.

##### i. Agreement with Knowledge or Consent of Surety.

**1380. Consent of surety necessary.**—*SAMUEL v. HOWARTH*, No. 1329, *ante*.

**1381.** —. —.]—In almost every case in which it has been held that a surety has been released by the creditor giving time to the principal it might have been said that it was done for the purpose of enabling the debtor better to fulfil his obligations. The answer is that the surety himself is the proper person to judge of the propriety of giving any accommodation to the principal, & no arrangement should be made without consulting him. The surety, if he pays, ought to have the benefit of all the securities possessed by the creditor (LORD LANGDALE, M.R.).—*ALVERT v. LONDON DOCK CO.* (1838), 2 Keen, 638; 7 L. J. Ch. 90; 2 Jur. 62; 48 E. R. 771.

**Annotations.**—*Refd.* Newton v. Charlton (1853), 2 Drew. 333; Watts v. Shuttleworth (1861), 7 H. & N. 353; v. Corbitt (1864), 12 W. L. 1030.

**1382. Surety not discharged.**—Pltf. who, having sued out a writ of *ca. sa.* against the principal, offers to accept a composition, & gives him time to make terms with his other creditors, does not thereby, the composition failing, discharge the bail.—*BRICKWOOD v. ANNISS* (1814), 5 Taunt. 614; 1 Marsh. 250; 128 E. R. 830.

**Annotation.**—*Refd.* Willson v. Whitaker (1816), 2 Marsh. 383.

#### PART IX. SECT. 2, SUB-SECT. 4.— C. (b) i.

**1382 i. Surety not discharged.**—Where, at the request of one of several

co-sureties on a cash credit bond, but without the knowledge or assent of the rest, the creditor enters into a binding agreement with the principal debtor that an extension of time for

payment shall be given him, the surety at whose request the time was given is not thereby discharged.—*JEANE v. CITY BANK OF SYDNEY* (1904), 2 C. L. R. 198.—**AUS.**

**Sect. 2.—Discharge from liability: Sub-sect. 4, C.**  
**(b) i., ii. & iii.]**

**1383.** ———]—**TYSON v. COX**, No. 1161.

**1384.** ———]—**TUCKER v. LAING**, No. 1325, *ante*.

**1385.** ———]—**Time of giving assent.—After time given by creditor.**—Where the principal offered to surrender in discharge of his bail, & an agreement was afterwards entered into between his attorneys & plffs.' agent, that the surrender should be dispensed with for six weeks, on the terms of the bail continuing liable, which agreement they were ignorant of at the time, as well as that their principal had offered to surrender; but they afterwards consented to their liability continuing on the terms mentioned in the agreement; & the principal in the meantime became bkpt., & obtained his certificate, & plff. afterwards proceeded against the bail without notice:—**Held:** they were discharged; on the grounds that their liability under their recognisance ceased, by time having been given their principal to surrender without their consent or authority in the first instance, & it could not be revived by their subsequent ratification of such agreement to continue liable, as they had not been informed that their principal had previously offered to surrender himself in their discharge. — **WEST v. ASHDOWN** (1823), 1 Bing. 164; 7 Moore C. P. 566; 1 L. J. O. S. C. P. 26; 130 E. R. 67.

**1386.** ———]—**Consent to grant of further time.**—Where time has been given to deft. by plff. & the bail afterwards consent to further time, with knowledge of the time already given:—**Held:** a waiver on their part of the first irregularity. **SPYER v. CASPAR**, **SPYER v. HERSCHELL** (1837), *Murp.* & 11. 47; 1 *Jur.* 137.

**1387.** ———]—**SMITH v. WINTER**, No. 1191, *ante*.

**1388.** ———]—**When time given by creditor.—Proviso against prejudice to sureties.**—A. & B. enter into a recognisance of bail for deft., then in prison at the suit of plff. Upon his liberation, plff. agrees to grant him time, upon his giving a *cognovit*, with stay of execution, until a certain day provided the bail consent to the arrangement. They do so, making it a condition that they are not to be prejudiced. Plff. sues out a writ of *ca. sa.* against deft., which is returned *non est inventus*. But of this he does not inform the bail, neither does he give them notice of the *cognovit* remaining unsatisfied:—**Held:** under these circumstances, upon the death of deft. & notice by plff. that he held the bail liable, the bail were entitled to have an *exoneretur* entered upon the recognisance. **SURMAN v. BRUCE** (1834), 10 Bing. 434; 4 Moo. & S. 184; 3 L. J. C. P. 144; 131 E. R. 972.

**1389.** ———]—**Unless time given not in accordance with agreement.**—**CROYDON GAS CO. v. DICKINSON**, No. 1200, *ante*.

**1390.** **Consent binds co-surety.**—If one of the bail below consents to time being given to deft. to perfect bail above, his act is binding upon both.—**HOWARD v. BRADBERRY** (1834), 3 Dowl. 92.

**1391.** **Bill of exchange or promissory note.—Limit of time to be given.—Not specified.**—**YATES v. EVANS**, No. 365, *ante*.

—[—**Sec. also, BILLS OF EXCHANGE**, Vol. VI., p. 401, Nos. 2016-2021.

ii. **Reservation of Creditor's Rights Against Surety.**

**1392. Surety not discharged.**—The principle stated on which bail are discharged by a dealing with the principal. Where a plff. receives bills of exchange from a deft., with an agreement that he shall not be precluded from proceeding while the bills are running, the bail are not thereby discharged.

If the creditor gives time to the original debtor, the surety is discharged (**GIBBS, C.J.**).—**MELVILL v. GLENDINING** (1816), 7 Taunt. 126; 129 E. R. 51.

**1393.** ———]—A. gave a promissory note, payable to B. (for which A. had received no consideration), as a security for goods to be sold to B. on credit; & B. indorsed the note over to the creditors. B. afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, & it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, & that on any default in paying the instalments the deed should be void:—**Held:** the delay granted to B. by this agreement did not discharge A.—**NICHOLS v. NORRIS** (1831), 3 B. & Ad. 41; 9 L. J. O. S. K. B. 172; 110 E. R. 15.

**Annotations:—****Reid.** **Kearsley v. Cole** (1816), 16 L. J. Ex. 115; **Bateson v. Gosling** (1871), L. R. 7 C. P. 9.

**1394.** ———]—(1) B. entered into a bond as a surety: the creditor subsequently took from the principal debtor a promissory note for the amount payable in two months, but afterwards, in consequence of the insolvency of the debtor, sued B. on the bond. B. then filed his bill to restrain the action, on the ground that he was discharged from liability by the giving of the promissory note: the creditor, by his answer, denied that such was the effect of the transaction; & on the hearing an inquiry was directed in respect of the circumstances under which the promissory note had been given. The master reported that, though there was not any written or any distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond:—**Held:** on further directions there was no case for the interference of a ct. of equity.

(2) A transaction, which would otherwise operate as a release of a surety, will not have that effect if the remedy against the surety is reserved; & the question, therefore, in the above case was, there being no special ground for equitable relief, whether an agreement to reserve the rights against the surety really existed:—**Held:** such an agreement did exist, & parol evidence was admissible to prove it.—**WYKE v. ROGERS** (1852), 1 De G. M. & G. 408; 21 L. J. Ch. 611; 19 L. T. O. S. 1; 42 E. R. 609, L. C.

**Annotations:—****As to (1) Consd.** **Boulter v. Mayor** (1865), 19 C. B. N. S. 76. **Reid.** **Re Wolmershausen, Wolmershausen v. Wolmershausen** (1890), 62 L. T. 511. **As to (2) Consd.** **Boulter v. Mayor** (1865), 19 C. B. N. S. 76. **Reid.** **Oriental Financial Corp'n. v. Overend Gurney** (1871), 7 Ch. App. 145, n.

**1395. Creditor's right to reserve.**—Supposing that in a transaction between the creditor & the principal debtor, by which time is given to the latter, there is a stipulation to the effect that the creditor may still proceed against the surety, why should it be the rule that such a stipulation is valid, & the surety remains unreleased? It is

**PART IX. SECT. 2, SUB-SECT. 4.—**  
**C. (b) ii.**

**1392 i. Surety not discharged.**—Where a creditor gives his debtor an ex-

tension of time for payment, a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was

given.—**ORMAN v. DIXON** (1896), 26 S. C. R. 87.—**CAN.**

**1395 i. Creditor's right to reserve.**—**ORMAN v. DIXON** (1896), 26 S. C. R. 87.—**CAN.**



that the principal debtor has made that arrangement, & it is his interest alone that is affected by it. He agrees that the creditor may proceed against the surety, & runs the risk of the surety proceeding against himself (SIR JOHN LEACH, M.R.). — *—* v. — (1832), 2 Coop. temp. Cott. 522; 47 E. R. 1281.

1396. —.]—OWEN & GUTCH v. HOMAN, No. 1057, *post*.

1397. —.]—(1) A creditor upon giving time to his principal debtor may reserve his rights against the surety, & this without communicating the arrangement to the surety.

(2) When the creditor gives a release to the debtor he cannot reserve any right against the surety, because the debt is gone at law.

An agreement between a bond debtor & his creditor, that the latter shall take all the debtor's property, & shall pay his other creditors 5s. in the pound, though not a discharge of the bond at law by way of accord & satisfaction, because not under seal, still operates in equity as a satisfaction of the debt; & it is not possible in equity, upon such a transaction as that, to reserve any rights against the surety; & any attempt to do so would be void as being inconsistent with the agreement.

—WEBB v. HEWITT (1857), 3 K. & J. 438; 29 L. T. O. S. 225; 69 E. R. 1181.

*Annotations:—As to (1) Consd.* Boaler v. Mayor (1865), 19 C. B. N. S. 76; Bateson v. Gosling (1871), L. R. 7 C. P. 9. *As to (2) Distd.* Green v. Wynn (1869), 4 Ch. App. 204. *Consd.* Bateson v. Gosling (1871), L. R. 7 C. P. 9. *Expld.* Muir v. Crawford (1875), L. R. 2 Sc. & Div. 156. *Refd.* Ellis v. Wilmot (1874), L. R. 10 Exch. 10. *Generally, Refd.* Steeds v. Steeds (1889), 22 Q. B. D. 537. *Mentd.* Re Wolmershausen, Wolmershausen v. Wolmershausen (1890), 62 L. T. 11.

1398. What amounts to reservation—Necessity for express intention—General understanding only.]—WYKE v. ROGERS, No. 1394, *ante*.

1399. —.]—OVIKEND, GURNEY & CO. (LIQUIDATORS) v. ORIENTAL FINANCIAL CORPN. (LIQUIDATORS), No. 1341, *ante*.

1400. —.]—Sufficiency of parol reservation.]—The pursuit of a counterclaim is a "proceeding continued" within the meaning of the surety's bond given in pursuance of Bkpey. Act, 1869 (c. 71), s. 7. A reservation by a creditor of his rights against a surety may be by parol.—NORMAN v. BOLT (1883), Cab. & El. 77.

1401. Proof of reservation—Parol evidence.]—WYKE v. ROGERS, No. 1394, *ante*.

1402. Effect of reservation—On principal debtor—Surety's right to indemnity continues.]—*—* v. —, No. 1395, *ante*.

1403. —.]—CLOSE v. CLOSE, No. 887, *ante*.

Bills of exchange.]—See BILLS OF EXCHANGE, Vol. VI., pp. 411–413, Nos. 2072–2076.

Covenant not to sue.]—See Sub-sect. 9, B. (d), *post*.

1401 i. Proof of reservation—Parol evidence.]—Parol evidence of the reservation of rights against the surety is admissible.—TRUSTS CORPN. OF ONTARIO v. HOOD (1896), 23 A. R. 589.—CAN.

#### PART IX. SECT. 2, SUB-SECT. 4.— C. (b) iii.

a. Agreement between debtor & creditor—Surety liable "after termination of agreement"—Time given to debtor before expiration of agreement—Surety not discharged.]—Deft. became surety to pltf., that O. would perform the conditions of an agreement, & would pay & satisfy all notes & other securities which remained outstanding

on the termination of said agreement. Some of the notes taken by O. having become overdue during the course of the business, pltf. drew drafts on O. for the amounts, which drafts O. accepted, but failed to pay. After the termination of the agreement action was brought on the guarantee:—*Held*: as deft. was not to be liable until after the termination of the agreement, & as the time given had elapsed before the liability of deft. accrued, the giving of the time did not prevent pltf. from looking to deft. as surety.—MCLAUGHLIN CARRIAGE CO. v. OLAND (1901), 31 N. S. R. 193.—CAN.

r. Extension of time—Advantageous to principal debtor & surety.]—

#### iii. Other Cases.

1404. Promise by surety to pay—Subsequent to giving time.]—MAYHEW v. CRICKETT, No. 1505, *post*.

1405. Agreement to stay proceedings—Made rule of court—Replevin bond.]—Declaration in debt by the assignee of a surety bond in replevin, set out in condition, which was, that "If B. appeared at the then next county ct., & there prosecuted his suit without delay against I., the bond to be void"; averment "that B. did not appear, etc." Plea, first, *non est factum*, & issue thereon; second, "that B. did appear & prosecute, etc."; & third, "that B. did appear at the then next county ct. & prosecute, etc., & which said suit is still depending & undetermined." Replication to the second & third pleas, traversing the appearance & prosecuting of the suit, but not traversing the allegation that the suit was still depending & undetermined, & issue on the replication:—*Held*: on these pleadings, an agreement (which was made a rule of the ct.) between pltf. & the principal to stay all proceedings in the replevin, upon payment by the latter of a certain sum of money, each party to pay his own costs, was admissible evidence to negative the allegation in the third plea, that the suit was still depending & undetermined, & the surety was not discharged by such agreement, after breach by the principal, but was liable for such sum as appeared upon a reference to be due.—HALLETT v. MOUNTSTEPHEN (1823), 2 Dow. & Ry. K. B. 343; 1 L. J. O. S. K. B. 76.

1406. Assignment of bail bond—After forfeiture—Time given after assignment.]—After a bail bond has been forfeited & an assignment thereof taken, time given to the principal is no discharge of the sureties. WOOSNAM v. PRICE (1833), 1 Cr. & M. 352; 3 Tyr. 375; 2 L. J. Ex. 115; 149 E. R. 435.

*Annotation:—Mentd.* Ellis v. Bates (1833), 1 Tyr. 58.

1407. Judgment against debtor & surety—Time given after judgment.]—A. & B. were indebted as principal & surety to C. B. died, & C. in a creditors' suit obtained a decree against his estate. Afterwards C. sued A., & took a judgment by arrangement, giving time, without the knowledge of the surety:—*Held*: this did not discharge the surety.—JENKINS v. ROBERTSON (1851), 2 Drew. 351; 23 L. J. Ch. 816; 61 E. R. 755.

*Annotation:—Follid.* Re A Debtor (No. 14 of 1913), [1913] 3 K. B. 11.

1408. —.]—The rule of law that time given to a principal debtor discharges a surety does not apply when the time is given after a judgment for the debt has been recovered by the creditor against both the principal debtor & the surety.—Re A Debtor (No. 14 of 1913), [1913] 3 K. B. 11; 82 L. J. K. B. 907; 109 L. T. 323;

Where what is done in regard to extending time is to the advantage of both principal debtor & surety the general rule as to extension of time discharging the sureties is not applicable. WRIGHT v. WESTERN CANADA ACCIDENT & GUARANTEE INSURANCE CO. (1911), 29 W. L. R. 153; 6 W. W. R. 1409; 20 D. L. R. 478; 20 B. C. R. 32. CAN.

s. Twelve months extension of time given principal debtor—Liability of surety arising—If debtor in default for fifteen months.]—Where the liability of a surety arises, if the principal debtor continued in default of the payment guaranteed for a period of fifteen months, he is not discharged if the



*Sect. 2.—Discharge from liability: Sub-sect. 4, C.*  
 (b) *iii.*, (c) & (d); *sub-sects. 5, 6 & 7, A. & B.*  
 (a) *i.*]

20 Mans. 119; *sub nom. Re BUTTEN*, 57 Sol. Jo. 579.

1409. *Surety's rights not injured.*—*PETTY v. COOKE*, No. 1139, *ante*.

1410. *Agreement between surety & debtor—As to relief of surety.*—*ROUSE v. BRADFORD BANKING Co.*, No. 750, *ante*.

(c) *Bills of Exchange.*

*See BILLS OF EXCHANGE*, Vol. VI., pp. 398–400, 407, Nos. 2599–2615, 2648, 2649.

(d) *Partial Relief.*

1411. *Continuing guarantee—Time in respect of specific debt—Liability for other debts.*—In consideration of pltf. supplying C. with goods, deft. agreed to be answerable up to £200 for the price of goods supplied to C. at any time due to pltf. on an account current after two months' credit. Some time after, £332 being then due from C. to pltf. for goods supplied, C. executed a mtge. deed to pltf. as security for the then existing debt & for any future debt for goods to be supplied. The deed contained a proviso that if C. paid pltf. the £332 in six months from its date, & all sums due for future supplies in six months from their date, without prejudice to pltf.'s right not to give credit in respect of future supplies the mtgd. premises were to be reconveyed to C. There was also a covenant to pay the existing debt in six months, & future debts within six months from their accruing due, without prejudice to pltf.'s refusing to give credit for future debts. The parties in fact dealt on a two months' credit only. In the course of dealing C. paid off £332. A further debt exceeding £200 having subsequently accrued, which C. could not pay, pltf. sued deft. on the guarantee. Dft. pleaded that he was discharged by times having been given by pltf. to C.:—*Held*: by the mtge.-deed pltf. did not give time to C. except in respect of the £332 debt, & as that debt had long since been discharged the giving that time did not prejudice the surety as to other & future debts due from C. to pltf.: as in fact only a two months' credit was given by pltf. to C. the guarantee remained in force & deft. was liable up to £200 on C.'s failure to pay the sum due in respect of goods supplied by pltf. to C. subsequent to the mtge. deed. *BINGHAM v. CORBITT* (1864), 4 New Rep. 376; 34 L. J. Q. B. 37; 12 W. R. 1030, Ex. Ch.

1412. *Separable contracts—Time in respect of one payment—Liability for other payments.*—*CROYDON GAS Co. v. DICKINSON*, No. 1200, *ante*.

SUB-SECT. 5.—AGREEMENT BETWEEN CREDITOR AND PRINCIPAL TO GIVE TIME TO SURETY.

1413. *General rule—Surety discharged.*—The holder of a security who agrees with the

principal debtor is given twelve months' extension of time.—*WALKER v. BOWEN* (1915), 34 W. L. R. 989; 10 W. W. R. 1071; 10 Alta. L. R. 14.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 4.—C. (d).

1. *Continuing guarantee—Present indebtedness of principal—Taking forged pay in renewal—Release of surety.*—K. gave a mtge. to a bank as security for present indebtedness of, & future advances to, a customer of the bank.

By the terms of the mtge. K. was to be liable for promissory notes, etc., of the customer outstanding at date of mtge., & all renewals, alterations & substitutions thereof:—*Held*: the bank having given up the promissory notes, etc., & accepted as renewals thereof, forged & worthless paper, K. was, to the extent of such worthless paper, relieved from liability as such surety.—*MERCHANTS BANK OF CANADA v. MCKAY* (1888), 15 S. C. R. 672.—*CAN.*

a. — *Bill for part of debt taken from principal debtor—Surety discharged*

principal to give time to the surety by so doing discharges the surety.

A financial co., by agreement with an agent, accepted bills of exchange which were discounted for the agent by a discount co., the agent guaranteeing payment. The discount co. were not at the time aware of the relations between the acceptors & the agent, but were informed before the bills matured that the agent was principal, & that the acceptors were sureties. After this the discount co. agreed with the agent not to press the acceptors for payment until certain other bills became due:—*Held*: the acceptors were thereby discharged.

If the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by implication an engagement not to sue the surety (*LORD HATHERLEY, C.*).—*ORIENTAL FINANCIAL CORPN. v. OVEREND, GURNEY & Co.* (1871), 7 Ch. App. 142; 41 L. J. Ch. 332; 25 L. T. 813; 20 W. R. 253, L. C.; *affd. sub nom. OVEREND, GURNEY & Co. (LIQUIDATORS) v. ORIENTAL FINANCIAL CORPN. (LIQUIDATORS)* (1871), L. R. 7 H. L. 318, H. L.

*Annotations*:—*Consol. Series v. Finch & Day* (1891), 7 T. L. R. 253; *Rouse v. Bradford Banking Co.*, [1894] A. C. 586. *Reid, Swite v. Redman* (1876), 1 Q. B. D. 536; *Claire v. Bidley* (1889), 41 Ch. D. 422. *Mentel, Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1.

1414. *Agreement to give time to one co-surety—Discharges other surety—If rights against him not reserved.*—Where there are two co-sureties, & the creditor grants a further loan to his principal debtor, & takes a new security for that & the former loan, & gives further time to him & one of the sureties only, without specially reserving his remedy against the other surety, he by so doing discharges the latter.—*VYNER v. HOPKINS* (1812), 6 Jur. 889.

SUB-SECT. 6.—AGREEMENT BETWEEN CREDITOR AND SURETY TO GIVE TIME TO SURETY.

1415. *Time given to one surety—Whether co-surety discharged—Liability to contribution.*—*DUNN v. SLEE*, No. 1063, *ante*.

1416. ————]—Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, & that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, & retained possession of the original bills:—*Held*: the separate notes having proved unproductive, he might still resort to his remedy against the other partners, & the taking under these circumstances the separate notes, & even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.—*BEDFORD v.*

*to extent of bill.*—Defts. were sureties to pltf. for D., on a continuing guarantee for the value of goods to be supplied by pltf. to D., not exceeding £300 in all. Pltf., without defts. knowledge or consent, having taken from D. a bill at three months still current for £45, on account of portion of the sum due for goods supplied to D., the actual amount due having been previously ascertained.—*Held*: defts. were only discharged to the extent of the £45 for which the bill was taken.—*DOWDEN v. LEVIE* (1884), 14 L. R. Ir. 307.—*IR.*

DEAKIN (1818), 2 B. & Ald. 210; 106 E. R. 344;  
*previous proceedings* (1817), 2 Stark. 178, N. P.

**Annotations:—**Consd. Winter v. Innes (1838), 4 My. & Cr. 101. **Expld.** Harris v. Farwell (1851), 15 Beav. 31. **Mentd.** Thompson v. Percival (1834), 5 B. & Ad. 925.

1417. — — Rights not reserved against co-  
surety.]—VYNER v. HOPKINS, No. 1414, *ante*.

1418. **Covenant by surety to pay**—In consideration of receiving time—Subsequent release of debtor.]—S. accepted a bill of exchange as surety for C., & subsequently in consideration of further time given him (S.) for payment, covenanted by deed to pay what was due on the bill with interest, & at the same time assigned a policy as further security :—*Held* : an “entire acquittal” of debts given to C. by all his creditors did not release S. —**DEFRIES v. SMITH** (1862), 10 W. R. 189.

**SUB-SECT. 7.—LACHES BY CREDITOR.**

### A. In General.

**1419. Laches must be wilful.**—A surety is not released from his engagement by mere lapse of time, unless where payment was to have been made within a limited period & the time has been extended by the other parties without his consent or knowledge (SIR WILLIAM SCOTT). —THE VREDEE (1811), 1 Dod. 1; 2 Eng. Pr. Cas. 120; 165 E. R. 1211.

Annotation: - **Refd.** The Harriett (1842), 1 Wm. Rob.

**1420.** —.—.]—If the surety calls upon the creditor to do any act, which, in the judgment of this ct., it is the duty of the creditor when so called upon to do, & the creditor wilfully omits to do such act, is not the surety discharged to the extent of the injury occasioned by such omission? Is he not discharged just as much as if the creditor, instead of remaining inert, had been active in taking some steps, detrimental to the surety, & plainly a breach of the creditor's duty in reference to his surety? That is to say, is not such surety discharged in a ct. of equity, whatever he might be in a ct. of common law? (SIR JOHN LEACH).—ANON. (1827), 2 Coop. temp. Cott. 524; 47 E. R. 1285.

1421. — Not in themselves sufficient to discharge surety.]—DURHAM CORPN. v. FOWLER, No. 585, *ante*.

*B. What Amounts to Laches.*

(a) *Omissions.*

i. *In General.*

**1422. Notification to surety**—Of completion of contract—**Indemnity lost to surety**—From third party.]—A. having sent an order to B. for certain goods, C. undertakes to guarantee payment to B., upon an undertaking of D. to indemnify C. B. accordingly informs C. that the goods are preparing, & afterwards ships them for A., without giving notice to C. that they are shipped. Afterwards D. desires to recall his indemnity, upon which C. writes to B. to know whether he had executed the order, to which no answer is given by B., for a considerable time, he having gone abroad in the interim. Upon this C., supposing from the silence of B. that the order was not executed, gives up his indemnity to D. C. still

remains liable to B., on his guarantee.—**OxLEY v. YOUNG** (1796), 2 Hy. Bl. 613; 126 E. R. 734; *previous proceedings* (1795), 1 Esp. 424, N. P.

1423. — Of default of debtor.]—ORME v. YOUNG, No. 1357, *ante*.

1424. ————.]—*Assumpsit* against the maker

of a promissory note. Plea, that it was a joint & several note made by deft. & T., & that deft. entered into it at the request of T., & for his accommodation, & in order that he might get it discounted by plffs.; that deft. had no other value or consideration for making it, & that he made it as a mere surety for T., of which plffs. had notice; & that, although the note was due in the hands of plffs. for six months, yet deft. had no notice, till the commencement of this suit, of its nonpayment by T., to the prejudice & without the knowledge or consent of deft.:—*Held*: bad on general demurrer. — *CLARKE v. WILSON* (1838), 3 M. & W. 208; 150 E. R. 1118.

1425. — — —.]-- CARTER v. WHITE, No. 479,  
*ante*

**1426. Presentation of bill for indorsement.]**—Where the firm of I. & Co. gave a guarantee to P. & Co. that they would indorse any bill or bills which S. might give to P. & Co. in part payment of an order for certain goods then executing for him, P. & Co. to allow 5 per cent. on the amount of the bills for the guarantee; & in part payment of the goods S. gave P. & Co. a bill at eighteen months, which the latter kept for seventeen months & ten days, & then, finding that S. was insolvent, applied for the first time to I. & Co. for their indorsement, tendering the amount of commission; —*Held*: P. & Co. were concluded by their laches, & I. & Co. were not liable on their guarantee. *PAYNE v. IVES* (1823), 3 Dow. & Ry. K. B. 661.

*Annotation :* **Consd.** *Goring v. Edmonds* (1829), 6 Blig.  
94.

**1427. Filing warrant of attorney.**—By an agreement between bankers, a customer & a surety, the surety guaranteed the balance due or to become due from the customer, subject to a limit & to a proviso empowering the surety at any time to determine by notice his liability as to subsequent dealings. The customer afterwards obtained a loan from the bank beyond the limit of the guarantee on a warrant of attorney, & simultaneously with it a second agreement was entered into between the bankers, the customer & surety that the warrant of attorney should not prejudice or affect the former agreement, & that the bank would, at any time when requested by the surety, enter up judgment & issue execution. The bank omitted to file a warrant of attorney, & the customer became bkpt. :—*Held*: (1) the agreement to issue execution was not *nudum pactum*; (2) by the omission to file the warrant of attorney the surety was discharged; (3) the surety who had pleaded to an action on the guarantee & then filed a bill for an injunction had put the bank to unnecessary costs & could only be relieved in equity on paying the costs at law subsequent to the declaration.—*WATSON v. ALLCOCK* (1853), 1 De G. M. & G. 242; 22 L. J. Ch. 858; 21 L. R. O. S. 204; 17 Jur. 508; 1 W. R. 399; 43 E. R. 499, 14 J.J.

*Annotation*:—As to (2) **Consd.** *Lawrence v. Walmsley* (1862), 12 C. B. N. S. 799.

**PART IX. SECT. 2, SUB-SECT. 7.—A.**

b. Whether laches can be imputed to Crown.]—The Crown cannot be guilty of laches & thereby permit a surety to be discharged.—R. v. NOVAK

(1920), 1 W. W. R. 136; 50 D. L. R. 412; 30 Man. L. R. 86.—CAN.

c. —. ]—No laches can be imputed to the Crown.—*R. v. FAY* (1879), 4 L. R. Ir. 606.—**IR.**

**PART IX. SECT. 2, SUB-SECT. 7.—**  
**B. (a) i.**

d. Award not made.—Until time for performance past.]—ADAMS v. McFARLANE (1873), 9 N. S. R. 379.—CAN.

**Sect. 2.—Discharge from liability: Sub-sect. 7, B.**  
**(a) i. & ii., & (b).]**

**1428. Entering judgment—Against surety or principal.]—**A. & B. entered into a bond as sureties for D., the principal: upon D.'s default, C. advanced the sum out of his own moneys, & obtained a bond to secure same from A. & B. & D.: C. entered judgment against A. immediately upon the execution of the bond, but did not enter judgment against the other surety or principal for upwards of two years:—*Held*: this omission did not entitle the other surety to be discharged from paying any portion of the original debt.—*Re CLUTTERBUCK'S ESTATE* (1856), 27 L. T. O. S. 327, P. C.

**1429. Insurance of goods against fire—Agreement between parties to insure.]—**By articles of agreement H. agreed with W. (pltf.) to complete certain fittings for a warehouse for £3,450, to be paid by instalments during the progress of the work. The contract contained a stipulation, "That W. shall & may insure the fittings from risk by fire at such time & for such amount as the architects may consider necessary, & deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement, reciting in part the contract, deft. agreed with pltf. to guarantee the due performance of the works by H. Pltf. advanced £1,800 to H. during the progress of the works; after which the fittings to the value of £2,300, while still unfinished, were destroyed by accidental fire in the workshop of H. Pltf. had not insured the fittings. H. became insolvent & never repaid the £1,800 or any part of it. Pltf. was compelled to pay a sum greater by £340 than the original contract price to complete the work contracted for:—*Held*: pltf. was bound to insure the fittings, & his omission to do so, in equity, discharged deft.'s liability, not merely to the extent of the benefit he would have derived from the insurance if effected, but *in toto*.—*WATTS v. SHUTTLEWORTH* (1861), 7 H. & N. 353; 5 L. T. 58; 7 Jur. N. S. 915; 10 W. R. 132; 158 E. R. 510, Ex. Ch.

**Annotations:—***Consd.* Lawrence v. Walmesley (1862), 12 C. B. N. S. 799; *Re Barber, Ex p.* Agra Bank (1870), L. R. 9 Eq. 725. *Reid.* Grant v. Budd (1874), 30 L. T. 319; Polak v. Everett (1876), 24 W. R. 365; Mansfield Union Grdn. v. Wright (1882), 9 Q. B. D. 683; Alliance & Dublin Gas Consumers' Co. v. Blott (1886), 3 T. L. R. 111.

**1430. Award not taken up—Until time for performance past.]—**Where a verdict was entered, subject to a reference, for pltf. in an action for libel against a publisher of a newspaper, & an award made, but not taken up by either party, until the time for its performance had elapsed, pltf. then signed judgment & issued execution, on which *nulla bona* was returned:—*Held*: pltf. was not entitled to a writ of *scil. fa.* against deft.'s sureties under 60 Geo. 3, c. 9, s. 8; 11 Geo. 4 & 1 Will. 4, c. 73, s. 3.—*Re JONES* (1863), 2 H. & C. 270; 159 E. R. 113; *sub nom.* JONES v. YOUNG, 2 New Rep. 361; 8 L. T. 672; *sub nom.* JONES v. YOUNG, *Re CHAPLIN*, 32 L. J. Ex. 254; *sub nom.* *Re JONES v. YOUNG, Ex p.* JONES, 9 Jur. N. S. 726; 11 W. R. 1079.

**PART IX. SECT. 2, SUB-SECT. 7.—**  
**B (a) ii.**

**e. Mere neglect to take active measures—Whether surety discharged.]—**Unless some act be done by the holder of a guarantee, such as an extension of the time limited for payment without the knowledge of the surety, the mere neglect by him to take active measures to enforce pay-

ment from the principal debtor will not relieve the surety from his liability to pay the debt.—*BROPHY v. ATTWOOD & HAYNES* (1818), 1 Nfld. L. R. 143.—**NFLD.**

**f. Two years delay.]—**A cautioner is not liberated by the creditor allowing two years to elapse after the term of payment, without demanding payment from the debtor.—*FLEMING*

**1431. Seizure of debtor's goods—Under arrangement between parties.]—**Pltfs. lent to B. & P., who were traders, £300, for the repayment of which the deft. became surety. At the time of the loan N. & P. assigned by deed dated Aug. 25, 1870, to pltfs., as security for the debt, the lease of their business premises & plant, fixtures, & things thereon. The deed provided for the repayment of the loan upon Aug. 25, 1871, & for the payment of interest on Feb. 25, 1871, & stipulated that, until default in payment of either the principal or interest, B. & P. should continue in possession of the property assigned to pltfs.; & that upon such default pltfs. should not sell without giving B. & P. one month's notice in writing. This deed was not registered under 17 & 18 Vict. c. 30. B. & P. failed to pay interest upon Feb. 25, but pltfs. did not enter into possession. About a week before Aug. 5, pltfs. received notice that B. & P. were insolvent, but they allowed them to continue in possession, & on that day B. & P. filed a petition for liquidation under Bkpcy. Act, 1869 (c. 71), & were adjudged bkpts. The trustee under the bkpcy. seized & sold the goods & chattels assigned by the deed:—*Held*: pltfs. by their omission both to register the deed & to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security to the surety, & owing to their laches he was discharged to the amount that the goods were worth.—*WULFF v. JAY* (1872), L. R. 7 Q. B. 756; 41 L. J. Q. B. 322; 27 L. T. 118; *sub nom.* *WOULFF v. JAY*, 20 W. R. 1030.

**Annotations:—***Consd.* Polak v. Everett (1876), 1 Q. B. D. 669. *Reid.* Rabinow v. Juggins (1880), 5 Q. B. D. 138; *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 38 W. R. 537. *Mentd.* Hawtrev v. Butlin (1873), 28 L. T. 532.

**1432. Registration of bill of sale.]—***WULFF v. JAY*, No. 1431, *ante*.

**1433. Omission to fill in name of drawer—On bill of exchange.]—***CARTER v. WHITE*, No. 479, *ante*.  
**Fidelity guarantees.]—***See* Sub-sect. 7, C., *post*.

**ii. Enforcement of Payment.**

**1434. Voluntary omission—Surety not discharged.]—**The laches of obligees in a bond, conditioned for the principal obligor to account for & pay over from time to time all such tolls as he should collect for the obligees, in not properly examining his accounts for eight or nine years, & not calling upon the principal for payment so soon as they might have done for sums in arrear or unaccounted for, is not an estoppel at law in an action against the sureties.—*TRENT NAVIGATION Co. v. HARLEY* (1808), 10 East, 34; 103 E. R. 688.

**Annotations:—***Consd.* Goring v. Edmonds (1829), 6 Bing. 91. *Reid.* Davey v. Prendergrass (1821), 5 B. & Ald. 187; *McTaggart v. Watson* (1836), 10 Bll. N. S. 618; *Black v. Ottoman Bank* (1862), 13 Moo. P. C. C. 472; *Durham Corp'n. v. Fowler* (1889), 22 Q. B. D. 394.

**1435. ———.]—***MAYHEW v. CRICKETT*, No. 1565, *post*.

**1436. ———.]—**One of two drawers of a joint promissory note, payable twelve months after date, who is surety for the other to the amount, is not discharged by the drawee not

*v. WILSON* (1823), 2 Sh. (Ct. of Sess.) 336.—**SCOT.**

**g. Two years & four months delay.]—**A cautioner became bound for a composition in a sequestration. Two years & four months elapsed from the day of payment, without any demand having been made against the cautioner, but time was not given to the principal:—*Held*: the delay

having demanded payment from the surety when due, nor till after having entered into a deed of composition, with the principal & his other creditors, & received the composition money.—**PERFECT v. MUSGRAVE** (1818), 6 Price, 111; 146 E. R. 757.

*Annotations*.—**Consd.** *Newton v. Chorlton* (1853), 2 Drew. 333. **Reid.** *Manley v. Boycot* (1853), 1 C. L. R. 273.

1437. ———.]—**DEVY v. EDWARDS & TAPPEN**, No. 1447, *post*.

1438. ———.]—The liability of a surety in a bond is not discharged by the delay of the creditor in suing for the debt, or by the circumstance of the principal debtor afterwards executing to the creditor another bond for a larger sum.—**RYRE v. EVERETT** (1826), 2 Russ. 381; 38 E. R. 379, L. C.

*Annotations*.—**Consd.** *Creighton v. Rankin* (1840), 7 Cl. & Fin. 325; *Newton v. Chorlton* (1853), 2 Drew. 333; *Black v. Ottoman Bank* (1862), 15 Moo. P. C. C. 472. **Reid.** *Cross v. Sprigg* (1849), 13 L. T. O. S. 505.

1439. ———.] **Unsuccessful applications made**—Without notice to surety.]—In Apr. 1825, deft. guaranteed the payment of money due from his son to plff. upon a sale of timber. Plff. received part payment of the son, & made repeated unsuccessful applications to him for the residue till Dec. 1827, when the son became bkpt. Plff. never disclosed to deft. the issue of these applications, but in Dec. 1827, sued him on his guarantee:—**Held**: deft. was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son.

Fraud would be a defence to the action, but not mere negligence (*TINDAL, C.J.*). (*GORING v. EDMONDS* (1829), 6 Bing. 94; 3 Moo. & P. 259; 7 L. J. O. S. C. P. 235; 130 E. R. 1215.)

1440. ———.]—**MUSKET v. ROGERS**, No. 506, *ante*.

1441. ———.]—**BELL v. BANKS**, No. 1316, *ante*.

1442. ———.]—**STRONG v. POSTER**, No. 738, *ante*.

1443. ———.]—**BLACK v. OTTOMAN BANK**, No. 1148, *post*.

1444. ———.]—In an action upon a bond & a promissory note, defts. pleaded, by way of equitable defence, in substance, that the bond & note were made by defts. as sureties for P. in his lifetime, to secure the payment by P. to a loan society whereof plffs. were treasurer & secretary, of £50 by weekly instalments of 5s., & that the said bond & note were made upon the terms & conditions that defts. should only be liable thereupon to the extent of any deficiency in the amount of such payments by P., & that in the event of P. becoming more than four weeks' payments in arrear, the committee (whereof plffs. were members) should immediately inform defts. of the same. Averments of P. becoming more than four weeks in arrear, & failure of the committee or plffs. or any person, to inform defts. thereof until a long & unreasonable time after P.'s death, & after the death of a co-surety with defts., whereby defts.' risk as sureties was im-

properly increased, & they were precluded from enforcing payment by P., & were greatly damaged:—**Held**: a rule in a book of printed rules of the society, stating that "if any member who has had his share advanced becomes more than four weeks' payments in arrear, they (the committee) should immediately inform the sureties of the same & have power to institute legal proceedings against them," even if it were binding & obligatory upon members of the society as between themselves, yet was no part of the contract between the plffs. who were members, & defts. who were not members, & did not enable defts. as sureties, to set up the want of such notice as an equitable defence to plffs.' action. *Semble*: no mere forbearance or abstinence of the creditor from suing the principal, provided he does not give time, releases the surety.

The general rule of law in respect to matters of this sort, where there is a surety, is this: the creditor is entitled frequently to make his demand for a certain period, & to enforce it in a certain way; but provided he does not tie his own hands up so as to prevent him from acting, he is not at all bound to do so. He may abstain from using any right that he possesses, & whether that is advantageous to the surety or not is not the question. The thing to be considered is, is he bound to do it? If he is not bound to do it, the surety cannot compel him (*POLLOCK, C.B.*).—**PRICE v. KIRKHAM** (1861), 3 H. & C. 137; 5 New Rep. 59; 34 L. J. Ex. 35; 11 L. T. 314; 29 J. P. 8; 159 E. R. 601.

**Creditor unable to enforce payment—Through own conduct.**—See Sect. 2, sub-sect. 4, B. (c), *ante*.

#### (b) Other Cases.

1445. **Reasonable inquiries regarding debtor—Debt payable after debtor leaves residence.**—

Where a party becomes security by bond, for the payment of money, advanced to a third person, & by the condition of the bond is to pay after notice, if the party has left his house, it is sufficient for the obligee of the bond to make reasonable inquiries after him, & laches are not imputable to him if he does so. (*HARRISON v. FITZHENRY* (1800), 3 Esp. 238, N. P.)

1446. **Credit of debtor extended Bankruptcy of debtor.**—*LONDON ASSURANCE CO. v. BUCKLE*, No. 632, *ante*.

1447. **Abandonment of action—By creditors against debtor.**—Although in the case of principal & surety there is not as between the obligee & the surety any obligation of active diligence on the part of the obligee against the principal, still if the obligee commences a suit against the principal & then abandons it this is a circumstance in favour of the surety & may operate to discharge him.—**DEVY v. EDWARDS & TAPPEN** (1826), 3 Add. 68; 102 E. R. 406.

*Annotation*.—**Reid.** *Canterbury (Archbp.) v. Tappen* (1828), 8 B. & C. 151.

**Fidelity guarantees.**—See Sub-sect. 7, C., *post*.

#### PART IX. SECT. 2, SUB-SECT. 7.—B. (b).

1. **Non-enrolment of tenant's recognisance—Delay of four years.**—A tenant's recognisance was executed at the same time as his lease, but was not enrolled for four years after. The tenant in the meantime became insolvent, & encumbered his property:—**Held**: the neglect to enrol the recognisance, when the lease was executed, did not discharge the surety. —**JEPHSON v. MAUNSKILL** (1847), 10 L. Eq. R. 132.—**IR.**

did not, without proof of positive giving of time, bar the creditor from suing the cautioner.—**MORISON v. BALFOUR** (1849), 11 Durl. (Ct. of Sess.) 653; 21 Sc. Jur. 185.—**SCOT.**

h. **Neglect to distrain—Right of distress not a security.**—In an action on a guarantee for the payment of a tenant's rent, the guarantor pleaded that at the time when the rent became due there was a sufficient distress on the demised premises which might have been distrained, but which by & through the negligence of plff., the

landlord, was wholly lost to deft.:—**Held**: the plea disclosed no answer to the action, & a right to distrain is not "a security."—**FOURSYTH v. McLEOD**, Mac. 293.—**N.Z.**

k. **Benefit of hypothec lost.**—By the Civil Law, sureties are not discharged from their liability to satisfy the creditor, though the benefit of a hypothec of the debtor is lost by the laches of the creditor to enforce his demands.—**MACDONALD v. BELL** (1840), 3 Moo. P. C. C. 315.—**S. AF.**

*Sect. 2.—Discharge from liability: Sub-sect. 7. (C.)**C. Fidelity Guarantees.*

**1448. General rule.**—(1) Surety sued upon a bond given to a bank as guarantee for the due discharge of certain specified services by their manager & cashier, pleaded negligence & want of due care on the part of the bank, in not properly checking & examining the accounts of their manager: demurrer to plea, that it was bad in substance & no defence to the action, sustained; the checking & examining the accounts not being expressed as obligatory on the principals in the bond, & not to be implied in law.

(2) The mere passive inactivity of the principal to whom a guarantee is given, or his neglect to call the principal debtor to account in reasonable time, & to enforce payment against him, does not discharge the surety; there must be some positive act done to the prejudice of the surety, or such degree of negligence as to imply connivance & amount to fraud. The rule at law & in equity is the same, & is distinguishable from the principles applied to bills of exchange, which depend upon mercantile usage.

(3) The surety guarantees the honesty of the person employed, & is not entitled to be relieved from his obligation, because the employer fails to use all the means in his power to guard against the consequences of dishonesty.—**BLACK v. OTTOMAN BANK** (1862), 15 Moo. P. C. C. 472; 6 L. T. 763; 8 Jur. N. S. 801; 10 W. R. 871; 15 E. R. 573, P. C.

*Annotations:*—As to (2) **Consd.** *Durham Corpn. v. Fowler* (1889), 22 Q. B. D. 391. **Refd.** *Wulff v. Jay* (1872), 41 L. J. Q. B. 322; *Mansfield Union Grdns. v. Wright* (1882), 9 Q. B. D. 683; *Carter v. White* (1883), 25 Ch. D. 666; *Kingston-upon-Hull Corpn. v. Harding* (1892), 41 W. R. 19.

**1449.** —[A surety for a contractor is not discharged from liability, although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer.—**KINGSTON-UPON-HULL CORPN. v. HARDING**, [1892] 2 Q. B. 491; 62 L. J. Q. B. 55; 67 L. T. 539; 57 J. P. 85; 41 W. R. 19; 30 Sol. Jo. 624; 4 R. 7; *sub nom.* *KINGSTON-UPON-HULL CORPN. v. TURNER*, 8 T. L. R. 672, C. A.]

**1450. Fraud of employee—Neglect of employer to supervise conduct—Duty of surety to supervise.**—**CREIGHTON v. RANKIN**, No. 1228, *ante*.

**1451.** —[Neglect must be gross.]—A bond was given by two sureties for the faithful discharge of his duties by an official assignee in bkpcy. Immediately upon his death, by the examination of his books, he was found to be a defaulter to a very large amount. Actions were commenced on the bond against the sureties. One of the sureties sought to restrain the action on the ground of the negligence of the officials

whose duty it was to examine the assignees' accounts, etc. There did not, however, appear to have been any want of compliance with the rules & regulations in bkpcy. by these parties, & the motion for an injunction was refused.

To discharge a surety for the due performance of duties there must be on the part of the obligee an act of connivance or gross negligence amounting to a wilful shutting of the eyes to the fraud, or something approximating to it.—**DAWSON v. LAWES** (1854), Kay, 280; 2 Eq. Rep. 230; 23 L. J. Ch. 434; 22 L. T. O. S. 254; 2 W. R. 213; 39 E. R. 119.

*Annotations:*—**Consd.** *Black v. Ottoman Bank* (1862), 15 Moo. P. C. C. 472; *Durham Corpn. v. Fowler* (1889), 22 Q. B. D. 391. **Refd.** *Kingston-upon-Hull Corpn. v. Harding*, [1892] 2 Q. B. 494.

**1452.** —[Employer warned by surety—Apprenticeship.]—A. put his son apprentice to B. & gave bond for his fidelity, & took a covenant from B. that he would at least once a month, see his apprentice make up his cash. The apprentice embezzled the cash, & B. brought an action on the bond. On a bill by A. to be relieved:—**Held:** A. should be answerable for no more than B. could prove his servant had embezzled in the first month after the embezzlement began.—**MOUNTAGUE v. TIDCOMBE** (1705), 2 Vern. 518; 23 E. R. 933.

*Annotation:*—**Refd.** *M'Taggart v. Watson* (1836), 10 Bl. N. S. 618.

**1453.** —[A father on binding his son apprentice gave a bond for £1,000 for his son's fidelity. The son embezzled £200, which the father paid, but desired the master not to trust his son any more with the cash. The master did trust the apprentice again with the cash, & was negligent in calling him to account. The son embezzled £1,000 more:—**Held:** the father was liable, but not to answer more in the whole than £1,000, including the first £200.—**SHEPHERD v. BEECHER** (1725), 2 P. Wms. 288; Cas. temp. King, 43; 24 E. R. 733, L. C.]

*Annotations:*—**Consd.** *Burgess v. Eve* (1872), L. R. 13 Eq. 450; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666. **Refd.** *Lloyd's v. Harper* (1880), 16 Ch. D. 290.

**1454.** —[—**BURGESS v. EVE**, No. 666, *ante*.]

**1455.** —[Checking accounts.]—**TRENT NAVIGATION CO. v. HARLEY**, No. 1134, *ante*.

**1456.** —[—A. was bound jointly with B., the trustee of a bkpt. estate in Scotland, to the extent of £1,000. The condition of the bond was, that B. should faithfully discharge his office, account, etc. The creditors of the bkpt., according to the practice in Scotland, chose three comrs. to act for them, & superintend the proceedings of the trustee. B., by various contrivances amounting to fraud against the estate, was found in arrear to the amount of £1,000. Whereupon the bond being put in suit against A., he pleaded that the comrs., by neglect & connivance, had caused & permitted the default, or knowing it had concealed it from him. Of this

have had a verdict for something, & the sureties were not discharged.—**McDONALD v. MAY** (1848), 5 U. C. R. 68.—**CAN.**

**1457.** —[—**BYRNE v. MUZZO** (1881), 8 L. R. Ir. 396.—**IR.**

*o.* —[Failure to give notice of irregular acts.]—Defts. were sureties on a bond given to pltf. assocn. by B. for the faithful discharge of his duties as an agent of the assocn. Among such duties was the remittance of all moneys or securities by bank draft, marked cheque, post office order, or by express. B. remitted moneys by his own personal cheques,

**PART IX. SECT. 2, SUB-SECT. 7.—C.**

**1448 I. General rule.**—Where the employer has actual knowledge of dishonest conduct on the part of the person for whom the sureties are responsible, justifying immediate dismissal, & nevertheless retains him in employment, the sureties are discharged from liability for subsequent default, unless informed of all such circumstances as are material to enable them to decide whether they will require the employment to be terminated, or assent to its continuance.—**EXRIGHT v. FALVEY** (1897), 4 L. R. Ir. 397.—**IR.**

**1448 II.** —[—**R. v. PRINGLE** (1872), 32 U. C. R. 308.—**CAN.**

*m.* **Fraud of employee—Retention in office—After knowledge of dishonesty.**—

—Where to an action on a bond against the sureties of a clerk for embezzlement the sureties pleaded that pltf. was damaged of his own wrong in allowing the clerk to remain in his office after he had become aware of the fraud:—**Held:** though the fraud of the clerk was known to pltf. long before he dismissed him, still, as this knowledge could only apply to the moneys taken after such knowledge had been acquired, pltf. should

imputation there was no distinct proof:—*Held*: even on that supposition A. was not discharged.—**M'TAGGART v. WATSON** (1836), 10 Bli. N. S. 618; 3 Cl. & Fin. 525; 6 E. R. 227, 11. L.

**Annotations**:—**Follid**. *Crichton v. Rankin* (1810), 7 Cl. & Fin. 325. **Consd**. *Dawson v. Lawes* (1854), Kay, 280; *Madden v. M'Mullen* (1860), 4 L. T. 180; *Black v. Ottoman Bank* (1862), 15 Moo. P. C. C. 472. **Follid**. *Durham Corp'n. v. Fowler* (1889), 22 Q. B. D. 391. **Refd**. *Berwick Corp'n. v. Oswald* (1853), 1 E. & B. 295; *Mansfield Union Grdns. v. Wright* (1882), 9 Q. B. D. 683; *Kingston-upon-Hull Corp'n. v. Harding*, [1892] 2 Q. B. 494. **Mentd**. *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32.

1457. ————]—**CRIUGHTON v. RANKIN**, No. 1228, *ante*.

1458. ————]—A policy of assurance against any loss by the want of integrity, honesty, or fidelity of one R., in his employment as secretary to the M. Literary & Scientific Institution, was granted by defts. to pltf. The basis of the contract was recited to be a statement in writing by the treasurer of the institution lodged at the office of the co., containing a declaration of the truth of the answers that had been given to the questions contained in the proposal for the policy; & there was a proviso that any fraudulent misstatement or suppression in that declaration should render the policy void from the beginning. The statement referred to contained (*inter alia*) the following questions & answers: "In what capacity do you intend to employ applt.; & with reference to this question will you state, as far as circumstances will permit, the nature of his intended duties & responsibilities?"—"He is secretary of the — Literary Institution, of which I am treasurer."—"The checks which will be used to secure accuracy in his accounts, & when & how often they will be balanced & closed?"—"Examined by finance committee every fortnight":—*Held*: this statement that the accounts of R. would be examined once a fortnight by the finance committee of the institution did not amount to a warranty; & defts. were liable upon the policy for a loss occasioned in consequence of the finance committee neglecting to examine his accounts in the manner specified.—**BENHAM v. UNITED GUARANTEE & LIFE ASSURANCE CO.** (1852), 7 Exch. 711; 21 L. J. Ex. 317; 19 L. T. O. S. 206; 17 J. P. 9; 16 Jur. 691.

**Annotations**:—**Refd**. *Towle v. National Guardian Assoc. Soc. & Albert Life Assoc. & Guarantee Co.* (1861), 5 L. T. 193. **Mentd**. *Re Universal Non-Tariff Fire Insce.*, *Forbes' Claim* (1875), L. R. 19 Eq. 485.

1459. ————]—**BLACK v. OTTOMAN BANK**, No. 1448, *ante*.

1460. ————]—**Rate collector**.]—Deft. as surety gave a bond to the guardians of the poor for the M. Union conditioned for the due discharge by C. of his duties as collector of poor rates for the parish of N. C. absconded, having embezzled part of the rates & allowed others to be lost by not applying for them. The guardians sued deft. for the loss. Deft. admitted his liability as to the sums embezzled, but disputed

his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N. had discharged their statutory duties with reasonable care the loss would not have occurred:—*Held*: pltf. were entitled to recover from deft. the moneys lost through failure of C. to collect them, for there had been no negligence on the part of pltf., & they were not answerable for the negligence of the overseers.—**MANSFIELD UNION GUARDIANS v. WRIGHT** (1882), 9 Q. B. D. 683; 47 L. T. 602; 17 J. P. 228; 31 W. R. 312, C. A.

**Annotation**:—**Mentd**. *Clarke v. Sonnenschein* (1890), 50 L. J. Q. B. 561.

1461. ————]—**Validity of rate Immaterial**.]—**DURHAM CORPN. v. FOWLER**, No. 585, *ante*.

1462. ————]—**Clerk to guardians—Fraudulent increase of salary**.]—Defts. guaranteed to the extent of £300 that the clerk to pltf. would duly & faithfully discharge all & every the duties of his office. Pltf. passed a resolution to increase the salary of the clerk, such increased amount to include remuneration for conducting all future guardians' elections & proceedings connected therewith. The clerk sent the resolution for the approval of the Local Government Board, but, intentionally & without the knowledge of the guardians, omitted the last portion of it. The increase was sanctioned, & the clerk received the larger salary & payments in respect of elections for some years before the omission was discovered:—*Held*: the clerk had not duly & faithfully discharged the duties of his office, & as the resolution passed by the guardians had never been approved by the Local Government Board, the payments in excess of the old salary were *ultra vires*, & pltf. were entitled to recover under the policy of guarantee. **BRAMLEY UNION GUARDIANS v. GUARANTEE SOCIETY** (1900), 61 J. P. 308; 16 T. L. R. 263, C. A.

1463. ————]—**Employee not dismissed—Employers having no power of dismissal**.]—Sureties in a bond for the due performance of his office by a collector of poor rates are not released by his non-dismissal on the obliges becoming aware of his having been in arrear with public money, where such money has not been collected by him in an office held under the obliges; or where the obliges have not power to dismiss him & have done all in their power to procure his dismissal; nor by the neglect of the obliges, on becoming aware of his having been so in arrear, to inform the sureties of the fact, where, from the relationship & transactions between the collector & the sureties, it cannot be supposed that the sureties were ignorant of it.—**CAXTON & ARINGTON UNION v. DEW** (1899), 68 L. J. Q. B. 380; 80 L. T. 325; 43 Sol. Jo. 316.

instead of as directed, & on a number of occasions asked to have such cheques held over for a few days in order to enable him to provide funds to meet them:—*Held*: it was the duty of the assoc. to have notified the sureties of his derelictions of duty, & having failed to do so, & having continued him in their employ with knowledge that he was violating his instructions, they could not recover against the sureties for the default of B.—**CONFEDERATION LIFE ASSOCN. v. BORDEN** (1904), 34 S. C. R. 338.—**CAN.**

p. ————]—**Neglect of employer—To compel debtor to account**.]—**MADDEN**

**v. M'MULLIN** (1860), 4 L. T. 180.—**IR.**  
q. ————]—**Monthly settlements of accounts—Not made by traveller**.]—In an action by an employer against an assoc. for payment of the amount of a sum embezzled by his traveller, it was proved in defence that no monthly settlements had been made between the employer & the traveller, & that the practice had been that, at the end of three months from the date of an order, the employer sent the account, not to the customer direct, but to the traveller for collection:—*Held*: the employer had failed to comply with the conditions of the contract, &

defenders were not liable.—**HAWORTH & CO. v. SICKNESS & ACCIDENT ASSURANCE ASSOCN., LTD.** (1891), 18 R. (Cl. of Sess.) 563; 28 Sc. L. R. 394.—**SCOT.**

r ————]—**Notice to surety of default by principal debtor—To pay monthly rents—(Addition precedent)**.]—**McC. & W.**, defts., entered into a bond conditioned that McC. should pay pltf. certain rent in equal monthly payments, with a proviso "that the municipality, pltf., shall, on default being made by the McC. in the payment of the monthly amount, give notice thereof to the obligors." The

**Sect. 2.—Discharge from liability: Sub-sect. 7, C.; sub-sect. 8, A. & B.]**

**1464. — Related to employer in double capacity—Guaranteed as clerk—Defalcation as customer.]—***Semble*: the surety in a bond conditioned for the good conduct of the principal as a banker's clerk, is not liable for misbehaviour consequent upon his being allowed to become a customer, & to keep an account with the bank.

In an action against a surety on a bond for the good conduct of an individual in his capacity of banker's clerk to *pltf.*s., where it was involved in some doubt whether the alleged misbehaviour was in the capacity of clerk or of customer, the *ct.* being of opinion that the intention of the surety was to guarantee *pltf.*s. merely against the misconduct of the party in his character of clerk, & that *pltf.*s. themselves had caused the difficulty, & imported the doubt into the cause, by suffering the person for whom the guarantee was given to assume the character of customer, refused to set aside a verdict for deft.—*STOVELD v. UPTON* (1836), 6 L. J. C. P. 126.

**1465. — — — — — Guaranteed as overseer—Defalcation as clerk.]—***COSFORD UNION v. POOR LAW & LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCN., LTD.*, No. 1261, *ante*.

**Concealment of fraud.]—***See* Part X., Sect. 4, sub-sect. 2, C., *post*.

#### SUB-SECT. 8. — LOSS OF BENEFIT OF SECURITY HELD BY CREDITOR.

##### A. In General.

Right of surety to benefit of securities held by creditor, *see* Part VI., Sect. 4, sub-sect. 2, B. (c), *ante*.

**1466. Default of creditor.]—**If the case were to happen of sureties being co-obligors in a bond, & calling upon the creditor to sue, & he had forborne to do so; if such a case were to happen, I believe it would be a new one in a *ct.* of equity; but I should think that it would be sufficient to turn the loss upon the creditor (*LORD THURLOW, C.*).—*Ex p. MURE* (1788), 2 Cox, Eq. Cas. 63; 30 E. R. 30, 1 L. C.

**Annotations:—***Reid. Owen v. Homan* (1851), 3 Mac. & G. 378. *Mentd. Williams v. Price* (1824), 1 Sim. & St. 581; *Glyn v. Hood* (1860), 1 De G. F. & J. 331.

**1467. Neglect of creditor.]—**If, by the neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged.—*CAPEL v. BUTLER* (1825), 2 Sim. & St. 457; 4 L. J. O. S. Ch. 69; 57 E. R. 421.

**Annotations:—***Consd. Newton v. Chorlton* (1853), 2 Drew. 333. *Reid. Pearl v. Deacon* (1857), 24 Beav. 186. *Mentd. Creighton v. Rankin* (1810), 7 Cl. & Fin. 325; *Dyson v. Morris* (1812), 1 Haro, 113.

**1468. — — — — —***—**J.*—A. obtained an advance of money from a loan society upon the security of the joint & several promissory note of himself & deft. (who to the knowledge & on the requirement of the society signed the same as surety) & of a bill of sale of A.'s furniture. Certain instalments of the note being in arrear, the lenders seized & sold the goods of A. under the bill of sale, & afterwards sued deft. for the balance:—*Held*: it was competent to deft. to show, by way of equitable defence, that, but for the mismanagement of

*pltf.*s.' agents, the goods of A. would have realised sufficient to satisfy the whole debt.—*MUTUAL LOAN FUND ASSOCN. v. SUDLOW* (1858), 5 C. B. N. S. 449; 28 L. J. C. P. 108; 5 Jur. N. S. 338; 141 E. R. 183.

**Annotations:—***Mentd. Re Davies & Troughton, Ex p. Clennell* (1861), 4 L. T. 60; *Wauthier v. Wilson* (1912), 28 T. L. R. 239.

**1469. — — — — —***—**J.*—A surety, deprived, through the negligence of the guaranteed creditor, of the full benefit of a collateral security, is *pro tanto* discharged.

A. lent B. £1,000. Repayment was secured by an assignment of B.'s equitable interest in settled property; & by a bond to which C., expressly as a surety, was joined with B. A. transferred the mtge. & bond to D. Neither A. nor D. gave notice of the mtge. to the trustees of the settlement, & part of the property was in consequence taken out of the mtge.:—*Held*: C. was entitled to set off the value of the property abstracted against the amount due under his bond.—*STRANGE v. FOOKS* (1863), 4 Giff. 408; 2 New Rep. 507; 8 L. T. 789; 9 Jur. N. S. 913; 11 W. R. 983; 66 E. R. 765.

**Annotation:—***Folld. Wulff v. Jay* (1872), L. R. 7 Q. B. 756.

**1470. — — — — —***—**J.*—A creditor who holds several securities for his debt, partly given by the principal debtor & partly by a surety, must retain all securities given by the principal debtor for the benefit of the surety, & if he neglect to do so he discharges the surety.—*MERCHANTS BANK OF LONDON v. MAUD* (1870), 18 W. R. 312; *reversd.* on other grounds (1871), 19 W. R. 657, L. C.

##### B. What Amounts to Loss of Benefit.

**1471. Neglect of statutory formalities—Failure to register memorial of annuity.]—**(1) Where an annuity bond granted by two becomes void by the neglect of the grantee in not registering a memorial under the statute he cannot recover back any part of the consideration money from the one who was known to be only a surety for the other, & had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it.

(2) As against a surety, the contract cannot be carried beyond the strict letter of it (*BULLER, J.*).—*STRATON v. RASTALL* (1788), 2 Term Rep. 366; 100 E. R. 197.

**Annotations:—***As to* (1) *Reid. Williamson v. Gould* (1823), 8 Moore, C. P. 221; *Wulff v. Jay* (1872), L. R. 7 Q. B. 756. *Generally, Mentd. Graves v. Key* (1832), 3 B. & Ad. 313; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127; *Sinclair v. Brougham*, [1914] A. C. 398.

**1472. — — — — — Loss of benefit of execution.]—**

A surety is discharged where the creditor, by neglecting the statutory formalities, loses the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he has proceeded to enforce upon a notice by the surety.—*WATSON v. ALLCOCK* (1853), 4 De G. M. & G. 242; 1 Eq. Rep. 231; 22 L. J. Ch. 858; 21 L. T. O. S. 204; 17 Jur. 568; 1 W. R. 399; 43 E. R. 499, L. J.

**Annotation:—***Consd. Lawrence v. Walmsley* (1862), 12 C. B. N. S. 799.

**1473. — — — — — Failure to register bill of sale.]—***WULFF v. JAY*, No. 1431, *ante*.

**1474. Abandonment of execution.]—***MAYHEW v. CRICKETT*, No. 1565, *post*.

payments were to be made on the last day of each month, beginning with the last of January, 1861. The first payment was made Feb. 1, the next, Mar. 8, the third Apr. 19, the fourth June 14, & some irregular

amounts between that day & Nov. 15 were paid. The first notice given was on Aug. 15, 1861, the second on Sept. 28, & the last on Dec. 28, 1861:—*Held*: the proviso for notice was to be considered as a condition precedent to

defts.' liability, & notice not having been given within a reasonable time, they were relieved.—*CHATHAM CORPN. v. MCCREA* (1872), 12 C. P. 352.—*CAN.*



**1475. — After agreement by surety to pay.]—** *READE v. LOWNDES*, No. 1312, *ante*.

**1476. Abandonment of distress—Rent paid by surety.]—***Re RUSSELL, RUSSELL v. SHOOLBRED*, No. 825, *ante*.

**1477. Sale of security—Within terms of pledge.]—**A. drew five bills in favour of B. on F. & Co., who accepted the same, & got them discounted by the Bank of Bengal, & on their becoming due procured their renewal. F. & Co. subsequently drew three bills on the Bank of Bengal; & for securing as well the repayment of the principal sum due on these bills & interest, as of all & every sum or sums which the bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of Chili copper, of a larger amount in value than the advances then made. By a condition in these bills, the bank were authorised, in default of payment within the time stipulated, to dispose of the copper by public or private sale, & to reimburse themselves the principal & interest due thereon. Shortly afterwards, F. & Co. failed, & assignees of their estate & effects were appointed under 9 Geo. 4 (c. 73). On presentation to A. of the first of the renewed bills, he served notice on the bank not to part with the securities so deposited with them, alleging that the bills drawn & renewed by him were accommodation bills for which he had not received any consideration, & were renewed on the faith of the securities being applicable to their discharge. The assignees of F. & Co. redeemed the copper by paying to the bank the amount of the principal & interest due upon the bills drawn by F. & Co. All the bills drawn by A. were dishonoured, & the Bank of Bengal brought an action against A. for their amount. On a bill filed by A., the bank were restrained by injunction from proceeding with the action at law. On appeal: *Held*: discharging the injunction, the redemption of the securities was a sale within the condition contained in the deposit bills, & such sale was not a release to A. as surety for the previous bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the bank, of the principal & interest due upon the bills.—*BANK OF BENGAL v. RADAKISSEN MITTER* (1842), 4 Moo. P. C. C. 140; 3 Moo. Ind. App. 19; 13 E. R. 255, P. C.

**1478. Sale of mortgaged property—Within term of mortgage deed.]—**Aplts. having become sureties on the faith of a mtge. granted by the principal debtor to his creditor, claimed to be released wholly or *pro tanto* from liability on the ground that creditor had without notice to them sold parts of the mtged. property in a manner unwarranted by the terms of the mtge. deed, & that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection:—*Held*: on the evidence the sale was effected by the mtgor., although with the previous consent of the mtgee., in the due course of his management & in a manner contemplated by the mtge. deed, & the liability of the sureties was not affected thereby.—*TAYLOR v. BANK OF NEW SOUTH WALES* (1886), 11 App. Cas. 596; 55 L. J. P. C. 47; 55 L. T. 444; 2 T. L. R. 742, P. C.

*Annotations:—Reid, Greenwood v. Francis*, [1899] 1 Q. B. 312; *Egbert v. National Crown Bank*, [1918] A. C. 903.

**1479. Assignment of security by mortgagee—Without notice to surety.]—**A brother & sister entitled in moieties to a reversionary interest in

a fund in ct. mortgaged it to secure a debt of the brother, the sister joining, & being described in the security as a surety for the brother. The mtgee. obtained a stop order, & afterwards on his marriage assigned the mtge. debt to trustees, who however neither obtained a stop order nor gave notice to the sister of the settlement. On a petition of the brother stating that the tenant for life had assigned to him her life interest in his share of the fund, & that he had paid a portion of the mtge. debt, & praying for a transfer of his share of the fund, a solr. who had acted for the sister & for the mtgee. on the occasion of the mtge., took upon himself without authority to instruct counsel to appear for the sister & her husband, & also for the mtgee., who was abroad, & to consent to or not oppose the petition. Upon the hearing of this petition the fund was ordered to be, & was transferred out of ct.: *Held*: neither the omission of the trustees to obtain a stop order, nor any of the above circumstances, operated to discharge the liability of the surety's share, but it continued subject to the payment of the mtge. debt.

The creditor enters into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them. The assignee acquires by the assignment all the rights of the assignor (*TURNER, L.J.*). *WHEATLEY v. BASTOW* (1855), 7 De G. M. & G. 261; 3 Eq. Rep. 859; 21 L. J. Ch. 727; 25 L. T. O. S. 191; 1 Jur. N. S. 1121; 3 W. R. 510; 11 E. R. 102, L. J.

*Annotations:—Distd. Strange v. Look* (1863), 1 Giff. 408. *Consd. Bolton v. Salmon*, [1891] 2 Ch. 18; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 834.

**1480. Release of mortgage debt.]—***PLEDGE v. BUSS*, No. 810, *ante*.

**1481. Security parted with to debtor.]** *NEWTON v. CHORLTON*, No. 809, *ante*.

**1482. — — — On undertaking to return.]—**A. was security for B. on a joint & several bond to Z. Certain title deeds of B. were deposited with Z. as a collateral security for the payment of the debt & interest secured by the bond. A. on a given day, offered to pay Z. the amount due on having B.'s title deeds delivered up to him. This was refused by Z. Subsequently Z. lent B. the title deeds to enable him to come to an arrangement with A. his surety, as to paying off the amount of the bond, on an undertaking to return them to Z. which he had done: *Held*: this was not such a dealing with the principal as discharged the surety from the debt & interest due on the bond.—*BUSHELL v. COLLETT* (1862), 6 L. T. 20.

**1483. Surrender of policy of insurance On bankruptcy of debtor.]** *COATES v. COATES*, No. 631, *ante*.

**1484. — — — .] Deft. became surety for the repayment of a sum of money advanced by plff. to P. Under the terms of the contract of suretyship P. deposited with plff. a policy of insurance on his life by way of collateral security. P. failed to pay the premiums on the policy, which in consequence lapsed. Subsequently to the expiry of the policy P. became bkpt., & plff. proved against P.'s estate for the whole amount of the debt due to her, without putting any value on the policy, which was consequently ordered by the Ct. of Bkpey. to be delivered up to the trustee. The question was whether plff., by adopting that course, had discharged deft. from his liability as surety:—*Held*: she had not, & for two reasons: first, that deft.'s position had not been altered by the surrender of the policy**



*Sect. 2.—Discharge from liability: Sub-sect. 8, B, C. & D.; sub-sect. 9, A. & B. (a) & (b).]*

to the trustee, for, having lapsed, it was a mere piece of waste paper of no marketable value whatever; & secondly, that, even assuming it had some value, & could be said to be a security, *pltf.* was none the less entitled to exercise the option given by *Bkpcy. Act*, 1869 (c. 71), of surrendering the security to the trustee & proving for the whole debt, because there happened to be a surety for the payment of that debt.—*RAINBOW v. JUGGINS* (1880), 5 Q. B. D. 422; 49 L. J. Q. B. 718; 43 L. T. 346; 44 J. P. 829; 29 W. R. 130, C. A.

*Annotation:—Reid, Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 511.

**1485. Depreciation in value of security—Not occasioned by act of creditor.]—**As between principal & surety, if the primary security prove worthless, whether it was so originally or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original & primary security was occasioned by the act of the creditor.

In *Mar.* a trader assigned all his goods, etc., to B., to secure a composition to his creditors, & B. became liable for the payment. The wife of the trader became surety to B. in respect to her separate estate. In *Nov.* the trader was made *bkpt.*, & B. entered into an arrangement by which he gave up the goods to the assignee:—*Held*: B.'s assignment was an act of *bkpcy.*, & the wife's separate estate as surety was not released.—*HARDWICK v. WRIGHT* (1865), 35 Beav. 133; 55 E. R. 845.

**1486. Failure to complete bill of exchange.]—***CARTER v. WHITE*, No. 479, *ante*.

#### *C. Extent of Discharge.*

**1487. Surety discharged pro tanto.]—***CAPEL v. BUTLER*, No. 1167, *ante*.

**1488. —.]—***STRANGE v. FOOKS*, No. 1469, *ante*.

**1489. —.]—***WULFF v. JAY*, No. 1431, *ante*.

**1490. —.]—***DALE v. POWELL, POWELL v. DALE & HOOD*, No. 821, *ante*.

#### *D. Security given by Co-Surety.*

**1491. Extent of creditor's duty—Not to waste security.]—***Deft.* & two others agreed to become sureties to *pltf.* for the debt of a fourth person, & all entered into a joint & several covenant for payment of the debt of £1,000 & interest; one of the sureties gave on his own account an extra collateral security for the same debt, by assigning an annuity for £600, which was not paid, but accounted for. The principal debtor also gave a bill of sale to *pltf.* under which he took possession, & which he afterwards gave up to one of the sureties on receiving bills for £200 from him:—*Held*: *deft.*, as one of the three sureties, was liable for one-third of the amount of the original debt & interest, notwithstanding the securities given & payments made by his co-sureties; the two other sureties having in effect paid their shares, *deft.* was liable to *pltf.* for his share.—*MARGRETT v. GREGORY* (1862), 6 L. T. 513; 10 W. R. 630.

#### **PART IX. SECT. 2, SUB-SECT. 8.—C.**

**1487 i. Surety discharged pro tanto.]—**Where the creditor holds collateral securities for all the parties interested, & is bound to use ordinary diligence

in the care of them, & upon payment by the surety to assign them to him; & if the creditor has, without the knowledge or consent of the surety, negligently suffered the securities to be diverted from the purpose of the

#### **SUB-SECT. 9.—DISCHARGE OF PRINCIPAL DEBTOR BY CREDITOR.**

##### *A. In General.*

**1492. When surety discharged—Security given by surety—For part of debt.]—**In general, a release to the principal debtor is, in equity, a release to the surety; but if the surety has, previously to the release given by the creditor, paid part of the debt, & given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety.—*HALL v. HUTCHONS* (1833), 3 My. & K. 426; 3 L. J. Ch. 45; 40 E. R. 162.

**1493. ——— & time given by creditor.]—***DEFRIES v. SMITH*, No. 1418, *ante*.

**1494. ——— Suretyship not expressed in guarantee—Joint liability.]—***ASHBEE v. PIDDUCK*, No. 739, *ante*.

**1495. ———.]—***BROOKS v. STUART*, No. 704, *ante*.

**1496. ——— Release obtained by fraud—Of debtor.]—**To an action on a guarantee, *deft.* pleaded a release by deed of the principal debtor, without *deft.*'s consent. Replication, that *pltf.* was induced to execute the deed by the fraud, covin, & misrepresentation of the principal debtor. The judge told the jury, that if any misrepresentation by the principal debtor had operated on *pltf.*'s mind, so as to make him desire the execution of the deed, & consequently, persuade the principal debtor to execute it, that would be a sufficient inducement to support the replication:—*Held*: no misdirection, & also, on motion in arrest of judgment, the replication was good.—*RUSSELL v. LEWIS* (1849), 13 L. T. O. S. 158.

**1497. ——— ——— Release rescinded.]—**A debtor & his surety persuaded the creditor to accept from the debtor a transfer of a *mtge.*, which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterwards the creditor, at the request of the surety, who suggested to him that he was secured by the *mtge.*, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew that they had refused to do, unless the release was given:—*Held*: the creditor was entitled to be restored to his rights against the surety.—*SCHOLEFIELD v. TEMPLER* (1859), 4 De G. & J. 429; 34 L. T. O. S. 36; 7 W. R. 635; 45 E. R. 166, L. C. & L. J.J.

*Annotations:—Reid, Re McCallum, McCallum v. McCallum*, [1901] 1 Ch. 113. *Mentd.* Heath v. Crealock (1874), 31 L. T. 650; Manks v. Whiteley, [1911] 2 Ch. 448; Stoddart v. Union Trust (1911), 81 L. J. K. B. 140.

**1498. ——— Release of debtor—Subsequent to surety's agreement to pay.]—***READE v. LOWNDES*, No. 1312, *ante*.

**1499. ———.]—***HIDSON v. BARCLAY*, No. 1534, *post*.

**1500. ——— Absolute release.]—***COMMERCIAL BANK OF TASMANIA v. JONES*, No. 219, *ante*.

**1501. Discharge not a fraud against surety—If remedies reserved against him.]—**To release the principal debtor is no fraud against the surety,

pledge, to the prejudice of the surety's right to be subrogated, the surety will be discharged to the extent of the actual loss.—*ROULEY v. GORMAN & CORAN* (1920), 47 O. L. R. 420; 18 O. W. N. 173; 55 D. L. R. 58.—*CAN.*

if it expressly provided that the creditor may, notwithstanding the release, pursue the surety, for such a course induces the surety subsequently to go against the principal.—*Re NATAL INVESTMENT CO., NEVILL'S CASE* (1870), 6 Ch. App. 43; 40 L. J. Ch. 1; 23 L. T. 577; 19 W. R. 36, L. J.J. *Annotations*:—*Consd.* *Re Contract Corp.*, *Hudson's Case* (1871), L. R. 12 Eq. 1. *Refd.* *Roberts v. Crowe* (1872), L. R. 7 C. P. 629. *Mentd.* *Kellock v. Enthoven* (1874), L. R. 9 Q. B. 241.

### B. What Amounts to Discharge.

#### (a) In General.

**1502. Apprenticeship guarantee—Not release to apprentice—Before breach of condition.]—ANON.** (1573), 3 Leon. 45; 71 B. R. 530.

Discharge of bond generally, see BONDS, Vol. VII., pp. 228 *et seq.*

**1503. Payment to debtor—By creditor—Mistake.]—**A surety to the East India co. discharged by payment of a balance to the principal under an erroneous settlement by the officers of the co. without their authority or knowledge. The East India co. having compelled payment from a surety in India by their power over him, as one of their servants, without an account or proceeding against the principal (though solvent), & otherwise under harsh circumstances, he was restored to the same situation by a decree for repayment with interest at 5 per cent. upon giving security for re-payment, in case in a future suit by the co. he should be held liable.—*LAW v. EAST INDIA CO.* (1709), 4 Ves. 824; 31 B. R. 427.

*Distd.* *M'Taggart v. Watson* (1836), 1 B. N. S. 618. *Consd.* *Newton v. Chorlton* (1853), 2 Drew. 134. *Distd.* *Kingston-upon-Hull Corp. v. Harding* (1892) 2 Q. B. 494.

**1504. Release of partnership debt—Release executed by one partner only.]—**(1) Demurrer to a bill by a surety, stating, that two partners having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, overruled.

(2) *Qu.*: whether a release so executed binds all the partners.

(3) It has always been held that time given to the principal releases the surety (LORD ELDON, C.).—*HAWKSHAW v. PARKINS* (1819), 2 Swan. 539; 36 E. R. 723, L. C.

*Annotation*:—As to (1) *Refd.* *Cooper v. Evans* (1867), 36 L. J. Ch. 131.

**1505. ——— To whom separate debt owing.]—**

—To an action of covenant by a joint-stock banking co-partnership, on a guarantee given by deft. to secure advances made by the co. to M., M. & Co., carrying on business under the name of M., M., L., & B., of the first part, W., H., & O., of the second part, & the several persons or partnership firms who should execute the said indenture, being creditors of M., M., L., & B., of the third part, H., being a member & partner in the said banking co-partnership, released M., M., L., & B., from all actions, debts, etc. Def't., in support of his plea, gave in evidence a composition deed, made between M., M., L., & B., of the first part, W., H., & O., of the second part, & the several persons or partnership firms, being creditors of M., M., L., & B., who should have executed or who should execute the said composition deed, of the third part. The deed, after reciting that M., M., L., & B., were indebted to W., H., & O., & to the several parties to the deed of the third part, & being unable to pay the said debts, had conveyed all their property & effects to W., H., & O., in trust for payment of their

debts, stated, that in consideration thereof, each of the said creditors, parties to the said deed of the second & third parts, did for themselves, their heirs, exors., etc., & partners, release M., M., L., & B., from all actions, debts, demands, etc. At the date of this release, & separate debt of £2 15s. was due from M. to H., & H. at the date of the release, was a shareholder in the joint-stock banking co-partnership. H. executed the deed in his own name:—*Held*: the plea was not proved, the release from M., M., L., & B., not including the debt due from M. & Co. to the joint-stock banking co., but applying only to debts due to such partnership firms as should execute the deed of the third part.—*BAIN v. COOPER* (1842), 9 M. & W. 701; 11 L. J. Ex. 325; 152 B. R. 296.

**1506. Determination of contract with debtor—Hire purchase agreement—Possession of goods resumed.]—**Pl'tfs. let to G. certain chattels. The sum of £125 was paid in advance. The balance, £243, was to be paid by monthly instalments. There was a power to seize in case of default. If all instalments were met, the chattels were to belong to G. Default was made, & pl'tfs. seized. Def't., in consideration of the return of the chattels to G., guaranteed the remaining instalments. Further default was made as to two instalments. Pl'tfs. again seized, & afterwards sued def't. for the amount of the two instalments:—*Held*: pl'tfs. had determined the original contract, & could not recover from the surety.—*HEWISON v. RICKETTS* (1894), 63 L. J. Q. B. 711; 71 L. T. 191; 10 L. 558, D. C.

*Annotation*:—*Mentd.* *Brooks v. Beinstein*, [1909] 1 K. B. 98.

**1507. Judgment against debtor Recovery of interest Accrued before & after judgment.]—***FABER v. LATHOM* (EARL), No. 607, *ante*.

#### (b) Discharge by Operation of Law — of Debtor.

See Bkpey. Act, 1914 (c. 59), ss. 16, 28, 54 (2).

**1508. Debtor discharged from bankruptcy—Surety not discharged.]—**The grantor of an annuity who is discharged out of custody under 51 Geo. 3, c. 125, is discharged, both as to his person & property from all future payments of the annuity; but the act is no discharge of his sureties, or of specific securities.—*COWLEY v. BUSSELL* (1812), 4 Taunt. 100; 128 B. R. 407.

*Annotations*:—*Refd.* *Abbott v. Bruce* (1839), 7 Scott, 753. *Mentd.* *Mence v. Graves* (1813), 4 Taunt. 851.

**1509. ———.]—DUNCAN v. SUTTON**, No. 1510, *post*.

—*See, further*, BANKRUPTCY, Vol. IV., pp. 587–588, Nos. 5373–5377.

**1510. Guarantee given after bankruptcy—Consent of sureties to creditor proving for debt—No dividend paid.]—**S. being in custody under a *ca. sa.* at the suit of pl'tf., a fiat in bkpey. issued against him, & he afterwards procured his discharge by giving a warrant of attorney with two sureties for the amount of the judgment. At the time of the execution of the warrant of attorney, one of the sureties requested pl'tf. to prove for the amount under the fiat, which was accordingly done. Judgment having been entered up on the warrant of attorney, the ct. refused upon a summary application to exonerate sureties.

The sureties would still be liable though the bkpt. were discharged (TINDAL, C.J.).—*DUNCAN v. SUTTON* (1835), 1 Bing. N. C. 431; 1 Scott, 338; 4 L. J. C. P. 161; 131 E. R. 1183.

**1511. Composition with creditors.]—***Re RENTON*, *Ex p. GLENDINNING*, No. 1555, *post*.

**Sect. 2.—Discharge from liability: Sub-sect. 9, B. (b), (c) & (d).]**

**1512. — Agreement to give up collateral securities—Consent of all creditors—Necessity for proof.]**—In an action on a note against a surety, deft. pleaded that it was made by three persons as sureties, & a fourth as principal: that the principal had compounded with her creditors; & that pltf. & other creditors mutually agreed with the principal & with each other, to accept the composition in satisfaction of all debts due to them from the principal, & of all demands in respect of such debts:—*Held*: it was an essential part of deft.'s proof in support of that plea, that all the creditors were parties to the agreement for giving up collateral securities; & the evidence being that one of the creditors took his money & went away before it had been finally settled whether pltf. would give up the note upon which the action was brought, the plea was not proved.—*VINCENT v. DOVE* (1817), 8 L. T. O. S. 411.

**1513. — Alleged misapprehension—As to capacity in which executed—Legal effect of deed.]**—Declaration on a guarantee by deft. for payment of goods, supplied by pltf.s. to J. Plea, that after J. became indebted to pltf.s., J. being also indebted to other persons, by an indenture between J. of the first part; E. & B. (one of pltf.s.) trustees, for themselves & the rest of the creditors, of the second part; & the several other persons whose names & seals were thereunto subscribed & set, being creditors of J. of the third part; after reciting that J. was indebted to the parties thereto of the second & third parts, in the several sums set opposite to their names in the schedule thereunder written which he was unable to pay in full; it was witnessed, that J. assigned all his estate & effects to the said trustees upon trust to pay ratably & without preference to themselves & their partners & the parties thereto of the third part, the sums set opposite their names in the schedule; & in consideration of the assignment the several creditors, parties thereto of the second & third parts, released J. from all debts which they or their partners might have against J. up to the date thereof. Replication on equitable grounds: that B. executed the deed in his character of trustee, & not in his character of creditor, & that he did so merely for the purpose of declaring the trusts of the deed, & not with any intention of releasing the debt; that he did not sign or seal the schedule nor was the debt of pltf.s. contained therein; & that if the deed operated in law as a release, it was executed by mistake, & in ignorance that such would be its legal effect. On demurrer to the replication:—*Held*: the release being general in its terms, the execution of the deed by B. operated as an extinguishment of the debt due to pltf.s.; & the facts disclosed by the replication did not afford any answer to the plea on equitable grounds.—*TREDE v. JOHNSON* (1856), 11 Exch. 840; 25 L. J. Ex. 110; 156 E. L. 1073.

*Annotations*:—*Ridd. Vorley v. Barrett* (1856), 26 L. J. C. P. 1. *Mentd. Exchange Bank of Yarmouth v. Blothen* (1885), 10 App. Cas. 293.

**1514. — Expressed to be analogous to bankruptcy proceedings.]**—To an action on a bond deft. pleaded that it was the joint & several bond of himself, & J. & was executed by him as surety only for J.; that afterwards a composition deed was made between J. of one part & pltf. & another on behalf of all the creditors of J. of the other part, whereby J. conveyed to the parties of the second part all his estate to be administered for

the benefit of his creditors "in like manner" as if J. had been adjudged bkpt.; & each of the creditors released J. from his debts "in like manner as if he had obtained a discharge in bkpcy."; & that pltf. executed this deed without the consent of deft. On demurrer:—*Held*: a good plea.—*CRAGOE v. JONES* (1873), L. R. 8 Exch. 81; 28 L. T. 36; 21 W. R. 408; *sub nom. GRAGOE v. JONES*, 42 L. J. Ex. 68.

*Annotation*:—*Distd. Ellis v. Wilmot* (1871), L. R. 10 Exch. 10.

**1515. — Winding up of company—Scheme of arrangement.]**—A scheme of arrangement sanctioned by the 1870 (c. 104), is an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for the winding up, whether voluntary or under the ct., & it is by operation of law that the scheme becomes effective to relieve the co. & its contributories from further liability than that which is contemplated or imposed by the scheme; their discharge being effected by the stay of actions imposed by Cos. Act, 1862 (c. 89), s. 87, after a winding-up or supervision order, & by an order to stay under sect. 138 of the same Act in the case of a voluntary winding up coupled with the stay of the winding-up proceedings excepting so far as necessary for carrying out the scheme. It is, therefore, unnecessary to insert in the scheme a reservation of the rights of sureties for the co.'s debts, or to insert in the order sanctioning it, at all events in a winding-up by order or under supervision of the ct., any express words staying proceedings by creditors, or discharging contributories from further liability than that imposed by the scheme.

Where the scheme contemplates the formation of a new co. to take over the assets of the liquidating co., & shareholders in the old co. are allowed to take shares, not fully paid up, in the new co. in respect of shares as to which they are liable in the winding up, the ct. may, as a condition of sanctioning the scheme, require the insertion, in the memorandum of assocn. of the new co., of a clause preventing them from escaping liability by transferring their new shares.—*Re LONDON CHARTERED BANK OF AUSTRALIA*, [1893] 3 Ch. 540; 62 L. J. Ch. 841; 69 L. T. 593; 42 W. R. 14; 9 T. L. R. 590; 37 Sol. Jo. 670; 3 R. 696.

*Annotations*:—*Consd. Mortgage Insec. Corp'n. v. Pound* (1895), 64 L. J. Q. B. 394. *Mentd. Re Canning Jarrah Timber Co.* (1900), 69 L. J. Ch. 416; *Re Tea Corp'n.*, *Sorsbie v. Tea Corp'n.*, [1904] 1 Ch. 12.

**— Rights reserved against surety.]**—*See* Sub-sect. 9, C., *post*.

**— Sureties to bills of exchange.]**—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 408–410, Nos. 2654–2667.

**—.]**—*See, further, BANKRUPTCY*, Vol. V., pp. 1190–1194, Nos. 9612–9638.

**Bankrupt lessee—Termination of lease.]**—*See* Nos. 1518–1522, *post*.

(c) *Surety for Lessor.*

**1516. Termination of lease—Performance of covenants.]**—A lease was granted to A. for fourteen years, with a proviso for terminating the lease at the end of seven if the landlord should so desire on his giving notice of his desire in writing; B. joined in the covenant as surety. The landlord gave a notice, in terms a notice to quit not expressing in terms his desire to terminate the tenancy under the proviso but referring to the

lease & its determinable quality :—*Held* : this was a termination of the lease under the proviso & discharged the surety.—*GIDDENS v. DODD* (1856), 3 Drew. 485 ; 25 L. J. Ch. 451 ; 20 J. P. 580 ; 4 W. R. 377 ; 61 E. R. 988.

1517. ——— **New tenancy.**—*TAYLEUR v. WILDIN*, No. 588, *ante*.

1518. ——— **Bankruptcy of lessee.**—If a surety enter into a bond with a principal conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bkpt. & be discharged under 49 Geo. 3, c. 121, s. 19.—*INGLIS v. MACDOUGAL* (1817), 1 Moore, C. P. 190.

*Annotations* :—*Refd.* *Tuck v. Fyson* (1829), 6 Bing. 321 ; *Harding v. Preece* (1882), 9 Q. B. D. 281.

1519. ——— **Where a lessee becomes bkpt., a surety joined in the lease with him is liable to the lessor for breaches of covenant occurring between the date of the commission, & the delivery up of the lease by the lessee under 6 Geo. 4, c. 16, s. 75.**—*TUCK v. Fyson* (1829), 6 Bing. 321 ; 3 Moore & P. 715 ; 8 L. J. O. S. C. P. 10 ; 130 E. R. 1304.

*Annotations* :—*Refd.* *Harding v. Preece* (1882), 9 Q. B. D. 281 ; *Stacey v. Hill*, [1901] 1 K. B. 660.

1520. ——— **Lease disclaimed.**—A disclaimer by the trustee in a bkpty. of a lease or other onerous property of the bkpt. operates as a surrender only so far as is necessary to relieve the bkpt. & his estate & the trustee from liability, & does not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed.

Take the case of a lease with a surety for the payment of rent. Could it ever have been intended that the bkpty. of the lessee was to release the surety (*JAMES, L.J.*)—*RE LEVY, Ex p. WALTON* (1881), 17 Ch. D. 746 ; 50 L. J. Ch. 657 ; 45 L. T. 1 ; 30 W. R. 395, C. A.

*Annotations* :—*Consd.* *Harding v. Preece* (1882), 9 Q. B. D. 281. *Mentd.* *Re Clarke, Ex p. East & West India Dock Co.* (1881), 17 Ch. D. 759 ; *Re Latham, Ex p. Glegg* (1881), 19 Ch. D. 7 ; *Re Morris, Ex p. Hart Dyke* (1882), 22 Ch. D. 410 ; *Hill v. East & West India Dock Co.* (1884), 9 App. Cas. 448 ; *Wood v. Hayes* (1885), 1 T. L. R. 207 ; *Re Cock, Ex p. Shilson* (1887), 20 Q. B. D. 313 ; *Heritable Reversionary Co. v. Millar*, [1892] A. C. 598 ; *De Vesci v. O'Connell*, [1908] A. C. 298 ; *O'Grady v. Wilmut*, [1916] 2 A. C. 231 ; *It. v. Halliday*, [1917] A. C. 260 ; *Tozer v. Viola*, [1918] 1 Ch. 75 ; *Victoria City Corp. v. Vancouver Island (Bp.)*, [1921] 2 A. C. 381 ; *Wise Lansdell*, [1921] 1 Ch. 420.

1521. ——— **Pltf. being lessee of a farm for a term of years assigned the lease to P., taking the covenant of deft. as surety for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bkpt., & his trustee having obtained the requisite leave of the ct. disclaimed all interest in the lease. Subsequently the lessor demanded from pltf. the half-year's rent accruing after the bkpty. Pltf. paid the rent & brought an action to recover the amount from deft. under his covenant. Neither pltf. nor deft. had entered upon or taken possession of the farm :—*Held* : pltf. was entitled to recover, on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve the bkpt., his estate, & the trustee, from liability without otherwise affecting third parties, & that pltf. as lessee remained liable for the rent & had his remedy over against deft. as the bkpt.'s surety.**—*HARDING v. PRECEE* (1882), 9 Q. B. D. 281 ; 51 L. J. Q. B.

515 ; 47 L. T. 100 ; 46 J. P. 646 ; 31 W. R. 42, D. C.

*Annotation* :—*Distd.* *Stacey v. Hill* (1900), 69 L. J. Q. B. 796 (*see* [1901] 1 K. B. 660).

1522. ——— **Deft. had guaranteed the payment of rent which might from time to time be in arrear for twenty-one days under a lease. There had not been any underlease or assignment of the lease. The lessee having become bkpt., the trustee in bkpty. disclaimed the lease. The lessor sued deft. for an amount which he claimed as rent in arrear in respect of a period subsequent to the disclaimer :—*Held* : the effect of Bkpty. Act, 1883 (c. 52), s. 55 (2), being that the lease was determined from the date of the disclaimer as between the lessor & the lessee, the liability of deft. for rent *in futuro* was also determined, & the action was not maintainable.**—*STACEY v. HILL*, [1901] 1 K. B. 660 ; 70 L. J. K. B. 435 ; 81 L. T. 410 ; 49 W. R. 390 ; 17 T. L. R. 311 ; 45 Sol. Jo. 325 ; 8 Mans. 169, C. A.

1523. ——— **Dissolution of company.**—A lease to a corpn. for a term of years determines if the corpn. is dissolved without having assigned the lease. On dissolution of the corpn. the lease does not vest in the Crown as *bona vacantia*, but the reversion is accelerated & the land reverts to the lessor.

Where a lease was made to a limited co. & payment of the rent during the term was guaranteed by sureties, on dissolution of the co. under Cos. Act, 1862 (c. 89), ss. 142, 143 : *Held* : the lease, not having been assigned, had determined & with it the liability of the sureties.—*HASTINGS CORPN. v. LETTON*, [1908] 1 K. B. 378 ; 77 L. J. K. B. 149 ; 97 L. T. 582 ; 23 T. L. R. 456 ; 15 Mans. 58, D. C.

*Annotation* :—*Refd.* *Woking U. C. (Basingstoke Canal) Act*, 1911, [1911] 1 Ch. 300.

#### (d) *Covenant Not to Sue.*

Covenant not to sue on bond, *see* BONDS, Vol. VII., p. 232.

1524. **What amounts to covenant not to sue**  
**Parol declaration of intention.**—*CROSS v.*  
*No. 1360, ante.*

1525. ——— **Release of debtor - Rights reserved against surety.**—A. & B. entered into a joint & several bond, conditioned for the payment of all moneys due by B. to a bank. After the making of the bond the bank, without the privy or consent of B., executed a deed, whereby they in terms released B. from all actions, etc., with a proviso that nothing therein contained was to extend to prevent the bank from suing any other person than B., who might be liable to make good to the bank any money due from B., or as being jointly or severally bound with B. in any bond, etc., as if the deed had not been executed, it being understood & agreed that, as regards any such suits, the deed should not operate or be pleaded in bar or as a release :—*Held* : (1) this deed operated only as a covenant not to sue B., & not as a release ; (2) A. was not discharged by the execution of that deed without his consent ; the effect of a covenant not to sue the principal debtor qualified by a reserve of the remedies against a surety being to allow the surety to retain all his remedies over against the principal, & the covenant not to sue operating only so far as the rights of the surety may not be affected.—*PRICE*

#### PART IX. SECT. 2, SUB-SECT. 9. — B. (d).

a. *Effect of covenant—Surety not discharged—Express reservation of*

*rights against surety.*—A covenant not to sue entered into by a creditor with the principal debtor, without the surety's consent, but reserving all

remedies by the creditor against others, does not discharge such surety.—*HALL v. THOMPSON* (1859), 9 C. P. 257.—*CAN.*

**Sect. 2.—Discharge from liability: Sub-sect. 9, B. (d), (e) & (f), & C. (a).]**

v. BARKER (1855), 4 E. & B. 760; 3 C. L. R. 927; 24 L. J. Q. B. 130; 25 L. T. O. S. 51; 1 Jur. N. S. 775; 119 E. R. 281.

*Annotations*:—As to (1) *Reid*, Duck v. Mayen, [1892] 2 Q. B. 511. As to (2) *Reid*, Bailey v. Edwards (1864), 4 B. & S. 761; Bateson v. Gosling (1871), L. R. 7 C. P. 9.

1526. ————.]—CURREY v. ARMITAGE (1858), cited 4 C. B. N. S. 221; 6 W. R. 516; 140 E. R. 1068.

1527. ————.]—Declaration by drawee against acceptor on a bill of exchange. Plea. A composition deed made between deft. of the first part, a trustee of the second part, & the executing or assenting creditors on behalf of themselves & all the creditors of deft. of the third part, by which deft. covenanted with the trustee to appropriate half of the future net income from his profession of attorney until 5s. in the pound should be realised & paid to his creditors (the amount of such income to be ascertained & paid at certain times therein mentioned), & the creditors covenanted with deft. to accept the deed in satisfaction of their debts, claims, & demands against deft., & released deft. & his future estate from their debts, claims & demands: provided that the release should not prejudice or prevent any of the creditors from claiming or realising any security held by them, or from suing any person other than the debtor liable to payment thereof for the recovery thereof, less the amount received by them under the deed, nor prejudice the rights or remedies of any such creditors except as against the debtor:—*Held*: the deed was a valid deed within Bkpey. Act, 1861 (c. 131), s. 192, inasmuch as the covenant by deft. was not unreasonable, & notwithstanding the proviso reserving remedies against sureties the deed was pleadable in bar.

This deed has the same effect as a contract which releases the principal & not the surety. It amounts to a covenant not to sue the debtor (SHEP, J.).—KEYES v. ELKINS (1861), 5 B. & S. 210; 5 New Rep. 218; 34 L. J. Q. B. 25; 11 L. T. 471; 11 Jur. N. S. 111; 13 W. R. 180; 122 E. R. 820.

*Annotations*:—*Reid*, Thompson v. Knight (1866), L. R. 2 Exch. 42; Hatch v. Hatch (1872), 28 L. T. 506. *Mentd.* Ray v. Jones (1865), 19 C. B. N. S. 416.

1528. ————.]—BATESON v. GOSLING, No. 1553, *post*.

1529. ————.]—In Mar. 1885, W., a son of testator, entered into a contract for the purchase of a business for £1,500, of which £300 was to be paid at once & the residue by instalments, to be secured by the joint & several promissory notes of W. & testator. W. had no property of his own, & testator, who was not a party to the contract, paid the £300, & he & W. gave their joint & several promissory notes to the vendor for the instalments. Testator paid the amount due on the first promissory note, but died before any of the others became due, having by his will, dated in Oct. 1885, given benefits to his sons, & declared that before any of them should participate under his will they should repay all sums of money advanced to them during his lifetime, & if unable to do so "such advances" should be taken as part of their shares under the will. Shortly after testator's death W. executed a creditors' deed, whereby he assigned all his property for the benefit of his creditors, & the creditors released him but reserved their rights as against his sureties. Nothing further having been paid in respect of the purchase-money, the vendor proved under the deed for the whole balance secured by the remain-

ing promissory notes, & failing to obtain payment, carried in a claim against the estate of testator, & the exors. paid the amount less a discount:—*Held*: the contract for purchase being a contract by the son alone, the giving of the joint & several promissory notes by testator was not in the nature of an advancement by testator in favour of his son W., but merely placed testator in the position of a surety for W. the principal, & the exors. of testator having paid the amounts of the promissory notes falling due after his death, were entitled to elect whether they would recover against the principal debtor under the agreement arising out of the suretyship, in which case they would be entitled to be paid or retain out of the income of W.'s share, or whether they would stand in the place of the vendor, the principal creditor, whom they had paid; but in the latter case they must give up their right of retainer.

It is quite clear that the release contained in the deed was not an absolute release so far as the surety was concerned, but only operated as a covenant not to sue between the principal creditor & the debtor. The surety was not released by the execution of that deed (STIRLING, J.).—*Re* WHITEHOUSE, WHITEHOUSE v. EDWARDS (1887), 37 Ch. D. 683; 57 L. J. Ch. 101; 57 L. T. 761; 36 W. R. 181.

*Annotations*:—*Consd.* *Re* Watson, Turner v. Watson, [1896] 1 Ch. 925. *Reid.* *Re* Melton, Milk v. Towers, [1918] 1 Ch. 37.

1530. ———— Although in terms absolute release.]—COMMERCIAL BANK OF TASMANIA v. JONES, No. 219, *ante*.

1531. Effect of covenant—Surety not discharged.]—If the obligee of a bond covenant not to sue one of two joint & several obligors, & if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor.—DEAN v. NEWHALL (1799), 8 Term Rep. 168; 101 E. R. 1326.

*Annotations*:—*Consd.* Hutton v. Eyre (1815), 1 Marsh. 603. *Reid.* Hawkhaw v. Parkins (1819), 2 Swan. 539; Twopenny v. Young (1821), 3 B. & C. 208; Jones v. Yates (1829), 4 Man. & Ry. K. B. 613; Lancaster v. Harrison (1830), 6 Bing. 726; Gibbons v. Vouillon (1849), 8 C. B. 483; Wilks v. De Castro (1858), 4 C. B. N. S. 216; Lodger v. Stanton (1862), 2 John. & H. 687.

1532. ————.]—KEARSLEY v. COLE, No. 951, *ante*.

1533. ————.]—PRICE v. BARKER, No. 1525, *ante*.

1534. ————.]—A simple release by a creditor given to a debtor discharges all sureties & co-debtors, & it is therefore, in general, inexpedient to insert a simple release in a composition deed. But a covenant not to sue the debtor, except in so far as may be necessary for the purpose of enforcing remedies against others, only bars the covenantor from suing for himself, but does not discharge sureties or co-contractors. It has the operation of a release so far as it is expedient in a composition deed to release the debtor, & no further; & it is therefore a proper & reasonable provision to insert in a deed relating to the debts & liabilities of a debtor & his release therefrom (*per* CUR.).—HIDSON v. BARCLAY (1865), 3 H. & C. 361; 34 L. J. Ex. 217; 12 L. T. 352; 13 W. R. 583; 159 E. R. 427, Ex. Ch.

*Annotations*:—*Reid.* Strick v. De Mattos (1864), 3 H. & C. 22; Walker v. Nevill (1864), 3 H. & C. 403; Lyne v. Wyatt (1865), 18 C. B. N. S. 593; Ray v. Jones (1865), 19 C. B. N. S. 416.

1535. ———— Bar to action by creditor.]—HIDSON v. BARCLAY, No. 1534, *ante*.

1536. ———— Ineffectual if release absolute.]—COMMERCIAL BANK OF TASMANIA v. JONES, No. 219, *ante*.

(c) *New Security taken by Creditor.*

**1537. Bill of exchange or promissory note.]—**H. & W. were principals in a bond, & E. a surety only, the obligee agreed with H. to take four notes drawn by different persons, & payable at future days, in lieu of the bond, but compelled H. to sign an agreement in his own name, & in the names of W. & E. to pay the deficiency, if the notes should not produce the whole principal & interest on the bond; before the notes became due H. & W. were hkpts.; the obligee having received only £500 on the notes, brought his bill for the residue of the principal & interest against E. as a co-obligor:—*Held*: plff. was not entitled to relief against E.—*SKIP v. HUEY* (1741), 3 Atk. 91; 26 E. R. 855; *sub nom.* *SKIP v. EDWARDS*, 9 Mod. Rep. 438, L. C.

**1538. —.]—**Deft. & his surety signed a promissory note. Deft. was afterwards discharged under Insolvent Act, 1826 (c. 57). The payee applied to the surety for payment, whereupon deft., to prevent the surety being sued, joined him in a new note. In an action by the payee:—*Held*: he could not recover on this note against deft., as it was a new contract for the old debt, though the new consideration of forbearance to the surety was added. *EVANS v. WILLIAMS* (1832), 1 Cr. & M. 30; 3 Tyr. 226; 2 L. J. Ex. 41; 149 E. R. 301.

*Annotations*: **Apld.** *Ashley v. Killick* (1839), 5 M. & W. 599; *Collins v. Benton* (1841), 2 Man. & G. 861. **Refd.** *Smith v. Alexander* (1846), 2 Har. & W. 82, *Sheerman v. Thompson* (1840), 11 Ad. & El. 1027, *Kidson v. Turner* (1848), 3 H. & N. 581. **Mentd.** *Peakman v. Harrison* (1872), L. R. 11 Eq. 181.

**1539. —.]—**Judgment was entered up by A. against B., C., & D., upon a warrant of attorney, in which C. & D. were sureties. B. being taken in execution, was discharged on giving to A. a fresh security for the debt. C. & D. were afterwards taken in execution. C. & D. refusing, by their counsel, to undertake to bring no action, the ct. discharged them out of custody with costs. —*EALIS v. FRASER* (1813), 6 Man. & G. 755; 131 E. R. 1097.

**1540. — Taken before guarantee expired — Afterwards destroyed.]—**A bill given for the amount of a guarantee by the person guaranteed & taken by plffs., before the expiration of the time mentioned in the guarantee, but afterwards destroyed in the guarantor's presence:—*Held*: to be no waiver of the guarantee. *COLLINS v. OWEN* (1866), 15 L. T. 327.

*See, generally*, **BILLS OF EXCHANGE**, Vol. VI., pp. 351, 401-404, Nos. 2341, 2622-2636.

**1541. Assignment of goods—As further security only.]—***TWOPENNY v. YOUNG*, No. 1350, *ante*.

**1542. Bond—For larger sum—Than original debt.]—***EYRE v. EVERETT*, No. 1438, *ante*.

**1543. —.]—***CLARKE v. HENTY*, No. 1353, *ante*.

**1544. — In lieu of prior one.]—**Where a creditor by bond, on the death of one of the co-obligors, took the bond of a third person "in lieu of the former joint bond":—*Held*: the estates

of the joint obligors in the first bond had been released.—*SHORE v. SHORE* (1847), 2 Ph. 378; 17 L. J. Ch. 59; 10 L. T. O. S. 105; 11 Jur. 916; 41 E. R. 989, L. C.

**1545. Substituted security—Security of debtor & surety—In substitution for personal liability of debtor.]—***LOWES v. MAUGHAN & FEARON*, No. 1594, *post*.

**New security equivalent to giving time.]—***See* Sub-sect. 4, B. (b), *ante*.

(f) *Bills of Exchange.*

*See* **BILLS OF EXCHANGE**, Vol. VI., pp. 340-341, 367-368, 387-391, 405-413, Nos. 2260-2262, 2425-2435, 2511-2564, 2637-2676.

C. *Reservation of Rights Against Surety.*(a) *Reservation in Guarantee.*

**1546. When surety liable—Debtor compounding with creditors.]—***Assumpsit* on a written guarantee given to plffs. for goods to be supplied by them to one G. to the extent of £100. The guarantee provided that plffs. were to have full liberty to extend the period of credit to G., & to hold over or renew bills, notes, or other securities given by him, " & to grant to G. & the persons liable upon such bills, notes, or securities, any indulgence, & to compound with him or them respectively, as plffs. might think fit, without the same discharging or in any manner affecting the liability of deft. by virtue of the guarantee." The declaration then averred the supply of goods exceeding the guarantee, of which sum £168 was unpaid by G., of which deft. had notice, & was requested to pay that sum, but had not done so. Plea, that after the debt was incurred by G., & before action brought, plffs. became parties to a composition deed between G. & his creditors, whereby he assigned all his stock-in-trade, etc., for the benefit of his creditors; & that, in consideration thereof, plffs. & the other creditors, parties thereto, granted a general release to G. of all debts & demands against him. The plea then averred, that the promise in the declaration was only made by deft. as surety, & that plffs., by the deed, released G. without the privity of deft., & without notice: *Held*: on demurrer, under the express terms of the guarantee, the security was not discharged by the release of the principal debtor.—*COWPER v. SMITH* (1838), 4 M. & W. 519; 150 E. R. 1534.

*Annotations*: **Fold.** *Union Bank of Manchester v. Beech* (1865), 3 H. & C. 672; *Perry v. National Provincial Bank of England*, [1910] 1 Ch. 461.

**1547. —.]—**Deft. covenanted with plffs. that in consideration that plffs. would give credit to T., he would be surety to the extent of £100 for any sum which might from time to time be owing by T. The deed provided that no indulgence, time, credit or forbearance given or shown to, or security taken from, or composition with T. should be any discharge of any liability under the deed, or should release deft. from observing the provisions thereof. T. entered into a deed of

PART IX. SECT. 2, SUB-SECT. 9.—  
B. (e).

**1537 i. Bill of exchange or promissory note.]—**Where deft. became surety to plff. for the rent of a piano, hired to H. & for its return on request, & plff. sold the piano to H. taking in security a bill on England with the understanding that if the bill should be dishonoured the sale was to be void:—*Held*: deft. was discharged.—*O'NEILL v. CARTER* (1852), 9 U. C. R. 470.—**CAN.**

**t. No reservation of rights against surety—In agreement for release of equity of redemption.]—**Where there is not, in the agreement for the release of the equity of redemption in land mortgaged, to a bank, any reservation of the bank's rights against the surety; the giving up of the bank's claim releases any claim the surety might have, & so interferes with the surety's rights.—*UNION BANK OF CANADA v. MAKEPEACE* (1918), 44 O. L. R. 202; 15 O. W. N. 179; 46 D. L. R. 193.—**CAN.**

**a. Mortgage Payable on demand.]—**After the date of a guarantee the creditor took a mgtg. from his debtor, in which the debtor covenanted to pay on demand all such moneys as should for the time being be owing to the creditor. The debtor's liability consisted partly of bills current:—*Held*: these liabilities were not accelerated & consequently the surety was not discharged.—*NATIONAL BANK OF NEW ZEALAND v. MEE & REID* (1886), 4 N. Z. L. R. C. A. 101.—**N.Z.**

*Sect. 2.—Discharge from liability: Sub-sect. 9, C. (a) & (b).]*

composition with his creditors under Bkpcy. Act, 1861 (c. 134), which contained an unconditional release, which pltf. executed:—*Held*: the composition deed was no defence to pltf.' claim for £100, as by the terms of the guarantee the surety was not discharged by the release of the principal debtor. *UNION BANK OF MANCHESTER, LTD. v. BEECH* (1865), 3 H. & C. 672; 34 L. J. Ex. 133; 12 L. T. 499; 13 W. R. 922; 159 E. R. 695.  
*Annotation*:—*Fold*, *Perry v. National Provincial Bank of England*, [1910] 1 Ch. 464.

1548. — — — — —]—*METROPOLITAN BANK OF ENGLAND & WALES v. COPPEE* (1896), 12 T. L. R. 258, C. A.

1549. — — — — —]—In 1903 P. as surety executed mtges. of certain property of his own to a bank to secure the overdraft of P. Brothers, a firm in which he was not a partner. The mtge. deeds all contained a provision that the bank should be at liberty without affecting their rights under the mtges., among other things, "to vary, exchange, or release any other securities held or to be held by the bank for or on account of the moneys thereby secured or any part thereof" . . . "& to compound with, give time for payment of, & accept compositions from & make any arrangements with the debtors or any of them."

In 1908 P. Brothers, being insolvent, called their creditors together, & a scheme was arranged whereby a co. was formed who should take over certain properties of the firm for realisation & should issue debentures to the creditors at the rate of 25s. for each £1 of their debts in full discharge thereof. The bank in accordance with this scheme applied for debenture stock on a form which contained an express agreement by the appts. to accept such debenture stock in full discharge of all their claims against P. Brothers. The amount of the debt in respect of which debenture stock was to be issued was £1,000. This amount was arrived at by deducting from the total debt due to the bank £160 the value put upon securities held by them on the property of the firm; but no deduction was made on account of P.'s mtges. The interest on the debenture stock not having been paid, the bank threatened to sell the property comprised in P.'s mtges. In an action by P. for reconveyance of the mtgd. property on the footing that nothing was due on the mtge.: *Held*: (1) as to the £1,000 the debt was completely discharged & the surety's property was released; (2) as to the £1,630, the debt remained unpaid, although the principal debtor was released; consequently by the express terms of the mtge. deeds the surety's property continued liable.—*PERRY v. NATIONAL PROVINCIAL BANK OF ENGLAND*, [1910] 1 Ch. 464; 79 L. J. Ch. 509 102 L. T. 300; 54 Sol. Jo. 233, C. A.

1550. — — — — —]—*New debtor accepted.—In place of old.—Extinguishment of old debt.*—*COMMERCIAL BANK OF TASMANIA v. JONES*, No. 219, *ante*.

*(b) Reservation in Instrument of Release.*

1551. *Validity of reservation.—Parol undertaking by surety.—To continue liability.*—Pltf., the obligee in a bond, given by two joint obligors, executed a release to one, & having brought an action on the bond against deft., the co-obligor, he

pleaded such release in bar; pltf. replied that the release was given with an undertaking on the part of deft., that such release should not operate in his discharge, & on demurrer:—*Held*: pltf. could not by a parol averment vary the instrument under seal, which being the release of an entire demand, would operate as a release to deft.—*COCKS v. NASH* (1832), 9 Bing. 341; 2 Moo. & S. 434; 2 L. J. C. P. 17; 131 E. R. 643.

*Annotation*:—*Reid*, *Teede v. Johnson* (1856), 11 Exch. 810.  
1552. — — — — —]—*Release of debtor absolute.*—*WEBB v. HEWITT*, No. 1397, *ante*.

1553. — — — — —]—A deed of arrangement under Bkpcy. Acts, 1861 (c. 134), & 1869 (c. 71), contained a release of the debtor, subject to a proviso reserving the rights of creditors holding securities:—*Held*: this operated as a covenant not to sue, & not as an extinguishment of the debt so as to bar the remedy against the surety, notwithstanding the deed contained an absolute assignment of all the debtor's property & effects to the trustees, & also provisions for enabling them to carry on the trade for the benefit of the estate.

If there be an absolute release of the principal, there can be no reservation of a right to proceed against the surety (WILLES, J.).—*BATESON v. GOSLING* (1871), L. R. 7 C. P. 9; 41 L. J. C. P. 53; 25 L. T. 570; 20 W. R. 98.

*Annotations*:—*Distd*, *Cragoe v. Jones* (1873), L. R. 8 Exch. 81. *Consd*, *Kills v. Wilmot* (1874), L. R. 10 Exch. 10; *Re Whitehouse*, *Whitehouse v. Edwards* (1887), 37 Ch. D. 683. *Mentd*, *Duck v. Mayou*, [1892] 2 Q. B. 511.

1554. — — — — —]—*In composition deed.*—It is competent for creditors executing a deed of composition with the principal debtor & certain of his sureties to reserve their remedies against other sureties.—*Re SLADE, Ex p. CARSTAIRS* (1820), Buck, 560, L. C.

*Annotation*:—*Reid*, *Maltby v. Carstairs* (1828), 7 D. & C. 735.

1555. — — — — —]—*Whether reservation to be expressly stated.*—(1) If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety.

(2) Not so, if it be stipulated in the deed of composition that the remedies against the sureties shall be reserved.

(3) Parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted.—*Re RENTON, Ex p. GLENDINNING* (1819), Buck, 517, L. C.

*Annotations*:—*As to* (2) *Consd*, *Owen v. Homan* (1850), 13 Beav. 196. *Reid*, *Kearsley v. Cole* (1846), 16 M. & W. 128; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Rouse v. Bradford Banking Co.*, [1891] 2 Ch. 32. *Generally*, *Reid*, *Bell v. Banks & Howden* (1841), Drinkwater, 236; *Re Black, Ex p. Graham* (1851), 5 De G. M. & G. 356; *Re Blakely, Ex p. Harvey, Re Blakely, Ex p. Springfield* (1854), 23 L. J. Bcy. 27, n. *Mentd*, *Strong v. Foster* (1855), 17 C. B. 201.

1556. — — — — —]—*Re BLAKELY, Ex p. HARVEY, Ex p. SPRINGFIELD*, No. 1102, *ante*.

1557. — — — — —]—*Previous resolution to release without reservation.*—In & prior to 1866 W. & L., partners in trade executed two joint & several bonds to the trustees of S.'s will to secure the repayment with interest of two sums of money advanced to them. In 1869, W. retired from the firm, & in pursuance of an agreement assigned by deed all his share & interest in the firm to L. who covenanted to indemnify him against all the

PART IX. SECT. 2, SUB-SECT. 9.—C. (b).

1552 I. *Validity of . . . . . lease to debtor absolute.*—Pltf., who was indorser of a note made by P. to a bank, made a mtge. to the bank,

which was stated in terms to be an additional security for the payment of the note & any renewal or renewals thereof. Subsequently the bank absolutely discharged the principal debtor:—*Held*: (1) the surety was discharged,

although it was shown that, by agreement between the principal debtor & the bank, not incorporated in the release, the surety was to be held liable still.—*CUMMING v. BANK OF MONTREAL* (1869), 15 Gr. 686.—*CAN.*



trade debts & liabilities. The trustees had notice of this deed. L. carried on the business, with C. till 1871, when they filed a petition for liquidation by arrangement. The trustees proved under the liquidation for the balance of the principal & interest then due on the bonds, attended & voted at all meetings of the creditors who agreed to accept a composition. The trustees were also parties to the composition deed by which they gave time to L. & C. for the payment of the balance due on the bonds [by instalments extending over two years]. W. filed a bill praying for a declaration that, under the circumstances, he was absolutely released from all liability under the bonds:—*Held*: (1) the retirement of W. with a covenant of indemnity with the knowledge of the trustees had altered his character of principal into that of surety; the subsequent acts & conduct of the trustees had effected a complete novation of the bond debts; & pltf. was entitled to the relief which he sought; (2) the effect of the composition under which time had been given to L. & C. as principal debtors, without the consent of W. was to discharge W.

(3) Where resolutions formally agreed to by creditors under Bkpey. Act, 1869 (c. 71), ss. 125, 126, contain no reservation of any rights against co-debtors or sureties, the reservation of such rights by a subsequent deed of composition is inoperative.—*WILSON v. LLOYD* (1873), L. R. 10 Eq. 60; 42 L. J. Ch. 559; 28 L. T. 331; 21 W. R. 507.

*Annotations*:—As to (1) *Refd.* *Bradford Old Bank v. Sutcliffe*, [1918] 2 K. B. 533. As to (2) *Consd.* *Re Jacobs*, *Ex p. Jacobs* (1875), 10 Ch. App. 211. *Refd.* *Simpson v. Henning* (1875), L. R. 10 Q. B. 106. As to (3) *Expld.* *Ellis v. Wilmet* (1874), L. R. 10 Exch. 10. *Refd.* *Re Littler*, *Ex p. Manchester & Liverpool District Banking Co.* (1874), L. R. 10 Eq. 249. *Generally*, *Mentd.* *Swire v. Redman* (1876), 1 Q. B. D. 536.

—*See further*, BANKRUPTCY, Vol. V., pp. 1190–1191, Nos. 9612–9620.

**1558. — Discharge of bill of exchange—Stipulation for delivery up of bill.**—A., the creditor of B. by bills for which C. & D. were sureties, by a deed to which B. & C. were parties, discharged B. & C. reserving his remedies against D.:—*Held*: such reservation was not defeated by a stipulation that the bills should be delivered up, it appearing that such stipulation was intended to be so modified as to give to A. the benefit of such reservation.—*MALBY v. CARSTAIRS* (1828), 7 B. & C. 735; 1 Man. & Ry. K. B. 549; 6 L. J. O. S. K. B. 196; 108 E. R. 898.

**1559. — Knowledge of all creditors—Necessity for.**—[Covenant. The declaration alleged, that debt. by certain articles of agreement under seal, which recited that one R. had opened an account with pltf., a banking co., covenanted & agreed to guarantee & be accountable for the due payment of all sums of money which then were or thereafter should become due to pltf. from R. by reason of any money, etc., then advanced or owing, or thereafter to be advanced or owing on the banking account from the said R. stating that such guarantee was limited to £500, & was to be a continuing guarantee, & providing that in case of bkpey. or insolvency, not only the £500 should

be paid to pltf. by debt. but that pltf. should be at liberty to apply the whole of the dividends receivable on their whole debt in discharge of the part not guaranteed; that the sum of £500 13s. 4d. became & was & still is due upon the advance of moneys by pltf. to R., yet that R. did not pay the same, & thereby debt. became liable to pay the sum of £500, the amount of his guarantee. To this debt. pleaded, secondly, that no part of the sum of £500 13s. 4d. was due or owing from the said R. to pltf. on the said banking account, *modo et forma*. Another plea was, that, after the accruing of the debt of R. to pltf., he was indebted to them in £1,100, of which the sum of £500 13s. 4d. was parcel, & was also indebted to other persons in large sums of money, & was in bad & insolvent circumstances & unable to pay pltf. & his other creditors their debts in full, & that thereupon he agreed with pltf. & his other creditors to pay, & pltf. & the other creditors mutually agreed with each other and with the said R. to accept from him a composition of 10s. 6d. in the pound, as a composition in full discharge of the said respective debts; & the plea then stated the payment by R. of the composition to pltf. Replication, that pltf. entered into the composition with the knowledge of debt., & upon the agreement that it should not discharge debt. from his liability upon the guarantee; which was denied by the rejoinder. At the trial, the facts stated in the replication were found by the jury, & the judge told them that under those circumstances they ought also to find the second issue for pltf., which they accordingly did: *Held*: the second plea amounted to a denial that there was any originally existing debt. & not of a debt being due at the commencement of the suit, & on a rule to arrest the judgment, the replication to the fourth plea was good, inasmuch as it did not appear that the reservation of pltf.' rights against debt. was unknown to the other creditors.—*DAVIDSON v. M'GREGOR* (1811), 8 M. & W. 755; 11 L. J. Ex. 164; 151 E. R. 1214.

*Annotation*:—*Mentd.* *Higgins v. Pitt* (1819), 4 Exch. 312.

**1560. — Winding-up of company—Scheme of arrangement.**—*Re LONDON CHARTERED BANK OF AUSTRALIA*, No. 1515, *ante*.

**1561. Effect of reservation—Surety not discharged.**—To a declaration on a promissory note, debt. pleaded that the note was the joint & several note of himself & G.; that pltf., by deed poll without debt.'s consent, released G. from the note & all actions, etc.; & thereby also released debt. from the same. Replication, *Non est factum*:—*Held*: as the plea did not set out the deed on oyer, the replication put in issue the execution of such a deed as released debt.; & a deed of release, executed by pltf. & others, creditors of G., containing an express clause to G. should not operate to discharge any one jointly liable with G. on securities to the said creditors, did not release debt.; & pltf. was entitled to the verdict on this issue.—*NORTH v. WAKEFIELD* (1849), 13 Q. B. 536; 18 L. J. Q. B. 214; 13 L. T. O. S. 115; 13 Jur. 731; 116 E. R. 1368.

*Annotation*:—*Refd.* *Re Arncliffe, Ex p. Good* (1877), 5 Ch. D. 46.

**1561 i. Effect of reservation—Surety not discharged.**—A covenant not to sue entered into by a creditor with the principal debtor, without the surety's consent, but reserving all remedies by the creditor against others, does not discharge such surety.—*HALL v. THOMPSON* (1859), 9 C. P. 267.—*CAN.*

**1561 ii. — — —**—A creditor by mistake executed an absolute release

to his debtor, but the agreement was that the creditor's right against a surety should be reserved:—*Held*: the surety was not discharged.—*BANK OF MONTREAL v. McFAUL* (1870), 17 Gr. 234.—*CAN.*

**1561 iii. — — —**—A creditor having the security of a third person for the due accounting of an agent, settled accounts, with that agent & took from

him a bond for the balance found to be due, & bills at different dates for the amount of the bond, & the interest thereon, until the last of the bills should fall due; & at the same time stipulated that he was at liberty at any moment to proceed on the original security:—*Held*: this was not a discharge of the surety.—*LINDSAY v. DOWNES (LORD)* (1840), 2 L. Eq. R. 307.—*IR.*



*Sect. 2.—Discharge from liability: Sub-sect. 9, (c) & (c); sub-sect. 10, f*

**1562. — Surety for interest only.]—**  
GREEN v. WYNN, No. 952, *ante*.

**1563. — Induces surety's action against debtor.]—***Re NATAL INVESTMENT Co., NEVILL'S CASE*, No. 1501, *ante*.

**— Construed as covenant not to sue.]—***See* Nos. 1525–1529, *ante*.

(c) *Bills of Exchange.*

*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 411–413, Nos. 2672–2676.

**SUB-SECT. 10.—DISCHARGE OF CO-SURETY BY CREDITOR.**

*A. In General.*

**1564. Other surety not discharged—Release to co-surety—No absolute release of debtor.]—***Ex p. GIFFORD*, No. 1030, *ante*.

**1565. Right to contribution interfered with.]—**  
(1) A creditor whose debt is secured by a warrant of attorney, having received promissory notes from the debtor & two sureties, & afterwards entered up judgment & taken the goods of the debtor, & without the knowledge of the sureties, withdrawn the execution, has discharged the sureties; but a subsequent promise to pay the debt by one surety, knowing that the execution has been withdrawn, renews his liability.

If a creditor, having given time to the debtor primarily liable, makes a demand on one who is secondarily liable, & receives a promise from him, that is sufficient to sustain the demand, not as the creation of a new, but as the revival of an old, debt (*LORD ELDON, C.*).

(2) Right of contribution between co-sureties, whether by separate instruments, or by the same instrument.

The fact that the liability arises on separate instruments affords no distinction as to the rights of contribution between the sureties. That law was so settled by *Deering v. Winchelsea (Earl)*, No. 1050, *ante* (*LORD ELDON, C.*).

(3) When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him. You have discharged a surety from whom I might have compelled contribution (*LORD ELDON, C.*).

(4) Sureties are entitled to the benefit of every security which the creditors have against the principal & whether he know the existence of these securities is immaterial (*LORD ELDON, C.*).

(5) The creditor might have remained passive if he chose (*LORD ELDON, C.*).—*MATTHEW v. CRICKETT* (1818), 2 Swan. 185; 1 Wils. Ch. 418; 36 E. R. 585, L. C.

*Annotations:—As to (1) Consd.* Smith v. Winter (1838), 4 M. & W. 454. *Reid.* Phillips v. Foxall (1872), L. R. 7 Q. B. 666. *As to (3) Consd.* Polak v. Everett (1876), 1 Q. B. D. 689; *Re* Wolmershausen, Wolmershausen v. Wolmershausen (1890), 62 L. T. 541. *As to (4) Distd.* Wade v. Coope (1827), 2 Sm. 155. *Consd.* Newton v. Chorlton (1853), 2 Drow. 333; Pearl v. Doacon (1857), 21 Beav. 186. *Reid.* Forbes v. Jackson (1882), 19 Ch. D. 615. *Generally, Reid.* Spaight v. Cowne, Edwards v. Spaight (1863), 1 New Rep. 550.

**PART IX. SECT. 2, SUB-SECT. 10.—A.**

**b. Other surety not discharged.]—**  
If a surety signs a guarantee to which appears the signature of a co-surety, the fact that the co-surety is subsequently relieved from liability does not relieve the other surety.—*J. R. WATKINS MEDICAL CO. v. LEE* (1920), 2 W. W. R. 493; 52 D. L. R. 543; 15 Alta. L. R. 345.—*CAN.*

**c. Other surety discharged.]—***A. & B.* granted a bill, which was deposited with a bank in security of such advances as might be made to C. during its currency. The bank, during its currency, discharged B.—*Held:* this discharge liberated A. from his entire liability.—*BRITISH LINEN CO.'S BANK v. THOMSON* (1853), 2 Stuart, 175.—*SCOT.*

**Release construed as covenant not to sue—**  
**Where rights reserved against other sureties.]—**  
*See* Nos. 1589, 1590, *post*.

*B. Joint Liability.*

*Sec, generally,* *BONDS*, Vol. VII., pp. 192–194, 237–238; *CONTRACT*, Vol. XII., pp. 510 *et seq.*

**1566. General rule—Co-surety released.]—**  
A bank proved in the liquidation of A. for a debt of £5,600 which they claimed from him, & afterwards sued for the same debt S., who had given them a guarantee of £1,000 on behalf of A., & whom they alleged to have been a partner with A. S. denied the partnership, & ultimately a compromise was entered into between him & the bank, by which the bank were to receive £2,800 in satisfaction of their claim against him & against another person who had given another guarantee on behalf of A. The guarantee of S. was given up to him, with a receipt indorsed upon it by the bank, expressed to be for £1,000, “in payment & discharge of the within guarantee, & also of all claims against him in reference to or in connection with” A.’s firm:—*Held:* assuming S. to have been a partner with A., this receipt did not operate as a release of S., & the bank were entitled to maintain their proof.

The rule that a release of one joint debtor operates to release the other also is founded upon the fact that the second would, if he were sued by the creditor, have a right to enforce contribution from the first. The rule, therefore, does not apply to a release of a merely ostensible partner, between whom & the person with whom he has held himself out to be a partner, no such right of contribution exists (*BACON, C.J.*).—*Re ARMITAGE, Ex p. GOOD* (1877), 5 Ch. D. 46; 46 L. J. Bey. 65; 36 L. T. 338; 25 W. R. 422, C. A.; *varying* *S. C. sub nom. Re ARMITAGE & Co., Ex p. HALIFAX JOINT STOCK BANKING Co.* (1876), 35 L. T. 551.

*Annotations:—Consd.* *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 541; *Re E. W. A.*, [1901] 2 K. B. 642. *Mentd.* *Re Tait, Ex p. Harper* (1882), 47 L. T. 421.

**1567. When other sureties discharged - Proof in bankruptcy of co-surety.]—***Proof* under the bkpcy. of one joint debtor after receiving a composition from the other expunged; the release to one being a release to both.—*Ex p. SLATER* (1801), 6 Ves. 116; 31 E. R. 984, L. C.

**1568. — Judgment against co-surety.]—**  
One of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill judgment was recovered:—*Held:* such judgment was no bar to an action of covenant against the three; such bill, though stated to have been given for the payment & in satisfaction of the debt, not being averred to have been accepted as satisfaction, nor to have produced it in fact.—*DRAKE v. MITCHELL* (1803), 3 East, 251; 102 E. R. 594.

*Annotations:—Consd.* Bell v. Banks (1811), 3 Man. & G. 258; *Bermondsey Vestry v. Ramsey* (1871), L. R. 6 C. P. 217. *Expld. & Distd.* Cambeport v. Chapman (1887), 19 Q. B. D. 229. *Folld.* Weger-Prosser v. Evans, (1895) 1 Q. B. 108. *Reid.* *Re* Davison, *Ex p. Chandler* (1884), 13 Q. B. D. 50; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180.

**1565 i. Right to contribution interfered with.]—**  
Where one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter cannot, upon payment of the debt, recover contribution from the co-surety.—*WORTHINGTON v. PECK* (1894), 24 O. R. 535.—*CAN.*

**1506.** ——— **Action against other sureties on separate undertaking.]**—A. & B. were jointly indebted to C.; after more than six years had elapsed since the debt accrued, A. promised in writing signed by him to pay his proportion when applied to. Afterwards, C. sued A. & B. jointly, in *indebitatus assumpsit*, on the original cause of action. B. pleaded the general issue, & A. pleaded the general issue & Stat. Limitations. A verdict passed against B. on the general issue, & for A. upon the general issue & upon the issue on Stat. Limitations, & judgment was entered for C. against B., & for A. against C. C. afterwards brought a fresh action against A., & declared specially on the new promise to pay his proportion:—*Held*: neither the recovery against B., nor the verdict & judgment for A., were any answer to the action against A. on the new promise.—*LECIMERE v. FLETCHER* (1833), 1 Cr. & M. 623; 3 Tyr. 450; 2 L. J. Ex. 219; 149 E. R. 540.

**Annotations:**—*Consd.* King v. Hoare (1844), 2 Dow. & L. 382; *Isaacs v. Salbstein*, [1916] 2 K. B. 139. *Refd.* Baker v. Walker (1815), 11 M. & W. 465; Buckland v. Johnson (1851), 15 C. B. 145; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337. *Mentd.* Edmunds v. Downes (1831), 2 Cr. & M. 459; Hooper v. Stephens (1835), 7 C. & P. 260; Bird v. Gammon (1837), 3 Bing. N. C. 883; Johnson v. Hodgson (1837), 2 M. & W. 653; Routledge v. Ramsay (1838), 3 Nev. & P. K. B. 319; Cheslyn v. Dalby (1810), 4 Y. & C. Ex. 238; Hartley v. Wharton (1840), 3 Per. & Dav. 529; Waller v. Lucy (1840), 1 Man. & G. 51; Courtenay v. Williams (1841), 3 Hare, 539; Williams v. Griffiths (1849), 3 Exch. 335; Deacon v. Gridley (1851), 21 L. J. C. P. 17; Walker v. Butler (1846), 6 E. & B. 506; Curlewis v. Mornington (1857), 5 W. R. 491.

**1570.** ——— **Judgment unsatisfied.]**—A judgment without satisfaction recovered against one of two joint debtors is a bar to an action against the other:—*Secus*, where the debt is joint & several.—*KING v. HOARE* (1844), 13 M. & W. 491; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 11 L. J. Ex. 29; 4 L. T. O. S. 174; 8 Jur. 1127; 153 E. R. 206.

**Annotations:**—*Consd.* Baker v. Sayers & Foster (1868), 17 L. T. 579; Kendall v. Hamilton (1879), 4 App. Cas. 501; *Re* Hodgson, Beckett v. Ramsdale (1885), 31 Ch. D. 177. *Apld.* Cambefort v. Chapman (1887), 19 Q. B. D. 229. *Consd.* McLeod v. Power, [1898] 2 Ch. 295. *Expld.* Isaacs v. Salbstein, [1916] 2 K. B. 139. *Refd.* Henry v. Goldney (1816), 15 M. & W. 491; Newton v. Blunt (1846), 3 C. B. 675; *Re* Morrison, *Ex p.* Waterfall (1851), 1 De G. & Sm. 199; Buckland v. Johnson (1851), 15 C. B. 145; Bernardose Vestry v. Ramsey (1871), L. R. 6 C. P. 247; *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50; Pilley v. Robinson (1887), 20 Q. B. D. 155; Beck v. Pierce (1889), 23 Q. B. D. 316; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602; Midgley v. Midgley, [1893] 3 Ch. 282; Wegg-Prosser v. Evans (1894), 61 L. J. Q. B. 1; Morel v. Westmorland (1902), 87 L. T. 635; Parr v. Snell, [1923] 1 K. B. 1. *Mentd.* Roddam v. Morley (1857), 1 De G. & J. 1; Owen v. Wilkinson (1858), 5 C. B. N. S. 526; Phillips v. Ward (1863), 3 New Rep. 92; *Re* Wheal Ludcott & Wrey Consols Mines Co., *Ex p.* Jackson (1869), 21 L. T. 67; Brinsmead v. Harrison (1872), L. R. 7 C. P. 517; Wemyss v. Hopkins (1875), 44 L. J. M. C. 101; Munster v. Cox (1885), 10 App. Cas. 680; Odell v. Cormack (1887), 19 Q. B. D. 223; *Re* Crook, *Ex p.* Collins (1891), 66 L. T. 29; Hammond v. Schofield, [1891] 1 Q. B. 453; Westmoreland Green & Blue Slate Co. v. Feilden, [1891] 3 Ch. 15; Chamberlyn v. Allen (1892), 36 Sol. Jo. 318; *Re* King & Beesley, *Ex p.* Horner (1894), 1 Mans. 505; Penny v. Wimbledon U. C. (1899), 68 L. J. Q. B. 704; London Assocn. for Protection of Trade v. Greenlands, [1916] 2 A. C. 15; Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Moore v. Flanagan, [1920] 1 K. B. 919; The Koursk, [1924] P. 110.

**1571.** ——— **—An action, & a judgment against two persons who had borrowed money from plffs., though the judgment is unsatisfied, constitute a bar to another action brought by the same plffs. against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in**

the business for the purposes of which the money had been borrowed.

K. had, under a written arrangement between himself & W. & M., made large advances to them in respect of certain speculations in iron. W. & M. fell into difficulties. K. brought an action against them to recover the debt, & obtained judgment. This judgment remained unsatisfied. W. & M., who resided in Scotland, became bkpt., there & K. put in his claim under the Scottish sequestration, & recovered a small dividend. K. then discovered that H. had been associated as a partner in the speculations in iron, & brought an action against him as having been jointly liable with W. & M. in respect of the advances:—*Held*: the action against H. was not maintainable, the contract having passed into a judgment.—*KENDALL v. HAMILTON* (1879), 4 App. Cas. 501; 48 L. J. Q. B. 705; 41 L. T. 418; 28 W. R. 97, 11 J.

**Annotations:**—*Consd.* *Re* Hodgson, Beckett v. Ramsdale (1885), 31 Ch. D. 177; Baddeley v. Consolidated Bank (1886), 34 Ch. D. 536. *Expld.* Leduc v. Ward (1886), 54 L. T. 214. *Apld.* Cambefort v. Chapman (1887), 19 Q. B. D. 229. *Consd.* Pilley v. Robinson (1887), 20 Q. B. D. 155. *Expld.* Weall v. James (1893), 68 L. T. 515. *Consd.* Wegg-Prosser v. Evans, [1895] 1 Q. B. 108; McLeod v. Power, [1898] 2 Ch. 295. *Expld.* Isaacs v. Salbstein, [1916] 2 K. B. 139. *Refd.* *Re* Crook, *Ex p.* Collins (1891), 66 L. T. 29; Hammond v. Schofield, [1891] 1 Q. B. 453; Hall v. Sim (1894), 10 T. J. R. 163; Morel v. Westmorland (1902), 87 L. T. 635; Parr v. Snell, [1923] 1 K. B. 1; Duffner v. Bowyer (1924), 40 T. L. R. 700. *Mentd.* *Re* McRae, Forster v. Davis, Norden v. McRae (1883), 25 Ch. D. 16; *Re* Davison, *Ex p.* Chandler (1884), 13 Q. B. D. 50; Munster v. Cox (1885), 10 App. Cas. 680; Odell v. Cormack (1887), 19 Q. B. D. 223; Beck v. Pierce (1889), 23 Q. B. D. 316; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; Hoare v. Niblett, [1891] 1 Q. B. 781; Westmoreland Green & Blue Slate Co. v. Feilden, [1891] 3 Ch. 15; British South Africa Co. v. Companhia de Mocambique, [1893] A. C. 602; *Re* Outram, *Ex p.* Ashworth & Outram (1893), 63 L. J. Q. B. 308; Wilson, Sons & Balcarres Brook S.S. Co., [1893] 1 Q. B. 422; *Re* Errington, *Ex p.* Mason, [1894] 1 Q. B. 11; Robinson v. Gelsel (1894), 61 L. J. Q. B. 52; Wigram v. Cox, Sons, Buckley, [1891] 1 Q. B. 792; *Re* Ritson, Ritson v. Ritson (1898), 67 L. J. Ch. 365; *Re* Comrs. v. Pinney, [1899] 2 Ch. 729; McChone v. Gyles (No. 2), [1902] 1 Ch. 911; Codling v. Mowlem, [1914] 2 K. B. 61; Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180; Norbury Natzo v. Griffiths, [1918] 2 K. B. 369; Rodriguez v. Speyer, [1919] A. C. 59; Moore v. Flanagan, [1920] 1 K. B. 919; Clarkson v. Davies, [1923] A. C. 100; The Koursk, [1924] P. 110; *Re* Pennington & Owen, [1925] Ch. 825.

**1572.** ——— **—An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract.**

Plffs. sold goods to a partnership consisting of the debt. & W. After the sale the partnership was dissolved. Plffs., who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership name. Plffs. sued W. in the partnership name on the bills, & recovered judgment, which was not satisfied. Plffs. afterwards sued debt. for the price of the goods:—*Held*: the case was within the principle of *Kendall v. Hamilton*, No. 1571, *ante*, & the judgment against W. on the bills was an answer to the action.—*CAMBEFORT v. CHAPMAN* (1887), 19 Q. B. D. 229; 56 L. J. Q. B. 639; 57 L. T. 625; 51 J. P. 455; 35 W. R. 838; 3 T. L. R. 738, D. O.

**Annotations:**—*Obtd.* & *N.F.* Wegg-Prosser v. Evans, [1895] 1 Q. B. 108. *Refd.* Isaacs v. Salbstein, [1916] 2 K. B. 139. *Mentd.* Wigram v. Cox, Sons, Buckley, [1894] 1 Q. B. 792.

**1573.** ——— **—Cause of action not founded on guarantee.]**—An unsatisfied judgment against one co-surety for a cheque given by him alone for the debt is not a bar to an action against the other co-surety on the original contract of

*Sect. 2.—Discharge from liability: Sub-sect. 10, B., C., D.*

EVANS, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1; 72 L. T. 8; 43 W. R. 66; 11 T. L. R. 12; 30 Sol. Jo. 26; 9 R. 830, C. A. 1574. — **Action against co-surety compromised.—On part payment of debt & costs.**—B. & C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce pltf.'s demand if he gained a verdict, & proposed to put an end to the action by paying part of the debt, & the costs of suit. This was agreed to, & a receipt given for the sum paid, which was stated to be for debt & costs in that action. A. afterwards sued C.:—*Held*: the composition above-mentioned did not operate as a discharge of the whole debt, but only to relieve B., & it was no defence for C.—WATTERS v. SMITH (1831), 2 B. & Ad. 889; 1 L. J. K. B. 31; 109 E. R. 1373.

*Annotations:—* Foll. Field v. Robins (1838), 8 Ad. & El. 90. *Reid*. King v. Hoare (1844), 13 M. & W. 494; *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46; *Re* Wolmershausen, Wolmershausen v. Wolmershausen (1890), 62 L. T. 541. *Mentd.* Isaacs v. Salbstein, [1916] 2 K. B. 139.

**Bills of exchange.**—See **BILLS OF EXCHANGE**, Vol. VI., pp. 389-391, 406-408, Nos. 2553-2564, 2624 2651.

#### C. Joint and Several Liability.

See, generally, **BONDS**, Vol. VII., pp. 192-191, 237 238; **CONTRACT**, Vol. XII., pp. 510 *et seq.*

1575. **General rule—Co-surety released unless rights reserved.**—HALLETT v. TAYLOR (1921), 151 L. T. Jo. 176.

1576. **When other sureties discharged—Obligee making obligor his executor.**—If the obligee in a joint & several bond, make one of two obligors his exor., with others, the action on the bond is discharged as to both obligors.—CHRETHAM v. WARD (1797), 1 Bos. & P. 630; 126 E. R. 1102.

*Annotations:—* *Appld.* Nicholson v. Revell (1836), 4 Ad. & El. 675. *Consd.* *Re* Wolmershausen, Wolmershausen v. Wolmershausen (1890), 62 L. T. 541. *Reid*. Froakley v. Fox (1829), 9 B. & C. 130; Kearsley v. Cole (1846), 16 M. & W. 128; Evans v. Bremridge (1855), 4 W. R. 161; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; *Re* Bourne, Davey v. Bourne, [1906] 1 Ch. 697. *Mentd.* Ford v. Beech (1818), 11 Q. B. 852.

1577. — **Acceptance of payment from co-surety—Receipt in discharge.**—In *assumpsit* on a promissory note, it was pleaded that, R. owing pltf. £290, pltf. agreed with R., S. R., & deft., that they should give pltf., & he should accept, their joint & several note for £290 as a satisfaction & security for the debt, which was done. It was further pleaded that, the note being due, & the debt unpaid, & pltf. having sued the three makers, it was agreed that the action should cease, & that the three makers should give their three joint & several notes for £52 18s. 8d. at thirteen months, & £110 13s. 4d. & £56 13s. 8d. at longer periods, as a satisfaction & security for £200 parcel of the debt due from J. R. with interest; & the notes were so given. It was further pleaded that, the first note being due & unpaid, & the second (now sued upon) not yet due, S. R. agreed with pltf. to pay, & did pay him, £100 in discharge of S. R.'s liability on the three last-mentioned notes, & pltf. accepted the same in such discharge, & gave up

to S. R. the first of the three notes, indorsed upon the note now sued upon a receipt of £47 1s. 4d. on account, erased S. R.'s name from this note, & discharged him from further liability thereon. These facts being admitted, & it being answered that the last-mentioned transaction with S. R. took place without deft.'s knowledge or consent, which was not denied:—*Held*: the discharge of S. R. by pltf. discharged the deft.—NICHOLSON v. REVILL (1836), 4 Ad. & El. 675; 1 Har. & W. 756; 5 L. J. K. B. 129; 111 E. R. 941; *sub nom.* NICHOLSON v. REVILL, 6 Nev. & M. K. B. 192.

*Annotations:—* *Consd.* Thompson v. Lack (1846), 3 C. B. 540. *Expld.* *Re* Armitage, *Ex p.* Good (1877), 5 Ch. D. 46. *Distd.* Cardwell v. Smith (1886), 2 T. L. R. 779. *Consd.* *Re* Wolmershausen, Wolmershausen v. Wolmershausen (1890), 62 L. T. 541. *Reid*. Kearsley v. Cole (1846), 16 M. & W. 128; Owen v. Homan (1850), 13 Beav. 196; Evans v. Bremridge (1855), 2 K. & J. 174; Price v. Barker (1855), 4 E. & B. 760; Webb v. Hewitt (1857), 3 K. & J. 438; Bateson v. Gosling (1871), L. R. 7 C. P. 9; Simpson v. Henning (1875), L. R. 10 Q. B. 406; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337.

1578. — **Judgment debt.**—A. & B. became liable on a "joint & several" guarantee to a bank for a sum of £6,000 owing to the bank from a co. Subsequently the bank obtained judgment for that sum against A. & B. "jointly & severally." The judgment not being satisfied, the bank presented a bkpcy. petition against B. alone for the whole judgment debt, but the petition was withdrawn upon terms arranged between B. & the bank & embodied in a receipt given to B. by the bank for £3,000 partly in cash & partly in bills paid & given by B. "in full discharge of all claims by the bank against B. in connection with the co., & all guarantees given by him to the bank in connection with that co., & in settlement of any outstanding questions as to the amount due to the bank." The bank then presented a bkpcy. petition against A. alone for £3,000, the alleged "balance" of the judgment debt of £6,000:—*Held*: the receipt amounted to an accord & satisfaction equivalent to a release of B. from the entire joint & several judgment debt, there being no surrounding circumstances qualifying its effect as an absolute release in terms, & consequently by reason of the release of A.'s co-debtor there was no debt to support bkpcy. proceedings against A.

The rule of law that the release of one of two joint debtors under a joint & several obligation operates as a release of the other applies as much to a judgment debt as to any other obligation.—*Re* E. W. A., [1901] 2 K. B. 642; 70 L. J. K. B. 810; 85 L. T. 31; 49 W. R. 642; 8 Mans. 250; *sub nom.* *Re* E. W. A., *Ex p.* DEBTOR, 45 Sol. Jo. 638, C. A.

*Annotation:—* *Expld. & Distd.* *Re* A Debtor (1913), 109 L. T. 323.

1579. — **Judgment against co-surety—Judgment unsatisfied.**—KING v. HOARE, No. 1570, *ante*.

1580. — **No intention to discharge other surety.**—Two persons joined in a joint & several promissory note as co-sureties for a third person. One co-surety having been sued to judgment by the creditor for the full amount, paid a smaller sum "in full discharge of the debt, & costs in the action against me." In an action by the creditor against the other co-surety, it was found that there had been no intention between the parties

#### PART IX. SECT. 2, SUB-SECT. 10.—C.

d. **General rule.**—A release by the creditor of one or more joint & several sureties, or giving time to one surety without the consent of the co-sureties, releases the others.—SCAN-

DINAVIAN AMERICAN NATIONAL BANK OF MINNEAPOLIS v. KNEELAND (1913), 24 W. L. R. 587; 4 W. W. R. 944.—CAN.

e. **Discharge of surety on payment of proportionate share—Liability of co-**

**sureties for balance.**—A discharge by a creditor of one of several parties bound jointly & severally as cautioners, upon payment of his share of the debt, does not liberate the co-cautioners from their joint & several liability for the balance.—CHURCH OF ENGLAND

to the first action that any right of pltf., or the first co-surety against the second co-surety should be discharged:—*Held*: pltf. was entitled to recover in the second action.—*CARDWELL v. SMITH* (1886), 2 T. L. R. 779, D. C.

**1581. — Release of co-surety by deed.**—*Semble*: if a creditor release by deed one of two sureties, who are jointly & severally liable, the other is also discharged.—*EVANS v. BREMIDGE* (1855), 2 K. & J. 174; 25 L. J. Ch. 102; 26 L. T. O. S. 104; 2 Jur. N. S. 134; 4 W. R. 161; 69 E. R. 741; *on appeal* (1856), 8 De G. M. & G. 100, L. J.J.

*Annotations*:—*Refd.* *Cumberlege v. Lawson* (1857), 26 L. J. C. P. 120; *Beckett v. Addyman* (1882), 9 Q. B. D. 783. *Mentd.* *Spaight v. Cowno, Edwards v. Spaight* (1863), 1 Hem. & M. 359; *Waterlow v. Bacon* (1866), 35 L. J. Ch. 643; *Cooper v. Evans* (1867), L. R. 4 Eq. 45; *Luke v. South Kensington Hotel Co.* (1879), 37 W. R. 514; *Royal Albert Hall Corp. v. Winchelsea* (1891), 7 T. L. R. 362; *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q. B. 73; *National Provincial Bank of England v. Brackenbury* (1906), 22 T. L. R. 797.

**Bills of exchange.**—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 389-391, 406-408, Nos. 2553-2561, 2642-2651.

#### D. Several Liability.

*See, generally*, *BONDS*, Vol. VII., pp. 192-194, 237-238; *CONTRACTS*, Vol. XII., pp. 510 *et seq.*

**1582. Other sureties not discharged—Unless right to contribution affected.**—(1) Where two or more sureties contract severally the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release:—*Held*: in an action upon a guarantee, a plea to the effect that M. was the deft.'s co-surety, & had been released in consideration of a new guarantee given to pltf., constituted no defence: the plea nowhere averring or implying that the liability was joint, or that deft. became surety on the faith of M.'s co-suretyship, or that any right of contribution had arisen against M. which had been taken away or injuriously affected or that deft. had suffered any damage or injury by the substitution described.

(2) A surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed (*per CUL.*)—*WARD v. NATIONAL BANK OF NEW ZEALAND* (1883), 8 App. Cas. 753; 52 L. J. P. C. 65; 49 L. T. 315, P. C.

*Annotation*:—*As to (2) Refd. Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 38 W. R. 537.

**1583. — Bankruptcy of co-surety—Original joint liability becoming several.**—*Re WOLMERSHAUSEN, WOLMERSHAUSEN v. WOLMERSHAUSEN*, No. 1186, *ante*.

**1584. — Compromise between creditor**

*LIFE & FIRE ASSURANCE CO. v. HODGES & MACADAM* (1857), 29 Sc. Jur. 486.—*SCOT.*

**I. — — — — —**—*CHURCH OF ENGLAND LIFE & FIRE ASSURANCE CO. v. WINK* (1857), 19 Duil. (Cl. of Sess.) 1079.—*SCOT.*

#### PART IX. SECT. 2, SUB-SECT. 10.—D.

**1582.1. Other sureties not discharged—Unless right to contribution affected.**—The C. co. & D. by separate independent contracts guaranteed to pltf. the good conduct in office of B. Pltf. sued the C. co., who pleaded that pltf. had discharged D. from liability under his policy, & that this also discharged

them:—*Held*: even if pltf. had so discharged D., thus operated only to release the C. co. to the extent to which they would have had a right of contribution from D.—*LONDON (CITY) v. CITIZENS' INSURANCE CO.* (1887), 13 O. R. 713. *CAN.*

**1582.ii. — — — — —**—Where two or more sureties contract severally, the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability, must show an existing right to contribution from his co-surety, which has been taken away or injuriously effected by his release.—*MERCHANTS BANK OF*

*& trustee—Precluding receipt of dividend.*—*Re WOLMERSHAUSEN, WOLMERSHAUSEN v. WOLMERSHAUSEN*, No. 1186, *ante*.

#### E. Reservation of Rights Against other Sureties.

**1585. Validity of reservation—Power of creditor to reserve—On composition with co-surety.**—*Re SLADE, Ex p. CARSTAIRS*, No. 1554, *ante*.

**1586. — Reservation by parol—Prior to release—Evidence of reservation inadmissible.**—In a suit against one of five joint & several sureties, it appeared that the creditor had, without deft.'s knowledge & consent, released another of the sureties "from all debts due by him to (the creditor) at this date":—*Held*: the creditor could not recover, & the legal effect of the release could not be modified by evidence of verbal negotiations prior to the release for the purpose of showing an agreement superseded by the release to reserve rights against the sureties.—*MERCANTILE BANK OF SYDNEY v. TAYLOR*, [1893] A. C. 317; 57 J. P. 741; 9 T. L. R. 463; 1 R. 371, P. C.

**1587. Effect of reservation—Other sureties not discharged—Power reserved to sue released surety—Jointly with other sureties.**—A release was given by pltf. to A., one of two partners, with a provision that it should not prejudice any claims which pltf. might have against B., the other partner; & that in order to enforce the claims against B., it should be lawful for pltf. to sue A., either jointly with B. or separately. In an action by pltf. against A. & B., this release having been pleaded by A. & set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B., for the purpose of enabling pltf. to recover payment of moneys due from B. & A. to pltf., either out of the joint estate of B. & A., or from B. or his separate estate, the replication was demurred to, & the demurrer overruled.—*SOLLY v. FORBES* (1820), 2 Brod. & Bing. 38; 4 Moore, C. P. 448; 129 E. R. 871.

*Annotations*:—*Consd.* *Twopenny v. Young* (1824), 3 B. & C. 208; *Cocks v. Nash* (1832), 9 Bing. 311. *Expd. & Distd.* *Warwick v. Richardson* (1844), 14 Sim. 281. *Folld.* *Thompson v. Lack* (1816), 3 C. B. 540. *Apld.* *Willis v. De Castro* (1858), 4 C. B. N. S. 216. *Consd.* *Bateson v. Gosling* (1871), L. R. 7 C. P. 9. *Refd.* *Watters v. Smith* (1831), 2 B. & Ad. 889; *Re Barrow & Goddard, Ex p. Christy* (1832), 2 Denc. & Ch. 155; *Ansell v. Baker* (1850), 15 Q. B. 20; *Owen v. Homan* (1851), 3 Mac. & G. 378; *Currey v. Arncliffe* (1858), 6 W. R. 516; *Green v. Wynn* (1869), L. R. 7 Eq. 28; *Hooper v. Marshall* (1869), 39 L. J. C. P. 14; *Re K. W. A.* (1901), 85 L. T. 31. *Mentd.* *Morley v. Frear* (1830), 4 Moo. & P. 305; *Simons v. Johnson* (1832), 3 B. & Ad. 175; *Upton v. Upton* (1832), 1 Dowl. 400; *Keasley v. Cole* (1846), 16 M. & W. 128; *Ford v. Beech* (1848), 11 Q. B. 852; *Squire v. Ford* (1851), 9 Hare, 47; *Pomfret v. Perring* (1854), 18 Beav. 618; *Price v. Barker* (1855), 4 E. & B. 760.

**1588. — — — — —**—A release to one of two sureties who had entered into a joint & several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso, that such release should not prejudice the right of the grantee to enforce its payment against the

*CANADA v. GUTHRIE* (1915), 32 W. L. R. 464.—*CAN.*

**G. — — — — —**—*Separate actions brought—One surety discharged.*—Where separate actions are brought against two sureties, the discharge of one does not operate as a discharge of the other.—*BEHWELL v. BRISON* (1810), 3 Ont. Dig. 5733.—*CAN.*

#### PART IX. SECT. 2, SUB-SECT. 10.—E.

**h. General rule.**—An agreement for the reservation of rights against co-debtors is not a release of the other debtors.—*LONGHAGAN & HANFORD v. SASKATOON, ETC. CO.* (1915), 31 W. L. R. 673; 8 W. W. R. 1031; 8

*Sect. 2.—Discharge from liability: Sub-sect. 10.*

grantor & the other surety, or either of them:—*Held*: the proviso restrained the operation of the release, & the liability of the co-surety was not affected by such release.—*THOMPSON v. LACK* (1846), 3 C. B. 540; 16 L. J. C. P. 75; 8 L. T. O. S. 142; 136 E. R. 216.

*Annotation*:—*Reid*, *Price v. Barker* (1855), 4 E. & B. 760.

**1589. — Release construed as covenant not to sue.**—To an action for goods sold & delivered, *deft.* pleaded that the causes of action accrued to *plffs.* against *deft.* & A. B. & C., jointly, & not otherwise, & not separately against *deft.*, & that *deft.* & A., B., & C., were jointly liable to *plffs.* in respect of the causes of action in the declaration, & not otherwise; & that, after the accruing of the causes of action, & before suit, *plffs.* by deed released A., B., & C. from the said causes of action, etc. Replication, that the deed in the plea mentioned was a deed of assignment by A., B., & C., of their estate & effects for the benefit of their creditors, & contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that, in another & earlier part of the same deed, it was agreed & declared in the words following, *i.e.* "that it shall be lawful for the creditors to execute these presents without prejudice to any mtge., lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties or any other person or persons who may be liable for the payment thereof"; & that all the creditors who executed the deed, executed the same without prejudice as aforesaid; & so *plffs.* said that *deft.* was not released as in & by the plea supposed:—*Held*: on demurrer, taking the plea & replication together, the deed appeared to amount only to a covenant not to sue A., B., & C., & not to a release; & consequently, that the liability of *deft.*, whether joint only, or joint & several, was not thereby discharged.—*WILLIS v. DE CASTRO* (1858), 4 C. B. N. S. 216; 27 L. J. C. P. 213; 31 L. T. O. S. 131; 6 W. R. 500; 140 E. R. 1066.

**1590. — — — — —** *HALLETT v. TAYLOR* (1921), 151 L. T. Jo. 176.

## SUB-SECT. 11. — REVOCATION OF THE GUARANTEE.

*A. Novation.*

*See, generally*, CONTRACT, Vol. XII., pp. 596 *et seq.*

**1591. General rule.**—*BRADFORD OLD BANK v. SUTCLIFFE*, No. 483, *ante*.

**1592. Substituted agreement—Revokes guarantee—Sale of goods.**—Declaration stated that *deft.* guaranteed *plff.* in supplying goods to one H. *Plen.* that, before breach, it was agreed between *plff.* & *deft.* that *plff.* should supply goods to H. & that they should be paid for at the end of three months by a bill at four months to be accepted by *deft.*, which agreement *plff.*, before breach, accepted in discharge of the former agreement, & released *deft.* from the performance thereof:—

*Sask. L. R.* 201; 21 D. L. R. 866.—**CAN.**

*K. — — — — —* *LEWIS v. ANSTRUTHER* (1852), 15 Dunt. (Ct. of Sess.) 280; 25 Sc. Jur. 172; 2 Stuart, 131.—**SCOT.**

**PART IX. SECT. 2, SUB-SECT. 11.—A.**

**1591 l. General rule.**—*LEWIS v.*

*D'ENTRIMONT* (1897), 29 N. S. R. 546.—**CAN.**

*l. Substituted agreement—Revokes guarantee.*—*OXFORD TOWNSHIP v. GAIR* (1888), 15 O. R. 362.—**CAN.**

*m. — — — — —* *CANADA PERMANENT L. & S. CO. v. BALL* (1899), 30 O. R. 557.—**CAN.**

*Held*: (1) the second agreement was an original undertaking, & did not require to be in writing under Stat. Frauds; (2) it was not an accord & satisfaction, & it was a defence to the action as being a substituted contract.—*TAYLOR v. HILARY* (1835), 1 Cr. M. & R. 741; 3 Dowl. 461; 1 Gale, 22; 5 Tyr. 373; 4 L. J. Ex. 72; 149 E. R. 1279.

*Annotations*:—*As to* (1) *Reid*, *Adams v. Wordley* (1836), 2 Gale, 29. *Generally*, *Mentd.* *Hayelden v. Staff* (1836), 5 Ad. & El. 153; *Jones v. Nanney* (1836), Tyr. & Gr. 634.

**1593. — — — — — Surety not consenting.**—A. owed £24,000 to B., which C. guaranteed; then B. agreed to take £12,000 on the joint notes of A. & C., & gave up the guarantee; the notes were not made & flats issued against A. & C.:—*Held*: B. could only prove what remained due of the £12,000, as the original guarantee was not revived.

If this second agreement had been entered into without the consent of . . . the surety, the latter would have been entirely discharged, because it would have prevented the creditor from suing the principal on the first agreement (*ERSKINE, C.J.*).—*Re LORRYMER, Ex p. POWELL* (1836), 1 Deac. 378; 2 Mont. & A. 533.

**1594. — — — — — Insurance policy.**—A surety guaranteed payment of the premiums upon a life policy, which had been assigned by the principal debtor to his creditor to secure payment of part of the debt. Subsequently, the creditor, without the knowledge of the surety, agreed with the debtor to take the security & the liability of the debtor & surety to pay the premiums thereon in substitution for the personal liability of the debtor, in respect of that portion of the debt, & released the debtor from personal liability in respect thereof:—*Held*: this arrangement discharged the surety.—*LOWES v. MAUGHAN & FEARON* (1884), 1 T. L. R. 6; Cab. & El. 340.

**1595. Transfer of debt—To new creditor.**—*BRADFORD OLD BANK v. SUTCLIFFE*, No. 483, *ante*.

**Effect of taking other security from debtor.**—*See* Sub-sect. 9, B. (c), *ante*.

*B. Notice to Determine.*

**1596. Whether revocable by notice—Continuing guarantee—Supply of goods.**—*BASTOW v. BENNETT*, No. 636, *ante*.

**1597. — — — — — Banking guarantee.**—*BURGESS v. EVE*, No. 666, *ante*.

**1598. — — — — — Under seal.**—*Re CRACE, BALFOUR v. CRACE*, No. 1630, *post*.

**1599. — — — — — Guarantee for rent.**—*Deft.*'s gardener entered into occupation of a cottage belonging to *plff.* & *deft.* guaranteed the rent for three months & from week to week thereafter. Four months after the tenancy began the gardener left *deft.*'s service & *deft.* then gave *plff.* a week's notice of the termination of the guarantee:—*Held*: the guarantee was terminable by notice.—*WINGFIELD v. DE ST. CROIX* (1919), 35 T. L. R. 432, D. C.

**1600. — — — — — Guarantee under seal.**—A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no defence to an action on the bond for a deficit, subsequent to the letter, if it

**PART IX. SECT. 2, SUB-SECT. 11.—B.**

*n. Validity of notice—Notice by one of two sureties.*—*Defts.* executed a bond as sureties for K., which recited his appointment as agent for *plffs.* About three months after the execution of the bond, *defts.*, or one of them, wrote to *plffs.*:—*Held*: whether

be not pleaded specially. *Qu.*: if it be pleaded.—*HOUGH v. WARR* (1824), 1 C. & P. 151, N. P.

**1601.** ———.—*B.* being hired as a clerk to A. & co., but not for any definite period, C. & D. joined with him in a bond to secure his duly accounting for his assets; C. died, & his extrix. gave a written notice to A. & co., that she would no longer remain surety; A. & co. communicated this notice to B., & required & obtained from him the bond of another surety; D. died, & also the new surety; & four years & a half after the death of C., B. died, when deficiencies were found in his accounts, subsequent to the notice:—*Held*: the extrix. of C. had no equity to restrain A. & co. from proceeding at law on the bond.—(*GORDON v. CALVERT* (1828), 4 Russ. 581; 38 E. R. 924, L. C. Annotation:—*Reid. Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733.

**1602.** ———.—**Parol notice.**—(1) By an agreement between plffs., a Solvency Guarantee Co., & defts., in consideration of a certain sum, it was agreed that the funds of the co. should be subject & liable to make good to defts. the loss occasioned to them during the term of two years by reason of any of the purchasers of their goods becoming bkpt., etc., within such time, & during any future period in respect whereof the co. should consent to receive further payments, but subject to certain conditions indorsed on the instrument. One of the conditions indorsed was, that all guarantees, whatever might be the original term, should, from the expiration of such original term, be treated as a renewed contract of the like nature & conditions, unless either the member interested therein or the board of directors should give two calendar months' notice of an intention not to renew the same:—*Held*: the renewed contract was not itself to be deemed to contain this particular condition as to renewal, & therefore, even in the absence of notice, the contract did not extend beyond one renewal.

(2) The agreement was signed by three directors, on behalf of the co., & by defts., & also sealed with the co.'s seal: *Held*: the seal was only a statutory authentication of the contract, & the instrument declared on was therefore not a deed, & consequently the agreement might be rescinded by parol.—*SOLVENCY MUTUAL GUARANTEE CO. v. FROANE* (1861), 7 H. & N. 5; 31 L. J. Ex. 193; 7 Jur. N. S. 899; 158 E. R. 369.

Annotation: *Generally, Mentd. Re Solvency Mutual Guarantee Co., Hawthorne's Case* (1862), 6 L. T. 574.

**1603.** ———.—**Guarantee for which consideration given once for all.**—*LLOYD'S v. HARPER*, No. 571,

**1604.** ———.—**Guarantee for future advances—Creditor not obliged to make such advances.**—*LLOYD'S v. HARPER*, No. 571, *ante*.

**1605.** **Necessity for notice—Guarantee expressed to be renewable.**—*SOLVENCY MUTUAL GUARANTEE CO. v. FROANE*, No. 1602, *ante*.

**1606.** **Validity of notice—Guarantee for specific period—Notice within such period.**—*OFFORD v. DAVIES*, No. 25, *ante*.

**1607.** ———.—**Power given to representatives of sureties—Notice by executors.**—A joint & several continuing guarantee bond provided that the obligors or any one or more of them, or their respective "representatives," might determine

their or his liability by a month's notice in writing to the obligees. One of the obligors having died, his exor., who was unaware of the bond, gave the obligee's notice only of his death:—*Held*: "representatives" included exors. & notwithstanding the notice the estate of deceased obligor was liable for indebtedness incurred by the principal debtors after his death.—*Re SILVESTER, MIDLAND RY. CO. v. SILVESTER* (1895), 1 Ch. 573; 64 L. J. Ch. 390; 72 L. T. 283; 43 W. R. 443; 30 Sol. Jo. 333; 13 R. 418.

Annotation:—*Consd. Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733.

**1608.** ———.—**To be given by each & all of sureties—Notice by one only.**—By an agreement the six signatories thereto jointly & severally agreed with a Canadian bank to guarantee repayment up to a fixed sum of all liabilities, including interest, which a customer had or should incur to the bank: it was provided that the agreement should be a continuing guarantee "until the undersigned, or the exor. or administrator of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee." In 1913, the bank, without notice to the guarantors but with the assent of the debtor, increased the rate of interest upon the advances to 8 per cent., though by the Bank Act it was illegal for a bank to charge more than 7 per cent. Subsequently one of the signatories died & his exors. gave notice purporting to terminate the liability of the estate of deceased under the guarantee:—*Held*: (1) the guarantee remained in force against all the guarantors until each & all of them or their respective exors. or administrators, gave notice to determine it; (2) the increase in the rate of interest did not discharge the guarantors, but they were liable for the principal sum advanced & for such interest as the debtor was legally liable to pay.—*EGBERT v. NATIONAL CROWN BANK*, [1918] A. C. 903; *sub nom. EGBERT v. NORTHERN CROWN BANK*, 87 L. J. P. C. 186; 119 L. T. 659; 35 T. L. R. 1, P. O.

—**Notice of death of surety—Not equivalent to notice to determine.**—*See* No. 1607, *ante*.

#### C. Death.

##### (a) Creditor.

*See* Mercantile Law Amendment Act, 1856 (c. 97), s. 4; Partnership Act, 1890 (c. 39), s. 18.

**1609.** **Death of one creditor—Partner—Banking guarantee.**—Where a bond by A., reciting that B. intended to open a banking account with C., D., & E., as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the banking house of C., D., & E.:—*Held*: on C.'s death such obligation ceased, & did not cover future advances made after another partner was taken in; & B. who was indebted to the house at C.'s death having afterwards paid off the balance which was applied at the time to the old debt incurred in C.'s lifetime, A. was wholly discharged from his obligation.—*STRANGE v. LEE* (1803), 3 East, 484; 102 E. R. 682.

Annotation:—*Appld. Dance v. Girdler* (1804), 1 Bos. & P. N. R. 34.

**1610.** ———.—**—**—**—**—**—**—A bond conditioned to repay to five persons all sums advanced by them or any of them in their capacity of bankers, will

plffs. were notified by one or both defts., the latter were discharged.—*NORTH BRITISH MERCANTILE INSURANCE CO. v. KEAN* (1888), 16 O. R. 117.—*CAN.*

—*The recall of the guarantee by a surety would not in every case debar the creditor from*

giving time to the debtor after the date of the recall.—*HAMILTON'S BANK v. BANK OF SCOTLAND*, [1913] S. C. 743.—*SCOT.*

#### PART IX. SECT. 2, SUB-SECT. 11.—C. (a).

*p. Death of one creditor—Partner.]*

—*Deft. guaranteed the price of goods supplied by C. & Sons to Q. C. died:—Held: the death of C. dissolved the firm of C. & Sons, & put an end to the contract of suretyship.*—*COMRAVE BREWING & MALTING CO. v. STRAUS* (1886), 11 A. R. 156; *reword.* 12 S. C. R. 571.—*CAN.*

**Sect. 2.—Discharge from liability: Sub-sect. 11, C. (a), (b) & (c) i.]**

not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers.—*WESTON v. BARTON* (1812), 4 Taunt. 673; 128 E. R. 495.

**Annotations:—***Apld.* *Simson v. Cooke* (1824), 1 Bing. 452. *Reid.* *Backhouse v. Hall* (1865), 34 L. J. Q. B. 111.

**1611. ————.]—A., B., & C.,** carrying on business in co-partnership for a term, which would expire on Feb. 19, 1807, under arts. which empowered A., in case of his death during the term, to bequeath his share of the trade in favour of his wife or children, S. a customer of the bank, & a surety, covenanted that they, or one of them, would pay to A., B., & C., the survivors or survivor of them, etc., all sums, which, on, before, or until Feb. 14, 1807, should become due from the customer to A., B., & C., the survivors or survivor of them, etc.; A. died, having bequeathed his share of the concern to his exors., in trust for his children: the business continued to be carried on under the same firm as before, & his exors. intereared in the management, & shared in the profits. At the time of A.'s death, the balance due from S. to the bank was upwards of £11,000; after that time S. continued his dealings with the bank in the same manner as previously, paying in more than £11,000 within a few weeks after A.'s death, but drawing out, during the same period, a larger sum; & these subsequent dealings were contained in the same account current with the preceding dealings; some years afterwards, S. became insolvent, being indebted to the bank in a balance of £10,000 & upwards:—*Held*: (1) the partnership, which carried on the business after the death of A., was a new partnership; (2) the surety's covenant did not extend to cover sums advanced to the customer by the bank after A.'s death; (3) the balance, due at A.'s death from the customer, was to be considered as discharged by the payments subsequently made by him to the bank.—*PEMBERTON v. OAKES* (1827), 4 Russ. 154; 6 L. J. O. S. Ch. 35; 38 E. R. 763, L. C.

**Annotations:—***As to (2) Apld.* *Chapman v. Beckinton* (1842), 3 Q. B. 703. *Generally, Reid.* *Bank of Scotland v. Christie* (1811), 8 Cl. & Fin. 211.

**1612. ————.]—Bill accepted before but payable after death.]—**Under a guarantee given to a banking-house, consisting of several partners, for the repayment of such bills, drawn upon them by one of their customers, as the bank might honour, & any advances they might make to the same customer, within a certain time:—*Held*: (1) the guarantee ceased upon the death of one of the partners in the bank, before the expiration of the time to which the guarantee was expressed to extend; (2) bills accepted before the death of the partner, & payable afterwards, were within the guarantee; (3) the amount guaranteed could not be increased by any act of the continuing firm & the customer, after the death of the partner, although such amount might be diminished by such act; (4) in the particular form of the guarantee, the amount guaranteed in respect of the bills honoured by the bank was not to be reduced by the amount of a balance owing from the bank to the customer when the guarantee ceased, such balance having been afterwards paid in the course of business between the continuing firm & the customer.—*HOLLOND v. TEED* (1848), 7 Hare, 50; 68 E. R. 20.

**Annotations:—***As to (1) Reid.* *Re Sherry, London & County Banking Co. v. Terry* (1881), 25 Ch. D. 692. *As to (4) Reid.* *Re Sherry, London & County Banking Co. v. Terry* (1884), 25 Ch. D. 692.

**1613. ————.]—Debt on bond against a surety.** The condition recited that W. C., E. W. C., & W. P., had lately entered into co-partnership, & that upon the treaty it was agreed, that W. P. should be the acting partner, & that he & J. B., as his surety, should become bound to W. C. & E. W. C. in £1,000; & it was conditioned, that "if W. P. should well & truly observe, perform, & keep all & every the covenants, provisoes, clauses, & agreements, on his part to be observed & performed, contained in a certain indenture or deed of co-partnership, bearing date, etc., & made, etc.; & also, if he, W. P., during such time as he should continue the acting partner in the trade or business of the co-partnership, should & did well, truly, & faithfully make, deliver, or transmit a just & true account in writing of all sum & sums of money, cash, notes, bills, & other partnership effects, which should come to the hands of W. P., or which he should be intrusted with, by or on account of the co-partnership; & also make good, answer for, & pay the moneys due on the balance of such account, & also all & every other sum or sums of money, cash, notes, & bills which might by possibility come to the hands of W. P., as such partner as aforesaid, to W. C. & E. W. C." then the obligation to be void, etc.

By the deed, referred to in the condition, & dated Jan. 1, 1830, it appeared that the partnership was to continue up to July 1, 1841; & it was covenanted, that on Mar. 1, 1831, & so in every year "during that co-partnership," the parties to the deed should meet & state a true account in writing concerning the joint stock, debts, & effects of the co-partnership, & enter the true particulars of such yearly account, & the rest & balance thereof, in three several books, & that on the allowance & approval of such account yearly, the parties should sign their names in each of the books at the foot of the account, which account, so stated, settled, & subscribed, should be final & conclusive, unless afterwards found in error to the amount of £20 & upwards.

The deed also contained a stipulation, enabling any of the parties thereto, their exors. & administrators, if they should be minded, to quit that co-partnership at the end of the seventh year of the co-partnership, upon giving to the other partners twelve calendar months' notice in writing of his intention, & then that that indenture of co-partnership & every covenant should determine as to the party giving the notice, except as regarded a valuation of his share, etc.

The deed subsequently contained a stipulation that any of the partners in the joint trade or business should be at liberty to transfer, in his lifetime, his share to any son, & to dispose of his share by will, & that the son, or person to whom the disposition should be made, or in the case of the death of a partner without such transfer or disposition, then the exor. or administrator of such partner should be deemed & considered a partner in the joint concern during the then residue thereof, subject to the stipulations & provisions of the partnership deed:—*Held*: upon the construction of the condition of the bond, & having reference in its construction to the language & covenants of the deed, that the obligation of the surety did not extend to any time beyond the carrying on of the said trade by "the co-partnership," viz. W. C., E. W. C., & W. P., & therefore, the surety was not liable for any false accounts rendered by W. P. after the death of W. C., although the business had been carried on after his death without the addition of a new partner.—*CHAPMAN v. BECKINTON*



(1842), 3 Q. B. 703; 3 Gal. & Dav. 33; 12 L. J. Q. B. 61; 7 Jur. 62; 114 E. R. 676.

*Annotation*.—*Reid*. Backhouse v. Hall (1865), 6 B. & S. 507.

1614. — **Creditors for costs awarded—Death before award.**—The condition of a bond, after reciting that A., B., & C. had filed a bill in equity against D. & E., was, that the obligee would pay all such costs as the Ct. of Ch. should award to defts., on the hearing of the cause:—*Held*: the death of E., before any costs awarded, could not be pleaded in discharge of the bond.—*KIPLING v. TURNER* (1821), 5 B. & Ald. 261; 106 E. R. 1188.

**Payments made after death.**—*See* Sect. 1, subsect. 1, A. (b) i., *ante*.

#### (b) Principal Debtor.

*See* Mercantile Law Amendment Act, 1856 (c. 97), s. 4; Partnership Act, 1890 (c. 39), s. 18.

1615. **When surety discharged—No action after judgment recovered.**—*SPARROW v. SOWGATE* (1621), W. Jo. 29; Win. 61; 82 E. R. 16.

*Annotations*.—*Mentd.* Taylor v. Caldwell (1863), 3 B. & S. 826; Ward v. Griffith (1895), 1 Ld. Raym. 83.

1616. — **Performance of arbitration award—Death before final award.**—A submission to arbn. contained a stipulation, that it should not be vacated by the death of either of the parties, but that, notwithstanding such an event, matters should be proceeded in. The final award having been made after the death of one of the parties:—*Held*: a surety for the fulfilment of it was liable.—*M'DOUGAL v. ROBERTSON* (1827), 4 Bing. 435; 2 Y. & J. 11; 1 Moo. & P. 147; 130 E. R. 835, Ex. Ch.

1617. — **Joint bond.**—A. & B. were obligors in a joint bond; A., who was alleged to be the principal debtor, died:—*Held*: his assets were not in equity liable upon the bond, but the liability survived to B.—*RICHARDSON v. HORTON* (1843), 6 Beav. 185; 12 L. J. Ch. 333; 49 E. R. 790.

*Annotations*.—*Consd.* Other v. Iveson (1855), 3 Eq. Rep. 562. *Mentd.* Richardson v. Jenkins (1853), 1 Drew, 477; Kinderley v. Jervis (1856), 22 Beav. 1.

1618. — **Annuity bond—Valuation of annuity on debtor's bankruptcy—Valuation unpaid in full at decease.**—A. executed an annuity deed, with sureties for payment of an annuity to B. during A.'s life. A. became bkpt. & the annuity was valued. The sureties continued to pay the annuity regularly until A. died. At that time the amount which the sureties had paid was less than the amount of the valuation. The sureties were discharged from further payment, & B. had no further claim.

The words of [6 Geo. 4, c. 16] s. 55, render the sureties liable to be sued for the accruing payments of the annuity, but if the principal be dead, there are no accruing payments (*ERLE, J.*).

It would be strange if the annuitant should be entitled to receive more because his debtor becomes bkpt. The effect of the sect. is to give the sureties an option either to pay the valuation of the annuity at once, or to continue to pay the annuity until that valuation & 4 per cent. interest on the money is made up (*PATTERSON, J.*).—*DALTON v. TUKE* (1848), 11 L. T. O. S. 219.

1619. **Death of one joint debtor—Partner.**—A bond by which, after reciting the partnership of J. & T. W., became surety for such sums as should be advanced to meet bills drawn by J. & T., or either of them:—*Held*: not to extend to bills drawn by J. after the death of T.—*SIMSON v.*

*COOKE* (1824), 1 Bing. 452; 8 Moore, C. P. 588; 2 L. J. O. S. C. P. 74; 130 E. R. 181.

*Annotation*.—*Reid*. P'case v. Hirst (1829), 8 L. J. O. S. K. B. 94.

1620. — — — — —.]—(1) A partnership composed of three persons, A., B. & C., gave a joint & several bond to a bank, to cover advances to be made to them by the bank on a cash credit; & in that bond, two estates held by A., were specially named as part securities for these advances: A. died:—*Held*: by his death the partnership was dissolved, & the security, so far as his estates were concerned, was no further continued; no arrangement between the surviving partners, or between them & the bank, for the purpose of settling the general accounts, being capable of affecting that security.

(2) After the death of A. the bank continued as before its dealings with the partnership, then constituted by B. & C.; & at a certain period, payments made to the bank entirely balanced the debt due to it at the time of A.'s death:—*Held*: the separate liability of A.'s estates was thereby discharged.

(3) B., the son & heir of A., within one year after his father's death, gave to the bank a heritable bond over his father's estates, for securing payment of advances to be made by the bank:—*Held*: this was a bond for his own & not for his father's debts, & was consequently void under Scottish Act of 1661, as a bond granted by the heir within one year of the ancestor's death.—*ROYAL BANK OF SCOTLAND v. CHRISTIE* (1811), 8 Cl. & Fin. 214; 8 E. R. 84, H. L.

*Annotation*.—*As to* (2) *Reid*. Deeley v. Lloyds Bank, [1912] A. C. 756.

1621. — — — — —.]—**SOLVENCY MUTUAL GUARANTEE CO. v. FREEMAN**, No. 1292, *ante*.

1622. — — — — —.]—Three persons carried on the business of shipbuilders under the name of "G. W. & W. J. Hall." No person of that name had been in the partnership for some time, & plff. & deft. being both aware of the constitution of the partnership, deft. gave plff. the following guarantee: "In consideration that you have at my instance & request consented to open an account with the firm of G. W. & W. J. Hall, shipbuilders, I hereby guarantee the payment to you of the moneys that at any time may become due not exceeding \$5,000":—*Held*: the guarantee ceased on the death of one of the partners, as a contrary intention did not appear by express stipulation, or by necessary implication from the nature of the firm or otherwise.—*BACKHOUSE v. HALL* (1865), 6 B. & S. 507; 6 New Rep. 98; 34 L. J. Q. B. 141; 12 L. T. 375; 11 Jur. N. S. 562; 13 W. R. 654; 122 E. R. 1283.

1623. — **Liability of estate.**—Bond by three obligors, whereby they bound themselves "jointly," & their heirs, etc., "respectively," to pay, which was conditioned to be void, if they or either of them, their or either of their heirs, paid:—*Held*: it was a joint & several obligation, & one having died, his assets were liable.—*TIPPINS v. COATES* (1853), 18 Beav. 401; 52 E. R. 158.

*Annotation*.—*Mentd.* Levy v. Sale (1877), 37 L. T. 709.

**Payments made after death.**—*See* Sect. 1, subsect. 1, A. (b) i., *ante*.

#### (c) Surety.

##### i. Single Suretyship.

*See, generally*, CONTRACT, Vol. XII., pp. 593, 594; EXECUTORS, Vol. XXIV., p. 644 *et seq.*

1624. **Liability of surety's estate—Joint guarantee.**—*OTHER v. IVESON*, No. 695, *ante*.



*Sect. 2.—Discharge from liability: Sub-sect. 11, C. 2 & 13.]*

**1625. — Continuing guarantee.]—**The death of the surety does not operate as a revocation of a continuing guarantee. J. gave a guarantee in the following terms: "Messrs. B. & Co.—I request you will give credit in the usual way of your business to H.; & in consideration of your doing so I do hereby engage to guarantee the regular payment of the running balance of his account with you, until I give you notice to the contrary, to the extent of £100":—*Held*: the liability was not determined by the death of J., but his exors. were liable to B. & Co. for goods sold & credit given to H. subsequent to the death.—*BRADBURY v. MORGAN* (1862), 1 H. & C. 249; 31 L. J. Ex. 462; 7 L. T. 104; 8 Jur. N. S. 918; 10 W. R. 776; 158 E. R. 877.

*Annotations:—Refd. Harris v. Fawcett* (1873), 8 Ch. App. 866; *Lloyd's v. Harper* (1880), 50 L. J. Ch. 140.

**1626. — Subsequent advances by creditors — With knowledge of death.]—**A guarantee was determinable by six months' notice. The guarantor died, leaving as his exor. the debtor on whose behalf the guarantee was given. The creditors to whom the guarantee was given continued to make advances to the debtor, knowing that there was no personal estate to answer the guarantee:—*Held*: under the circumstances, the creditors were not entitled to the benefit of the guarantee for their advances subsequent to the death.

This guarantee was not determined by the death (MELLISH, L.J.).—*HARRIS v. FAWCETT* (1873), 8 Ch. App. 866; 42 L. J. Ch. 502; 20 L. T. 84; 21 W. R. 742, L. J.J.

*Annotations:—Refd. Coulthart v. Clementson* (1879), 5 Q. B. D. 42; *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *Re Silvester, Mid. Ry. v. Silvester* (1895), 61 L. J. Ch. 390.

**1627. — — — — After notice of death.]—**A continuing guarantee, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor.—*COULTHART v. CLEMENTSON* (1879), 5 Q. B. D. 42; 40 L. J. Q. B. 201; 41 L. T. 798; 28 W. R. 355.

*Annotations:—Distd. Lloyd's v. Harper* (1880), 16 Ch. D. 290. *Consd. Beckett v. Addyman* (1882), 9 Q. B. D. 783; *Re Silvester, Mid. Ry. v. Silvester*, [1895] 1 Ch. 573. *Refd. Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733; *Anchorson v. Tiedegar Dry Dock & Wharf Co.*, [1909] 2 Ch. 401.

**1628. — — — — Guarantee in which consideration given once for all—Guarantee for member of Lloyd's.]—***LOYD'S v. HARPER*, No. 571, *ante*.

**1629. — — — — Guarantee for future advances—Creditor not bound to make such advances—Determination on notice of death.]—***LOYD'S v. HARPER*, No. 574, *ante*.

**1630. — — — — Fidelity guarantee—Liability continues —Unless expressly provided against.]—**Where a bond is given by a surety for the integrity of a person, in consideration of that person's being appointed to an office by the obligee of the bond, the liability of the surety will not, unless expressly so stipulated in the bond, be determined by his death.—*Re CRACE, BALFOUR v. CRACE*, [1902] 1 Ch. 733; 71 L. J. Ch. 358; 86 L. T. 144; 18 T. L. R. 321.

*Annotation:—Refd. Wingfield v. De St. Croix* (1919), 35 T. L. R. 432.

#### PART IX. SECT. 2, SUB-SECT. 11.— C. (c) i.

**1625 i. Liability of surety's estate—Continuing guarantee.]—***DODD v. WHELAN*, [1897] 1 I. R. 575.—*IR.*

q. — — Fidelity guarantee—Li-

ability continues.]—The exors. of sureties are liable for the defalcation of the principal, committed after the death of their testator, & even after notice that they would not be liable.—*R. v. LEEMING, APPLEGHARTS' EXECUTORS* (1850), 7 U. C. R. 306.—*CAN.*

**1631. Notice of death—Not equivalent to notice to determine—Specific proviso for notice to determine.]—***Re SILVESTER, MIDLAND RY. CO. v. SILVESTER*, No. 1807, *ante*.

**Death of one co-surety.]—***See* Sub-sect. 11, C. (c) ii., *post*.

**Payments made after death.]—***See* Sect. 1, sub-sect. 1, A. (b) i., *ante*.

#### ii. Joint Suretyship.

*See, generally, CONTRACT, Vol. XII., pp. 593, 594; EXECUTORS, Vol. XXIV., pp. 644 et seq.*

**1632. Death of one co-surety—Liability of survivor—Bond executed under mistake.]—**A tradesman ignorant of the nature of a bond, filled up one from A. & B. to C. in which the obligors were only jointly bound; one of them died, & the question was, whether the survivor was answerable for the whole money. The ct. relieved upon the mistake.—*SIMPSON v. VAUGHAN* (1739), 2 Atk. 31; 20 E. R. 415, L. C.

*Annotation:—Refd. Thorpe v. Jackson* (1837), 2 Y. & C. Ex. 553.

**1633. — — — —]**—The death of one of the co-sureties under a joint & several continuing guarantee does not by itself determine the future liability of the surviving co-surety. Claim, that by a bond G. & H., as principals, & deft. & W., since deceased, as sureties, became jointly & severally bound to ptfs., subject to a condition that if the obligors should repay to the obligees all sums of money to be by them advanced to G. & H., so that deft. & W. should not be responsible for more than £250, the bond should become void: that W. died before action: that after his death ptfs. made advances to G. & H.: that G. & H. liquidated their affairs by arrangement pursuant to Bkpcy. Act, 1869 (c. 71): that more than £250 was owing from them to ptfs. Defence, that shortly after the decease of W. ptfs. had notice of the existence of his will, & that exors. thereunder had proved it:—*Held*: upon demurrer, the defence was bad.—*BECKETT v. ADDYMAN* (1882), 9 Q. B. D. 783; 51 L. J. Q. B. 597, C. A.

**1634. — — — — Joint guarantee—Conduct of survivors.]—***ASHBY v. DAY*, No. 1246, *ante*.

**1635. — — — — Liability of representative—For proportionate share.]—**Where a joint obligor dies, his representative shall be charged *pari passu* with the surviving obligor in the payment of the bond.—*PRIMROSE v. BROMLEY* (1739), 1 Atk. 89; 26 E. R. 58.

**1636. — — — —]**—*STIRLING v. FORRESTER*, No. 1033, *ante*.

**1637. — — — —]**—*BATARD v. HAWES, BATARD v. DOUGLAS*, No. 1080, *ante*.

**1638. — — — —]**—F. E. & B. bound themselves jointly & severally in a penal sum to secure an advance made by an insurance co. to F., & the bond stipulated that on the death, bkpcy., or absence beyond seas of E. or B., F. should procure another surety to enter into a further bond in the like sum & to the like effect. E. having died, F. procured H. to become surety, & F., B. & H. bound themselves to the insurance co. by a further bond, similar in its terms to the original bond, but with a proviso that E.'s estate should not be released from the sum secured by the former bond. F.

#### PART IX. SECT. 2, SUB-SECT. 11.— C. (c) ii.

**1634 i. Death of one co-surety—Liability of survivor—Joint guarantee—(Conduct of survivors.)—***FENNELL v. MCGUIRE* (1870), 21 C. P. 134.—*CAN.*  
*Notice of death.]*

having become bkpt., B. & H. paid the debt in equal shares, & took from the insurance co. an assignment of both bonds. B. & H. claimed contribution against E.'s estate for half the amount paid:—*Held*: the estate was only liable to contribute one third.—*Re ENNIS, COLES v. PEYTON*, [1893] 3 Ch. 238; 62 L. J. Ch. 991; 69 L. T. 738; 7 R. 544, C. A.

1639. ————J.—*RAMSKILL v. EDWARDS*, No. 1035, *ante*.

#### D. Other Cases.

1640. **Guarantee for apprentice—Ill treatment of apprentice by master.**—[*LOCKLEY v. ELDRIDGE* (1671), *Cas. temp. Finch*, 124; 23 E. R. 68.

*Annotation*:—*Reid*, *Webb v. England* (1860), 29 Beav. 41.

1641. ———— **Apprehension of ill treatment—Reasonable grounds for apprehension.**—[To a statement of claim alleging that deft. had become surety on an indenture of apprenticeship for the faithful service of the apprentice, & that the apprentice had not faithfully served, but had absented himself, deft. pleaded that while the apprentice was in pltf.'s service pltf. assaulted him & inflicted personal injury upon him, & threatened to do him grievous bodily harm, & that the apprentice fearing that grievous bodily harm would be inflicted upon him, left pltf.'s service:—*Held*: the statement of defence should be amended by adding an allegation that the apprentice had reasonable ground for such fear.

The statement of defence, as it stands, is not a good plea. . . . If it had gone on to say that the apprentice had reasonable grounds for fearing that grievous bodily harm would be inflicted upon him, I should have had no doubt that it would have been sufficient (*GROVE, J.*).—*HALLIWELL v. COUNSELL* (1878), 38 L. T. 176.

1642. **Agreement between creditors & sureties—Agreement by majority of creditors—Resolution of company—Right of minority creditors.**—[*SHAW v. ROYCE, LTD.*, No. 8, *ante*.

1643. **Lunacy of surety—No notice given to determine liability.**—[The liability of a surety under a continuing guarantee is determined by the lunacy of the surety, as it would be by death; although there is a general provision in the contract that it shall not be determined except on the surety or his representatives giving three months' notice. A surety guaranteed the loan account & the current account of a co. with a bank, & against depreciation of debentures of the co. deposited with the bank as security. The surety became insane when there was a balance due on the loan account. The bank had notice of the lunacy, but no notice to determine the contract was given by the lunatic's committee, although there was a clause in the contract that the guarantee should not be determined unless three months' notice was given by the surety or his representatives. The contract made no provision for the case of lunacy:—*Held*: the liability of the surety on the continuing guarantee was determined by his lunacy, & the guarantee ceased to be operative, but his committee

was liable for the amount of the loan account accrued due at the time when he became a lunatic.—*BRADFORD OLD BANK v. SUTCLIFFE*, [1918] 2 K. B. 833; 88 L. J. K. B. 85; 110 L. T. 727; 34 T. L. R. 290; 62 Sol. Jo. 404; 23 Com. Cas. 209; *on appeal*, [1918] 2 K. B. 836, C. A.

#### SUB-SECT. 12.—BANKRUPTCY OF SURETY.

1644. **When liability discharged.**—[A. & Co. guaranteed to B. & Co. payment for any goods which they might supply to C. within a certain period, at a credit of two & two months. C. became indebted to B. & Co. for goods, & gave them three bills of exchange, in payment, indorsed by A. & Co. who shortly afterwards became bkpts. One of these bills was dishonoured before, & the other two bills after, their bkpcy. C. was likewise indebted to B. & Co. before the bkpcy. of A. & Co. for some goods, for which they had a right only to call on C. to give them a bill at two months, at the time of A. & Co.'s commission:—*Held*: in an action, brought upon the guarantee, against A. & Co. their certificate was a good defence, by virtue of 49 Geo. 3, c. 121, s. 9.—*GASKELL v. LINDSAY* (1810), 110 L. T. 212, N. P.

1645. ————J.—*BOYD v. ROBINS & LANGLANDS*, No. 417, *ante*.

1646. ———— **Including costs of action against principal.**—[A guarantee on a bill who is discharged by bkpcy. from his liability on the bill, is discharged also from the costs of an action against the principal.—*BOTTOMLEY v. WILSON* (1822), 3 Stark. 118, N. P.

1647. ———— **Surety for annuity—Arrears after discharge in bankruptcy.**—[A surety for an annuity is relieved, by 1 Geo. 4, c. 119, from arrears which may become due after his discharge, in consequence of failure in payment by the principal, & consequently, the annuity creditor in such a case may come in with the rest of insolvent's creditors.—*COLLINS v. LIGHTFOOT* (1826), 5 B. & C. 581; 8 Dow. & Ry. K. B. 339; 4 L. J. O. S. K. B. 274; 108 E. R. 216.

1648. ————J.—[Under Execution Act, 1814 (c. 96), an insolvent surety for the grantor of an annuity is not protected by the final order from liability for arrears accruing after petition filed, & unpaid by the grantor. For the instalments of such annuity were not, before default, debts within the operation of the Statute.—*THOMPSON v. WHATLEY* (1850), 16 Q. B. 189; 20 L. J. Q. B. 86; 16 L. T. O. S. 301; 15 Jur. 575; 117 E. R. 851.

*Annotation*:—*Reid*, *Amott v. Holder* (1852), 17 Jur. 318.

**Bankruptcy of co-surety—Proof by surety.**—*See BANKRUPTCY*, Vol. IV., p. 272, Nos. 2554–2580.

#### SUB-SECT. 13.—DISCHARGE UNDER MONEY-LENDERS ACT, 1900.

*See Money Lenders Act*, 1900 (c. 51), s. 1 (2); *MONEY & MONEY-LENDING*.

The dissolution of a co., grantors of a letter of guarantee, by the death of one of the partners, does not discharge

the surviving partner, although notified in the *Gazette*, but not specially intimated to the holders of the guarantee.

—*KEMP v. ALLAN* (1824), 3 Sh. (Ct. of Sess.) 153; 21 Fac. Coll. 523.—*SCOT*.

## Part X.—Avoidance of the Guarantee.

### SECT. 1.—IN GENERAL.

*See, generally, MISREPRESENTATION & FRAUD.*

**1649. Contract strictissimi juris.**—*BACON v. CHESNEY*, No. 709, *ante*.

**1650. Whether contract uberrimae fidei.**—*HAMILTON v. WATSON*, No. 1696, *post*.

**1651.** —]—The assured is bound to give to the underwriter all the information in his power: I think the same principle is applicable to the case of sureties (*LORD TREURO, O.*)—*OWEN v. HOMAN* (1851), 3 Mac. & G. 378; 20 L. J. Ch. 314; 18 L. T. O. S. 45; 15 Jur. 339; 42 E. R. 307, L. O.; *on appeal, OWEN & GUTCH v. HOMAN* (1853), 4 H. L. Cas. 997, H. L.

*Annotations:—*Consd. *Newton v. Chorlton* (1853), 2 Drew. 333; *North British Insce. v. Lloyd* (1854), 10 Exch. 523. *Reid. General Steam Navigation Co. v. Rolt* (1860), 6 C. B. N. S. 550; *Lee v. Jones* (1864), 17 C. B. N. S. 482; *Oriental Financial Corp. v. Overend, Gurney* (1871), 7 Ch. App. 142; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1; *Nicholas v. Ridley*, [1904] 1 Ch. 192. *Mentd. Davies v. Stainbank* (1855), 6 De G. M. & G. 679; *Price v. Barker* (1855), 4 E. & B. 760; *Gardner v. Chapman* (1860), 6 Jur. N. S. 1254; *Way v. Hearn* (1862), 11 C. B. N. S. 774; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Muir v. Crawford* (1875), L. R. 10 2 Sc. & Div. 456; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32. *Generally, Reid. Nicholas v. Ridley*, [1904] 1 Ch. 192. *Mentd. Gardner v. Chapman* (1860), 6 Jur. N. S. 1254; *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

**1652.** —]—*NORTH BRITISH INSURANCE CO. v. LLOYD*, No. 1607, *post*.

**1653.** —]—*WYTHES v. LABOUCHERE*, No. 742, *ante*.

**1654.** —]—A guarantee is not void merely by reason of the non-communication by the principal to the surety of the precise circumstances of the loan secured, where the creditor has no reason to suppose they were not so communicated, at least where the transaction is not substantially different from the one which the surety contemplates.—*MATTHEWS v. BLOXSOME* (1864), as reported in 12 W. R. 795.

*Annotations:—**Mentd. Steele v. McKinlay* (1880), 5 App. Cas. 754; *Glenie v. Bruce Smith*, [1907] 2 K. B. 507.

**1655.** —]—*DAVIES v. LONDON & PROVINCIAL MARINE INSURANCE CO.*, No. 1721, *post*.

**1656.** —]—*SEATON v. HEATH, SEATON v. BURNAND*, No. 1, *ante*.

**Guarantee, indemnity & insurance distinguished.]**

—*See* Part I., *ante*.

### SECT. 2. - DUTY OF CREDITOR.

**1657. Duty to inquire—Where suspicion of fraud.**—(1) Though a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud.

(2) It is a general rule that a creditor may give time to a principal debtor without prejudicing his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect.—*OWEN & GUTCH v. HOMAN* (1853), 4 H. L. Cas. 997; 1

*Eq. Rep.* 370; 22 L. T. O. S. 58; 17 Jur. 861; 10 E. R. 752, H. L.

*Annotations:—*As to (1) *Reid. Newton v. Chorlton* (1853), 2 Drew. 333; *North British Insce. v. Lloyd* (1854), 10 Exch. 523; *General Steam Navigation Co. v. Rolt* (1860), 6 C. B. N. S. 550; *Lee v. Jones* (1864), 17 C. B. N. S. 482; *Duncan, Fox v. North & South Wales Bank* (1880), 6 App. Cas. 1. As to (2) *Consd. Oriental Financial Corp. v. Overend, Gurney* (1871), 7 Ch. App. 142. *Reid. Davies v. Stainbank* (1855), 6 De G. M. & G. 679; *Price v. Barker* (1855), 4 E. & B. 760; *Way v. Hearn* (1862), 11 C. B. N. S. 774; *Bateson v. Gosling* (1871), L. R. 7 C. P. 9; *Muir v. Crawford* (1875), L. R. 10 2 Sc. & Div. 456; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32. *Generally, Reid. Nicholas v. Ridley*, [1904] 1 Ch. 192. *Mentd. Gardner v. Chapman* (1860), 6 Jur. N. S. 1254; *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

**1658. Debtor & surety engaged to marry—Independent advice for surety.**—When a man obtains, without consideration, a security from a lady to whom he is engaged to be married, the ct. requires him to show the *bona fides* of the transaction.

A debtor induced a lady, to whom he was engaged, to become security for a debt. After the marriage, she insisted that she had been imposed upon:—*Held*: the only duty of the creditor, who was aware of the relation between the parties, towards the lady was to see that she had proper professional assistance, & any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security.—*COBBETT v. BROCK* (1855), 20 Beav. 524; 52 E. R. 706; *affd.*, 20 Beav. 531, n., L. J.J.

*Annotations:—*Consd. *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188. *Mentd. Carnegie v. Carnegie* (1874), 30 L. T. 460.

**1659. As to covenant by surety—Mortgage to secure debt.**—(1) The principle on which the ct. acts in cases where a fraud is practised on a person borrowing money, & the lender has notice of that fraud, cannot be extended to cases where there is either an absence of fraud or an absence of all notice of fraud. When a solr. who already owes money proposes a mtgc. & a personal covenant for payment by a client who is known by the creditor to be a trustee for him, & there is no reason to suspect fraud by the solr., it is no part of the creditor's duty to interpose between the solr. & client, & ascertain from the latter that all the facts are known to him, & that he understands what he is about to do. Nor is it equivalent to notice of fraud that the instrument recites that the antecedent debt of the solr. is a loan made to the trustee at the date of the mtgc.

(2) A surety can only be relieved against his contract where misrepresentations have been made or facts concealed by the creditor which it was incumbent on him truly to disclose.—*GREENFIELD v. EDWARDS* (1865), 2 De G. J. & Sm. 582; 12 L. T. 411; 11 Jur. N. S. 419; 13 W. R. 668; 46 E. R. 501, L. J.J.

**1660. Debtor & surety husband & wife—Undue influence on wife.**—F., who was indebted to B., obtained from his wife, deft., a guarantee in favour of B. to cover his debts then due to B., a present advance of £500 & future credits, the

### PART X. SECT. 2.

**a. Duty to disclose.**—Mere non communication to the surety by the creditor of facts known to him, affecting the risk to be undertaken by the surety, does not vitiate the contract.—*GREAT WESTERN SMELTING & REFIN-*

*ING CO. v. FRANCISCO PEREIRA (MARQUES)* (1914), 9 Hong Kong L. R. 93.—**HONG KONG.**

**t.** —]—A creditor is not bound to send the surety information as to the position of his principal.—*CUNNINGHAM v. BUCHANAN* (1864)

10 Gr. 523.—**CAN.**

**a.** —]—*JOPER v. COX* (1882), 10 L. R. Ir. 200.—**IR.**

**b.** —]—It is not necessary that persons to whom a guarantee is given should voluntarily disclose the fact that the person guaranteed is

total liability being limited to £1,500. Deft. was a trader on her own account, & had on previous occasions given F. small amounts of financial aid. Deft. was aware of F.'s financial position & of his indebtedness to B. B., B.'s solr., F., & deft. were the only persons present when the guarantee was signed, & deft. had no independent advice. The guarantee, a very complicated document, was twice read over by the solr., who suggested to B. that deft. should be separately represented:—*Held*: (1) deft. did not sufficiently understand the nature of the guarantee; (2) the relationship of husband & wife was one where in the case of a large voluntary benefit influence was presumed to exist; (3) the transaction being challenged, the burden was on the donee to prove that the giving of the guarantee was free from the influence of the husband, & in the absence of independent advice, this had not been discharged; (4) B. was sufficiently put on inquiry to be affected with the equitable flaws in the transaction.—*BISCHOFF'S TRUSTEE v. FRANK* (1903), 89 L. T. 188; *on appeal*, cited, [1909] 2 K. B. at p. 397, C. A.

*Annotations*:—*As to* (1) *Reid*. *Chaplin v. Brammall*, [1908] 1 K. B. 233. *As to* (3) *Folld*. *Chaplin v. Brammall*, [1908] 1 K. B. 233. *Reid*. *Howes v. Bishop*, [1909] 2 K. B. 390; *Talbot v. Von Boris*, [1911] 1 K. B. 851; *Shears v. Jones* (1922), 128 L. T. 218.

**Duty to disclose—Whether contract uberrimae fidei.**—*See Sect. 1, ante.*

**1661. Duty to explain—Meaning & effect of guarantee.**—I am not aware of any principle or any authority which imposes upon a person to whom another is about to give a bond of indemnity as surety any special obligation without having been asked to do so, to give particular explanations to the surety as to the meaning or effect of such bond (*KINDERSLEY, V.-C.*).

If the person taking the indemnity does either by the frame of the instrument or by any representations made to the surety or in any other manner mislead the surety as to the effect of it or occasion his misapprehending it . . . or if he knows or has reason to believe that the surety misapprehends the nature or effect of the instrument & allows him to execute it without removing such apprehension in any such cases a ct. of equity would interfere to prevent any advantage being taken (*KINDERSLEY, V.-C.*).

If the person taking the indemnity . . . takes advantage of his [the surety's] ignorance or distress or induces him to execute the instrument under circumstances by which he is deprived of the means & opportunity of having legal advice & assistance . . . the ct. would interfere to prevent any advantage being taken (*KINDERSLEY, V.-C.*).—*SMALL v. CURRIE* (1854), 2 Drew. 102; 22 L. T. O. S. 268; 2 W. R. 213; 61 E. R. 657; *on appeal*, 5 De G. M. & G. 141, L. J.J.

largely indebted to them.—*WARD v. NATIONAL BANK OF NEW ZEALAND* (1887), 3 N. Z. L. R. 33 (S. C.).—*N.Z. c.* —*J.*—*ROYAL BANK OF SCOTLAND v. GREENSHIELDS*, [1914] S. C. 259.—*SCOT.*

*d.* —*Suspicion of debtor's dishonesty.*—*BANK OF SCOTLAND v. MORRISON*, [1911] S. C. 593.—*SCOT.*

**1661 i. Duty to explain—Meaning & effect of guarantee.**—A person about to become surety for another should be informed of all circumstances which may affect his suretyship, & if intentionally concealed by the party for whose benefit the security is given, the guarantee may be avoided.—*CARRIN v. PERKINS* (1859), 7 Gr. 340.—*CAN.*

#### PART X. SECT. 3.

*a. Duty to inquire—As to any*

#### SECT. 3.—DUTY OF SURETY.

**1662. Duty to inquire—As to any particular matter—Within knowledge of creditor.**—*HAMILTON v. WATSON*, No. 1696, *post*.

**1663. —When given means of knowledge—Surety solicitor.**—Where a bill is filed to set aside a covenant of suretyship, on a ground of fraudulent concealment of a previous release from prior suretyship, to which pltf. was liable, the circumstance that pltf. is a person knowing the forms of legal business, as for instance a solr., is of importance in consideration of the question of fraud & concealment, as such a person may be fairly presumed to have known what by a prudent inquiry, he might have discovered.—*WASON v. WARING* (1850), 15 L. T. O. S. 450, L. C.; *subsequent proceedings* (1852), 15 Beav. 151.

**1664. —**—*J.*—A party relying on his ignorance of facts must show, not only that he had not the information, but that he could not, with due diligence, obtain it.

Pltf. a surety, sought to set aside a deed executed in 1818, on the ground that he had been released by a transaction between the principals in 1812, of which he was ignorant in 1818. It appeared that he had made inquiries in 1815, & was referred to persons who could give him the information, but neglected to do so until the end of 1819, when he obtained it:—*Held*: having in 1815 the means of acquiring the knowledge, he must be deemed to have had it in 1818, & his bill was dismissed.—*WASON v. WARING* (1852), 15 Beav. 151; 51 E. R. 491.

#### SECT. 4.—FRAUDULENT CONCEALMENT AND MISREPRESENTATION.

##### SUB-SECT. 1.—IN GENERAL.

**1665. Creditor must have knowledge of fraud.**—*SPENCER v. HANDLEY*, No. 1670, *post*.

**1666. Whether fraud a necessary ingredient.**—*RAILTON v. MATHEWS*, No. 1686, *post*.

**1667. —**—*J.*—The rule which prevails in assurances upon ships & lives that all material circumstances known to the assured must be disclosed though there be no fraud in the concealment, does not extend to the case of guarantees. In the latter case, the concealment, to vitiate the guarantee must be fraudulent.

A. obtained a loan of £10,000 from pltf.s., an insurance co., on the deposit of certain railway shares with a stipulation, that, if the market value of the shares fell below a certain amount, A. should either furnish fresh shares or pay their value, so as to leave a given surplus. When the time for repayment of the loan arrived, the shares

*particular matter.*—If the principal's statements or credit are doubted, the surety should inquire into them & the very fact that a guarantee is called for by the creditor should put the surety on the alert.—*CUNNINGHAM v. BUCHANAN* (1864), 10 Gr. 523.—*CAN.*

*i.* —*J.*—A person who, having been induced by fraud to go surety for another fails to inquire what his liability, cannot set up fraud as a defence.—*MANTLE LAMP CO. OF AMERICA v. NIXON*, [1924] 3 D. L. R. 1073.—*CAN.*

**1664 i.** —*When given means of knowledge.*—*DOMINION BANK v. BLAIR* (1880), 30 C. P. 591.—*CAN.*

**1664 ii.** —*J.*—*BANK OF AUSTRALASIA v. REYNELL* (1901), 10 N. Z. L. R. 257.—*N.Z.*

**1664 iii.** —*J.*—*STANDARD BANK v. DU PLOOY, STANDARD BANK v. COETZEE* (1899), 16 S. C. 161.—*S. AF.*

#### PART X. SECT. 4, SUB-SECT. 1.

**1666 i. Whether fraud a necessary ingredient.**—*GREAT WESTERN SMELTING & REFINING CO. v. FRANCISCO PEREIRA (MARQUES)* (1914), 9 Hong Kong L. R. 93.—*HONG KONG.*

**1666 ii.** —*J.*—In order to liberate a cautioner on the ground of misrepresentation or concealment, it is not necessary that it should be wilful or fraudulent, but only that it should be such as must be presumed to have influenced him in undertaking the cautionary.—*ROYAL BANK OF SCOTLAND v. HANKEN* (1844), 6 Dunl. (Ct. of Sess.) 1418; 16 Sc. Jur. 598.—*SCOT.*

**Sec. 4.—Fraudulent concealment and misrepresentation: Sub-sects. 1 & 2, A., B. & C.]**

having fallen in value, the time was extended to a further period on the deposit of additional shares & the acceptance of A.'s brother B. to the amount of £2,000. Before the loan became due in pursuance of the terms of this second arrangement B. applied to pltf.s. to be released from his acceptance on procuring the guarantee of deft. & three others for £500 each. Pltf.s. assented to this arrangement. A. then informed deft. of the loan & of its terms, & told him that, unless he could procure security, his shares would be sold at a great loss; but the arrangement as to the withdrawal of B.'s acceptance was not communicated to deft., & he was wholly ignorant of it. Dft. executed a guarantee, which did not refer to B.'s acceptance for £2,000, but recited the consideration for the guarantee to be the original loan, of pltf.'s agreeing not to require any further security in the event of the depreciation of the shares as provided for by the original agreement. In an action on this guarantee:—*Held*: the non-communication of the private arrangement between pltf.s. & A. his brother did not amount to constructive fraud, & afforded no defence to the action.—**NORTH BRITISH INSURANCE CO. v. LLOYD** (1854), 10 Exch. 523; 3 C. L. R. 261; 24 L. J. Ex. 14; 24 L. T. O. S. 157; 1 Jur. N. S. 45; 156 E. R. 515.

**Annotation:—** *Consd.* Wythes v. Labouchere (1859), 3 De G. & J. 593. *Apld.* Pledge v. Buss (1860), John. 663. *Consd.* Lee v. Jones (1861), 17 C. B. N. S. 482; Phillips v. Foxall (1872), L. R. 7 Q. B. 666; London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Refd.* Fletcher v. Krell (1873), 42 L. J. Q. B. 55; Mackreth v. Wainman (1884), 51 L. T. 19; Welton v. Somes (1888), 5 T. L. R. 46.

1668. —.]—**PLEDGE v. BUSS**, No. 810, *ante*.

**SUB-SECT. 2.—CONCEALMENT—WHAT AMOUNTS TO.**

**A. In General.**

1669. **Proviso in settlement—Restraint on anticipation—Annuity to married woman.**—Settlement by a husband of money, in trust to pay the interest to the wife during her life, with a proviso against anticipation. The husband joins with a surety in a covenant to pay an annuity, secured by an assignment by the wife of the interest to become due & of the principal sum in the event of there being no children of the marriage:—*Held*: the surety not entitled to any remedy in equity under the assignment in respect of his payment of the arrears of the annuity recovered against him by an action upon the covenant, although he had no notice of the proviso against anticipation in the settlement; a charge of fraudulent concealment not being sufficiently established.—**JACKSON v. HOBHOUSE** (1817), 2 Mer. 483; 35 E. R. 1025, L. C.

**Annotations:—** *Refd.* Baggott v. Meux (1814), 1 Coll. 138; Clive v. Carew (1859), 1 John. & H. 199; Thomas v. Price (1877), 46 L. J. Ch. 761; Stanley v. Stanley (1878), 47 L. J. Ch. 256. *Mentd.* Johnson v. Freeth (1836), Donnelly, 16; Tullett v. Armstrong (1838), 1 Beav. 1; Moore v. Moore (1844), 13 L. J. Ch. 121; Stikeman v. Dawson (1847), 1 De G. & Sm. 90; Barrow v. Barrow (1858), 4 Ex. & J. 409; Willoughby v. Middleton (1862), 2 John. & H. 344; Sharpe v. Foy (1868), 4 Ch. App. 35; Arnold v. Woodhams (1873), L. R. 18 Eq. 29; *Re* Glanville, Ellis v. Johnson (1886), 31 Ch. D. 532; Bateman v. Faber, [1897] 2 Ch. 223.

1670. **Further & separate security—Bond from debtor to creditor—Bond prepared by creditor's attorney—Connivance of creditor & attorney.**—C. contracted with R., the attorney of pltf. to purchase the good-will of a business for £425. C.

& H. as his surety, gave pltf. a bond for £300, & C. gave his separate bond for £125. To an action on the bond, H. pleaded that it was obtained by the fraud of pltf.:—*Held*: to support this plea, H. was bound to show that R. who prepared the bond, knew & agreed that H. should be kept in ignorance of C.'s further liability for the £125.—**SPENCER v. HANDLEY** (1842), 4 Man. & G. 414; 5 Scott, N. R. 546; 11 L. J. C. P. 250; 134 E. R. 169.

1671. **Incumbrances on property—Charged with payment of annuity.**—A. covenanted to convey to B. certain property free from incumbrances, except such as were set forth in a sched., in consideration of B. & C., as his surety, doing certain things. It turned out that the property was charged with another incumbrance, of which C. had no actual knowledge, A. having forgotten that it existed:—*Held*: C. was discharged from his liability as surety.—**WILLIS v. WILLIS** (1850), 17 Sim. 218; 15 L. T. O. S. 178; 14 Jur. 404; 60 E. R. 1112.

1672. **Insolvency of debtor.**—**BALSH v. WILKINSON** (1852), 18 L. T. O. S. 225.

1673. **Dangerous nature of cargo—Sale of ship—Guarantee for purchase-money.**—Deft. R. agreed to sell two steamships to the A. D. Steam Navigation Co., of which pltf.s. were two of the directors, & it was agreed that the purchase-money should be paid partly in shares & partly in bills of exchange accepted by the co., & the vessels should be mortgaged to R. to secure the remainder of the purchase-money. Pltf.s. then agreed to indorse certain of the bills, & in consideration of that guarantee, R. agreed that they should be owners of two-thirds of the property mortgaged. The vessels were never formally transferred to the co., & no mtge. was ever executed, but soon after the agreement R., acting as agent of his own firm, & assuming to act as agent of the co., dispatched the vessels to Constantinople, & thence dispatched one of them to Trebizond, laden with munitions of war for the Circassians, who were then at war with Russia:—*Held*: as the dangerous nature of the cargo, which exposed the vessel to extraordinary risk, was concealed from the company by R., he could not have enforced the agreement against the co., & pltf.s. were entitled to be relieved from their liability.—**BURKE v. ROGERSON** (1866), 14 L. T. 780; 12 Jur. N. S. 635; 2 Mar. L. C. 375, L. J. J.

1674. **Circumstances affecting principal debtor—Surety for a surety—Rate of interest on original loan.**—On the application of applt., respnt. an underwriter at Lloyd's, underwrote an instrument in the form of a policy whereby he guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by applt. Resp. made no inquiry as to the rate of interest payable by the borrower or as to the circumstances of the loan, & no information was given to him on those points. In fact the interest was over 30 per cent. & the borrower was unable to repay the loan. In an action on the policy the jury found that the transaction was not one of exceptional risk:—*Held*: the non-disclosure of the rate of interest & the circumstances of the loan did not constitute a defence, there being no evidence that those facts were material to the only risk undertaken by respnt., namely, the solvency of the surety.—**SEATON v. BURNAND, BURNAND v. SEATON**, [1900] A. C. 135; 69 L. J. Q. B. 409; 82 L. T. 205; 16 T. L. R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H. L.; *revd.* S. C. *sub nom.* SEATON v. HEATH, SEATON v. BURNAND, [1899] 1 Q. B. 782, C. A.

**Annotations:—** *Refd.* London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Mentd.* Parr's Bank v. Albert Mines Syndicate (1900), 5 Com. Cas. 116; *Re*

Denton's Estate, Licensees Insee. Corp'n. & Guarantee Fund v. Denton, [1904] 2 Ch. 178; Floyd v. Gibson (1909), 100 L. T. 761; Cantieri Meccanico Brindisano v. Janson, [1912] 3 K. B. 452; Banbury v. Bank of Montreal, [1918] A. C. 626; Yorke v. Yorkshire Insee., [1918] 1 K. B. 662; Wilson v. United Counties Bank, [1920] A. C. 102; Yorkshire Insee. v. Craine, [1922] 2 A. C. 541.

### B. Secret Agreements between Parties.

**1675. Between debtor & creditor.—To secure undue advantage to creditor.]—**JACKMAN v. MITCHELL, No. 149, *ante*.

**1676. ———.]—**A., a trader, in embarrassed circumstances, being indebted to pltf. for money lent, & goods, pltf. promised to induce A.'s creditors to agree to a composition on condition of A.'s giving pltf. a promissory note for the money lent, signed by A. & another as security: the note was given by A. & signed by deft. as security; the pltf. & A. agreed to keep the matter a secret from A.'s creditors, & pltf. endeavoured, but in vain, to accomplish a composition with them:—*Held*: the transaction was fraudulent & void, & pltf. could not recover on the note against deft. —WELLS v. GIRLING (1819), 1 Brod. & Bing. 447; 4 Moore, C. P. 78; 129 E. R. 795.

*Annotation:—Mentd. Re Tye, Ex p. Gullebert* (1838), 7 L. J. Bcy. 25.

**1677. ———.]—**In an action upon a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that pltf., the indorsee, had signed an agreement to accept from the maker of the note 5s. in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to pltf. before he signed the agreement that deft. would continue liable for the residue of the debt secured by the note, & that the agreement would be void unless all the creditors signed:—*Held*: the execution of this agreement had the effect of discharging the surety; any private bargain the effect of which is to give the creditor an advantage over the others is void (LITTLEDALE, J.). LEWIS v. JONES (1825), 1 B. & C. 506; 6 Dow. & Ry. K. B. 507; 3 L. J. O. S. K. B. 270; 107 E. R. 1148.

*Annotations:—Reid. Bateson v. Gosling* (1871), 1 L. R. 7 C. P. 9; Croydon Commercial Gas & Coke Co. v. Dickinson & Pollard (1876), 35 L. T. 943. *Mentd. Reay v. Richardson* (1835), 2 Cr. M. & R. 422; Kearsley v. Cole (1816), 16 M. & W. 128; Wyke v. Rogers (1852), 21 L. J. Ch. 611; Hirschfeld v. L. B. & S. C. Ry. (1876), 2 Q. B. D. 1; Hinchand Punamchand v. Temple, [1911] 2 K. B. 330.

**1678. ———.]—**PENDLEBURY v. WALKER, No. 1052, *ante*.

**1679. —Sale of goods—Sale at more than market price.]—**It was agreed between the vendors & vendee of goods that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety:—*Held*: that was a fraud on the surety, & rendered the guarantee void.—PINCOCK v. BISHOP (1825), 3 B. & C. 605; 5 Dow. & Ry. K. B. 505; 3 L. J. O. S. K. B. 109; 107 E. R. 857.

*Annotations:—Expld. Owen v. Homan* (1851), 3 Mac. & G. 378. *Consd. North British Insee. v. Lloyd* (1854), 10 Exch. 523; Mackreth v. Walmesley (1884), 51 L. T. 19. *Reid. Spencer v. Handley* (1842), 5 Scott. N. R. 546; Mann v. Beeny (1813), 1 L. T. O. S. 56; *Re Mason, Ex p.*

Sharp (1844), 3 Mont. D. & De G. 490; Lee v. Jones (1861), 17 C. B. N. S. 482. *Mentd. Williams v. Rawlinson* (1825), 3 Bing. 71.

**1680. —Appropriating advance to old debt.]—**Where a person borrows a sum of £100 upon a note, but by an arrangement with the Loan Co. it is agreed that they shall deduct from the £100 the balance remaining due on a former loan, which arrangement is not communicated to the surety, this is not a fraud upon a surety so as to vitiate the contract, & he is, nevertheless, liable for the whole sum of £100.—CANNAM v. JOHNSON (1847), 9 L. T. O. S. 82.

**1681. Creditor & retiring surety—Terms of old guarantee undisclosed.—To surety executing new guarantee.]—**NORTH BRITISH INSURANCE Co. v. LLOYD, No. 1607, *ante*.

**1682. Creditor & third party—Performance of work—If debtor defaults.]—**II. contracted with defts. to execute certain sewage works, for which he was to be paid upon the certificate of the surveyor of defts. On the same date II. as principal, & pltf., & another as sureties, entered into a bond to defts. for the due performance of the contract on or before a day fixed. II. failed to perform his contract, & became bkpt., & defts. then began an action against pltf. to enforce the penalty under the bond.

Before the contract with II. defts. had entered into an agreement with a large owner of property in the neighbourhood, that the works should be executed at their joint expense, under the joint superintendence & control of his & their surveyor; but this agreement was never communicated either to II. or to pltf. On the failure of II. the works were placed in the hands of the landowner. Pltf. filed his bill against the above-named defts. only, to restrain prosecution of the action, & the judge awarded an injunction on the ground that the concealment of the last-mentioned contract was a circumstance which exonerated pltf. from all liability:—*Held*: as the landowner, who was virtually pltf. in the action was not a party to the suit, & as the fact of the concealment could be raised by the pltf. for his defence at law, the injunction must be dissolved.—STIFF v. EASTBOURNE LOCAL BOARD (1869), 20 L. T. 339; 17 W. R. 428, 1 L. J.J.

**1683. Debtor & surety.]—**ELLIS v. WARNES (1601), Yelv. 47; 1 Brownl. 85; Cro. Jac. 33; Moore, K. B. 752; 80 E. R. 31.

*Annotations:—Apld. Anon.* (1678), 2 Mod. Rep. 279. *Consd. Cuthbert v. Haley* (1799), 8 Perm. Rep. 390. *Reid. Boyer v. Bampton* (1710), 7 Mod. Rep. 331.

**1684. —Ignorance of co-surety.]—**MACKRETH v. WALMESLEY, No. 1127, *ante*.

### C. Fidelity Guarantees.

**1685. Character—Bank agent.]—**Applts. bound to Bank of Scotland in a cautionary bond for one of their agents who fail.

If a man found that his agent had betrayed his trust that he owed him a sum of money or that it was likely that he was in his debt, if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person knowing or having ground to believe that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct even with a

RITCHIE (1865), 11 Gr. 499.—CAN.

**1675 II. ———.]—**DALGETY v. MOSS, Mac. 495.—N.Z.

**1675 III. ———.]—**BANK OF ATRALAPIA v. WILSON (1886), 3 N. Z. L. R. C. A. 130.—N.Z.

### PART X. SECT. 4, SUB-SECT. 2.—B.

**1675 I. Between debtor & creditor.—To secure undue advantage to creditor.]—**A. guaranteed to B., a creditor of C., composition notes, which B. was to indorse for the other creditors. B.

represented to the creditors, before the composition was agreed to, that he was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—*Held*: this secret bargain vitiated the whole transaction.—CLARKE v.

**Sect. 4.—Fraudulent concealment and misrepresentation: Sub-sect. 2, C. & D.; sub-sect. 3.]**

view to security against future transactions of the agents (LORD ELDEN, C.).—SMITH v. BANK OF SCOTLAND (1813), 1 Dow. 272; 3 E. R. 697, H. L.

**Annotations:—***Consd.* Raitton v. Mathews (1844), 10 Cl. & Fin. 934. *Refd.* North British Insce. v. Lloyd (1854), 10 Exch. 523; Lee v. Jones (1864), 17 C. B. N. S. 482; Phillips v. Foxall (1872), L. R. 7 Q. B. 666; London & Provincial Marine Insce. v. Davies, Davies v. London & Provincial Marine Insce. (1878), 47 L. J. Ch. 511; Mackreth v. Walmesley (1884), 51 L. T. 19; London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Mentd.* Low v. Guthrie, [1909] A. C. 278.

**1886. — Commission agent—Concealment undue but not wilful.**—More non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, & within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself.

A party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, & put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond, & which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding judge directed the jury, that the concealment, to be undue, must be wilful & intentional with a view to the advantages the employers were thereby to gain:—*Held*: the direction was wrong in point of law.—RAITTON v. MATHEWS (1844), 10 Cl. & Fin. 934; 8 E. R. 993, H. L.

**Annotations:—***Apld.* London General Omnibus Co. v. Holloway, [1912] 2 K. B. 72. *Consd.* National Provincial Bank of England v. Glauusk, [1913] 3 K. B. 335. *Refd.* Mallalieu v. Hodgson (1851), 15 Jur. 817; North British Insce. v. Lloyd (1854), 10 Exch. 523; Lee v. Jones (1864), 17 C. B. N. S. 482; Mathews v. Bloxsome (1864), 12 W. R. 795; Phillips v. Foxall (1872), L. R. 7 Q. B. 666; Mackreth v. Walmesley (1884), 51 L. T. 19; Durham Corp'n. v. Fowler (1889), 22 Q. B. D. 391.

**1887. Default—Within knowledge of employer—Concealed by employer from surety—Known otherwise to surety.**—If A. become bound to B. for the honesty of C. who embezzles money, B. may maintain an action on the guarantee, though three years have elapsed without any notice having been given of the embezzlement of C. by B. to A.; at least if A. was acquainted with the circumstance from any other quarter, & B. does not appear to have concealed it from him industriously. A. will not be discharged from his guarantee though B. appear to have given credit to C. for the amount of the sum embezzled.—PEER v. TATLOCK (1799), 1 Bos. & P. 419; 126 E. R. 986.

**Annotations:—***Apld.* Goring v. Edmonds (1829), 3 Moo. & P. 259. *Refd.* Phillips v. Foxall (1872), L. R. 7 Q. B. 666.

**PART X. SECT. 4, SUB-SECT. 2.—C.**

**1890 I. Default—Within knowledge of employer—Concealed by employer from surety.**—OTTAWA AGRICULTURAL INSURANCE CO. v. CANADA GUARANTEE CO. (1878), 30 C. P. 360.—CAN.

**1890 II. —**—[—]—BRITISH EMPIRE ASSURANCE CO. v. LUXTON (1893), 9 Man. L. R. 169.—CAN.

**1890 III. —**—[—]—The concealment from a surety of previous defaults of the principal debtor, when there is a continuing guarantee of conduct or solvency, is in itself evidence of fraud.—RUTHENIAN FARMERS ELE-

VATOR CO. v. HRYCAK, [1924] 3 D. L. R. 402; 2 W. W. R. 825.—CAN.

**1890 IV. —**—[—]—SMITH v. BANK OF SCOTLAND (1829), 4 Fac. Coll. 300.—SCOT.

**1890 V. —**—[—]—RAITTON v. MATHEWS & LEONARD (1844), 3 Bell. Sc. App. 56; 16 Sc. Jur. 502.—SCOT.

**1890 VI. —**—[—]—FRENCH v. CAMERON (1893), 20 R. (Ct. of Sess.) 906; 30 Sc. L. R. 836; 1 S. L. T. 259.—SCOT.

**1891 I. —**—[—]—Concealment not fraudulent.—PEERS v. OXFORD

**1888. —**—[—]—CAXTON & ARRINGTON UNION v. DEW, No. 1463, ante.

**Employee continued in service.**—Deft. by a guarantee undertook to be responsible up to £50 for the honesty of S. during his continuance in plttf's employ. During the employ S. made defalcations which plttf. discovered on Nov. 20, but without notice to deft. condoned the offence & continued S. in his employ. S. having again made defalcations.—*Held*: deft. was discharged from liability for the defalcations subsequent to Nov. 20.—PHILLIPS v. FOXALL (1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 37 J. P. 37; 20 W. R. 900.

**Annotations:—***Foldd.* Sanderson v. Aston (1873), L. R. 8 Exch. 73. *Distd.* Durham Corp'n. v. Fowler (1889), 22 Q. B. D. 391; Caxton & Arrington Union v. Dew (1899), 68 L. J. Q. B. 380. *Consd.* Kingston-upon-Hull Corp'n. v. Harding, [1892] 2 Q. B. 494; London General Omnibus Co. v. Holloway (1911), 105 L. T. 550. *Refd.* Welton v. Soames (1888), 5 T. L. R. 46. *Mentd.* Federal Supply & Cold Storage Co. of South Africa v. Angehrn & Piel (1910), 80 L. J. P. C. 1.

**1890. —**—[—]—SANDERSON v. ASTON, No. 1208, ante.

**1891. —**—[—]—Concealment not fraudulent.—(1) Where the employer of a servant, when taking a bond from another, which purported to make him responsible as surety for the fidelity of the servant, did not disclose to the surety the fact, known to the employer, but not known to the surety, that the servant had previously been guilty of dishonesty in his employment, the employer cannot enforce the bond against the surety in respect of subsequent dishonesty of the servant, although the non-disclosure by the employer of the previous dishonesty of the servant was not fraudulent.

(2) Distinction between suretyship of the fidelity of a servant & a guarantee in respect of a banking account discussed.

There is a wide distinction between a case like the present & the cases which have been cited of guarantees for overdrafts given to bankers. Dishonesty may occur & the guarantee is given to ensure against the chance, but the guarantees for overdrafts are required for the purpose & not on the chance of being used . . . the surety may well complain "I did not know that your servant was a thief," but he cannot be heard to complain "I did not know that your customer had been overdrawn his account" (FARWELL, L.J.).—LONDON GENERAL OMNIBUS CO., LTD. v. HOLLOWAY, [1912] 2 K. B. 72; 81 L. J. K. B. 603; 106 L. T. 502, C. A.

**Annotation:—***As to (2)* *Refd.* National Provincial Bank of England v. Glauusk, [1913] 3 K. B. 335.

**1892. —**—[—]—Necessity for proof of knowledge.—In an action by a board of guardians on a policy or guarantee for the honesty of a collector of poor rates, to which defts. plead fraud, it is not enough for defts. in support of that plea to show actual defalcations existing at the time the policy was effected, coupled with the fact that the board,

(1870), 17 Gr. 472.—CAN.

**1891 II. —**—[—]—MEAFORD TOWN v. LANG (1890), 20 O. R. 42; (1891), 20 O. R. 541.—CAN.

**1891 III. —**—[—]—BALKRISHNA KIRTIKAR v. BANK OF BENGAL (1891), 1 L. R. 15 Bom. 585.—IND.

**g. —**—[—]—No defence to action by public officer.—A defence that the surety was not informed of misconduct committed by the person whose honesty was guaranteed, & that such misconduct was known to the person to whom the guarantee was given cannot be raised when the



in answering certain questions touching the cheques on the collector, had referred to the orders of the poor law board, which to their knowledge had not been strictly pursued by the collector, but *semble* : it is incumbent on them to go on & prove that plffs. actually knew of the existing defalcations.—*ROMFORD UNION GUARDIANS v. BRITISH GUARANTEE ASSOCN.* (1852), 7 Exch. 792; 20 L. T. O. S. 82; 16 J. P. 809; 155 E. R. 1171.

**1693. Existing debt—Relieving officer—No necessary imputation of misconduct.]**—In an action against the surety on a bond conditioned for the faithful discharges of the duties of a relieving officer, deft. pleaded & proved that at the time of the execution of the bond there was a balance of £206 due from the principal, in respect of money which had been received by him as relieving officer, & that that fact was not communicated to him:—*Held*: as the existence of that balance did not necessarily involve any imputation of misconduct against the relieving officer, it was not a material fact which the guardians were bound to communicate to the surety before he executed the bond.—*STOKESLEY UNION GUARDIANS v. STROTHER* (1853), 22 L. T. O. S. 81; *sub nom.* *STOKESLEY GUARDIANS v. STODDART*, 2 W. R. 14; 17 J. P. Jo. 729.

**1694. — Commission agent.]**—P. had been employed by plffs. in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, & by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of £1,272, plffs. required him to find security to the amount of £300, & at his request deft. consented to guarantee £100. The agreement of guarantee recited the terms of dealing between plffs. & P.; but the fact that P. was already indebted to plffs. in the large sum above mentioned was concealed from the sureties. In an action against deft. upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by plffs. of a material fact:—*Held*: the non-communication by plffs. to deft. of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea.—*LEE v. JONES* (1864), 17 C. B. N. S. 482; 34 L. J. C. P. 131; 12 L. T. 122; 11 Jur. N. S. 81; 13 W. R. 318; 144 E. R. 194, Ex. Ch.

*Annotations*:—*Consd.* *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72. *Refd.* *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666; *Mackreth v. Walmesley* (1881), 51 L. T. 19; *Welton v. Somes* (1888), 5 T. L. R. 16. *Mentd.* *Fletcher v. Kroll* (1873), 42 L. J. Q. B. 65.

**1695. Banking guarantee distinguished.]**—*LONDON GENERAL OMNIBUS CO., LTD. v. HOLLOWAY*, No. 1691, *ante*.

**Sureties on administration bond.]**—*See EXECUTORS*, Vol. XXIII., pp. 224, 228, Nos. 2714-2762.

#### D. Banking Guarantees.

**1696. Previous debt—Due to bank—No inquiry by surety.]**—A surety is not of necessity entitled

to receive, without inquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal & that party. If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry.

An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers, is not avoided by the fact, that, immediately after the execution of the obligation, the cash credit is employed to pay off an old debt due to the banker.

If the surety intends to rely upon such a fact for his defence, as showing that there was a previous agreement between the banker & the customer to deal with the credit in a particular manner, to which he, if he had known it, should not have consented, he must bring such a defence before the ct. by putting it on the record.—*HAMILTON v. WATSON* (1845), 12 Cl. & Fin. 100; 8 E. R. 1330, II. L.

*Annotations*:—*Apld.* *North British Insce. v. Lloyd* (1851), 10 Exch. 523. *Consd.* *Lee v. Jones* (1861), 17 C. B. N. S. 482; *Mackreth v. Walmesley* (1881), 51 L. T. 19. *Distd.* *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72. *Refd.* *Gardner v. Walsh* (1855), 1 Jur. N. S. 828; *Stewart v. McKean* (1855), 10 Exch. 675; *Wythes v. Labouchere* (1859), 3 Do. & J. 393; *Pledge v. Russ* (1860), *John*, 663; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666; *Welton v. Somes* (1889), 5 T. L. R. 181; *Seaton v. Heath*, *Seaton v. Burnand*, [1899] 1 Q. B. 782; *National Provincial Bank of England v. Glanusk*, [1913] 3 K. B. 335.

**1697. State of debtor's account - Not disclosed by bank—No inquiry by surety.]**—*WYTHES v. LABOUCHERE*, No. 742, *ante*.

**1698. — — —.]**—*WELTON v. SOMES* (1889), 5 T. L. R. 184, C. A.

**1699. — Not disclosed by debtor—When bank affected by notice - Same solicitor acting for all parties.]**—*WYTHES v. LABOUCHERE*, No. 742, *ante*.

**1700. Circumstances suggesting fraud By debtor on surety—Not disclosed by bank.]**—The non-disclosure by a bank to the guarantor of a customer's overdrawn account of facts from which the bank is suspicious that the customer is defrauding him does not discharge the guarantor. *NATIONAL PROVINCIAL BANK OF ENGLAND, LTD. v. GLANUSK*, [1913] 3 K. B. 335; 82 L. J. K. B. 1033; 109 L. T. 103; 29 T. L. R. 593.

**1701. Fidelity guarantee distinguished.]**—*LONDON GENERAL OMNIBUS CO., LTD. v. HOLLOWAY*, No. 1691, *ante*.

**Misrepresentation.]**—*See* Sect. 4, sub-sect. 3, *post*.

#### SUB-SECT. 3.— MISREPRESENTATION.

*See, generally*, MISREPRESENTATION & FRAUD.

**1702. General rule—Misrepresentation of material fact—Avoids guarantee.]**—If any material part of the transaction between a creditor & his debtor is, with the knowledge or assent of the creditor, misrepresented to a surety, the misrepresentation being such, that, but for the same having taken

action on the guarantee is brought by a public officer—there is no privity between him & the surety as there would be between a private person to whom the bond was given & the surety.—*LAWDER v. LAWDER* (1873), 71 C. C. L. R. 57.—IR.

#### PART X. SECT. 4, SUB-SECT. 3.

**1702 I. General rule—Misrepresentation of material fact—Avoids guarantee.]**—*GANANOQUE CORPN. v. STUNDEN* (1882), 1 O. R. 1.—CAN.

**1702 II. — — —.]**—*MOLSON BANK v. TURLEY* (1885), 8 O. R. 293.—CAN.

**1702 III. — — —.]**—*TORONTO BREWING & MALTING CO. v. HERVEY* (1887), 13 O. R. 61.—CAN.

**1702 IV. — — —.]**—*ELGIN LOAN & SAVINGS CO. v. LONDON GUARANTEE & ACCIDENT CO.* (1906), 11 O. L. R. 330; 7 O. W. R. 109.—CAN.

**1702 V. — — —.]**—*RUTHEANIAN FARMERS ELEVATOR CO. v.*

*HRYSKAK*, [1924] 3 D. L. R. 402; 2 W. W. R. 825.—CAN.

**1702 VI. — — —.]**—*BANK OF AUSTRALASIA v. ADAMS* (1889), 8 N. Z. L. R. 119.—N.Z.

**1702 VII. — — —.]**—*FALCONER v. NORTH OF SCOTLAND BANK* (1863), 1 Macph. (Cl. of Sess.) 704; 35 Sc. Jur. 404.—SCOT.

**1702 VIII. — — —.]**—*M'DOUGALL & HERBERTSON v. NORTHERN*



**Sect. 4.—Fraudulent concealment and misrepresentation: Sub-sect. 3 & 4. Sect. 5: Sub-sect. 1.]**

place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law, on the ground of fraud.

**Pltfs. agreed to lend £2,600 to C. & D., upon the security of a policy of insurance, a mtge. of certain leaseholds, & the joint & several promissory note of defts. & E. for £2,600, pltfs. deducting thereout a debt of £600, then due to them from C. on his private account. A deed prepared in conformity with this agreement recited, amongst other things, that the entire interest in the policy was available for the purposes of the security, & that the private debt of C. had been paid to pltfs. The nature of the agreement between pltfs. & C. & D. was not communicated to deft., but the recitals of the deed were read over in his presence when he attended at the office of pltfs.' attorneys for the purpose of signing the note, & the note bore an indorsement identifying the sum thereby secured with the sum mentioned in the deed:—*Held*: this untrue representation thus made to deft. before he signed the note, that the private debt of C. had been paid, avoided the note.—*STONE v. COMPTON* (1838), 5 Bing. N. C. 142; 1 Arn. 436; 6 Scott, 846; 2 Jur. 1012; 132 E. R. 1059.**

**Annotations:—***Distd. Green v. Gosden* (1811), 3 Man. & G. 446. *Consd. Mann v. Beeny & Humphrey* (1813), 1 L. T. O. S. 56. *Refd. Ex p. Sharp* (1841), 3 Mont. D. & De G. 490; *Mallalieu v. Hodgson* (1861), 16 Q. B. 689; *Owen v. Homan* (1851), 3 Mac. & G. 378; *Evans v. Bremridge* (1855), 4 W. R. 161; *Mackreth v. Walmsley* (1841), 51 L. T. 19.

**1703. — — — — —.]—SMALL v. CURRIE, No. 361, ante.**

**1704. — — — — —.]—BLEST v. BROWN, No. 759, ante.**

**1705. State of debtor's banking account—Pre-existing debt.]—STONE v. COMPTON, No. 1702, ante.**

**1706. — — — — —.]—Misrepresentation must be acted upon.]—M'KEWAN v. THORNTON, No. 441, ante.**

**1707. — — — — —.]—Evidence of attorney of surety—Admissibility.]—M'KEWAN v. THORNTON (1861), 2 F. & F. 594, N. P.**

**— — — — —.]—Concealment.]—See Sect. 2, sub-sect. 1, B. (c) iii, ante.**

**1708. Power of creditors—To stop sale on execution.]—Upon the eve of a sale by the sheriff, a surety gave a written guarantee for payment of the judgment debts by instalments, in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, & in consequence the sale took place. The surety gave notice that the consideration having failed, the guarantee was at an end. It appeared that representations were made on behalf of the judgment creditors when they took the guarantee that they had power to stop the sale, & that it would be stopped:—*Held*: the surety was entitled to have the guarantee delivered up to be cancelled.—(*COOPER v. JO* (1859), 1 De G. F. & J. 240; 27 Beav. 313; 1 L. T. 351; 45 E. R. 350, L. C.**

**Annotations:—***Consd. Glegg v. Gibbey* (1877), 46 L. J. Q. B. 325. *Refd. Brookings v. Maudslay, Son & Field* (1888), 38 Ch. D. 636.

**ASSURANCE CO. (1864), 2 Macph. (Ct. of Sess.) 935; 36 Sc. Jur. 468.—SCOT.**

**1702 ix. — — — — —.]—SURETY—LAND v. LOW (1901), 3 F. (Ct. of Sess.) 972; 34 Sc. L. R. 710; 9 S. L. T. 91.—SCOT.**

**h. By debtor—Without knowledge**

**of creditor.]—If a proposed creditor sends his standing printed form of contract to one proposing to become his debtor, for signature by him & two sureties, misrepresentation by the debtor to the sureties, without the knowledge of the creditor, will not affect the sureties' liability to the**

**1709. In recitals of indenture—Estate taken by debtor—Life estate described as estate tail.]—A., with B. & C. his sureties, entered into a bond to D., the condition of which, after reciting that A. was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, enure to the use of D. in fee, was, that the bond should be void, if the recovery should be suffered 'so & in such manner as that, under & by virtue thereof, the estate should be vested in D. for ever': the recovery was duly suffered, but A. being seised 'or life only, D. brought an action upon the bond, so which one of the sureties pleaded, that, if A. had been seised in tail, the recovery was suffered so as to vest the estate in D. in fee:—*Held*: this plea was bad, because, the recital in the condition did not estop D. from disputing that A. was seised in tail, nor release the surety from his obligation, being the intention of the parties, that D. should have an estate in fee.—*EDWARDS v. BROWN* (1829), 3 Y. & J. 423; subsequent proceedings (1831), 1 Cr. & J. 307.**

**Annotation:—***Refd. Wheelton v. Hardisty* (1858), 8 E. & B. 285.

**1710. — — — — —.]—Signing of specification—Guarantee for performance of work.]—By an indenture made between a local board, pltfs. of the first part, certain contractors of the second part, & deft. of the third part, the contractors covenanted to do certain work upon the basis of a certain specification; & deft. covenanted to pay any losses that might be sustained from the non-performance of the work. The indenture recited that the specification had been signed by five members of the local board as was required by the local Act. In point of fact the specification had never been signed, although it had been acted upon. In an action against the sureties:—*Held*: the mere fact of the specification not having been signed did not release the sureties from their liability.—*RUSSELL v. TRICKETT* (1865), 13 L. T. 280; 30 J. P. 8.**

**1711. Rate of interest—On money lent—Higher than rate represented.]—A plea that a promissory note was obtained by fraud, covin, & misrepresentation, pleaded by a surety in such note, was held not to be supported by proof that the note was given for money lent by pltfs. at 20 per cent. interest, in the name of a joint stock co., fraudulently represented by pltfs. to have been established for the purpose of lending money at 5 per cent., & to consist of shareholders, contributors, & borrowers, & to be governed by officers elected by such shareholders, contributors, & borrowers, no such co. having ever existed, & the two pltfs. being the only lenders.—*GREEN v. GOSDEN* (1841), 3 Man. & G. 446; 4 Scott, N. R. 13; 11 L. J. C. P. 4; 5 Jur. 1010; 133 E. R. 1218.**

**Annotations:—***Refd. Cannam v. Johnson* (1847), 9 L. T. O. S. 52; *Wright v. Campbell* (1861), 2 F. & F. 393.

**1712. As to party advancing loan—Cestui que trust—Consenting to advance of trust moneys.]—A party joining as surety in a bond ought to be informed of the nature of the obligation, name of the obligee, & the relation in which he stands to the principal obligor.**

**M. induced W. to join him as surety in a bond for repayment of a loan, saying he only wanted time to realise securities, & he would hold her harmless.**

**creditor.—J. R. WATKINS MEDICAL CO. v. LEE** (1920), 2 W. W. R. 493; 52 D. L. R. 543; 15 Alta. L. R. 345.—CAN.

**k. Substituted guarantee—Setting aside—Liability under original guarantee.]—When a guarantor, liable to**

M. & S. being trustees of a fund, sold it, with consent of B., the *cestui que trust*, & thereby raised the loan for M., who informed W. that B. was the lender, but did not inform her how the loan was raised:—*Held*: B. not being in fact the lender, his personal representatives had no privity of contract with, nor equities against, W., & in consequence of the concealment from her of the real nature of the transaction, she was, in equity, altogether released from the bond.—*SQUIRE v. WHITTON* (1848), 1 H. L. Cas. 333; 12 Jur. 125; 9 E. R. 785, II. L.

*Annotation*:—*Reid*. *Hambro v. Hull & London Fire Insec.* (1858), 28 L. J. Ex. 62.

**1713. As to nature of transaction—Discharged guarantee bond—Fraudulently offered as security—For debt unknown to surety.**—A., together with B. & C. as his sureties, executed a bond to D. for securing £300 & interest; the debt is paid by C. with the proper money of A.; but C. neglects delivering up the bond to A. to be cancelled. C. afterwards procures this bond to be assigned as a collateral security for a debt of his own:—*Held*: this assignment was a gross fraud in C. & a perpetual injunction was granted to restrain all further proceedings upon the bond.—*MAY v. HARMAN* (1709), 4 Bro. Parl. Cas. 156; 2 E. R. 106, II. L.

**1714.** —.]—*MANN v. BEENY* (1843), 1 L. T. O. S. 56.

**1715. — Bond held out as temporary security only.**—In an action on a bond on the plea of fraud, & an equitable plea to the effect that the bond was executed on an advance of money to one of the obligors, on the faith of an agreement that there should be a mtge. by way of security, & that the bond should be only a temporary security until the mtge. was executed; the evidence of two out of three obligors, that there was such agreement, & their positive statement that the bond was never read over to them, notwithstanding that the mtge. recited an agreement in writing, which was produced, though not put in, & which they admitted having signed at the time the bond was executed:—*Held*: evidence to go to the jury in support of the pleas, & upon the whole of the evidence, the question was, whether deft. executed the bond on the faith of a false representation as to nature & effect of the bond. But pltf. having been called, & having put in the written agreement, which was for a bond as well as mtge., the verdict for deft. was set aside as against evidence.—*SMITH v. WINDER* (1858), 1 F. & F. 95, N. P.

**1716. — Signature to character reference.**—Deft. was induced to sign a guarantee by the fraudulent representation that he was signing a reference. In an action against him on the guarantee the jury were directed that pltf. were entitled to a verdict unless they were satisfied that deft. was cheated out of his signature by misrepresentation, & that he in signing it was not guilty of negligence. The jury found for deft.—*WALTER v. BURTON* (1886), 2 T. L. R. 310, N. P.

#### SUB-SECT. 4.—PARTIES TO ACTION FOR RELIEF.

**1717. Action for cancellation by co-surety—Necessary parties—Debtor & co-surety.**—*ALLAN v. HOULDEN*, No. 762, *ante*.

a bank on a guarantee, is induced by means of a misrepresentation of an agent of the bank to give the bank a second guarantee by way of substitu-

tion for the first, he is not entitled to have the second guarantee unconditionally set aside, but must restore the bank to the position it occupied

#### SECT. 5.—COERCION.

##### SUB-SECT. 1.—IN GENERAL.

*See, generally*, CONTRACT, Vol. XII., pp. 92–112. Nos. 566–738.

**1718. General rule.**—*SMALL v. CURRIE*, No. 1661, *ante*.

**1719. —.]—**Natural influence exerted by one who possesses it to obtain a benefit for himself is undue *inter vivos*, so that gifts & contracts *inter vivos* between certain parties will be set aside, unless the party benefited can show affirmatively that the other party could have formed a free & unfettered judgment in the matter.—*PARRITT v. LAWLESS* (1872), L. R. 2 P. & D. 402; 41 L. J. P. & M. 68; 27 L. T. 215; 36 J. P. 822; 21 W. R. 200.

*Annotations*:—*Reid*. *Hampson v. Guy* (1891), 61 L. T. 778; *Chaplin v. Brammhall* (1907), 97 L. T. 860; *Howes v. Bishop*, [1909] 2 K. B. 390; *Craig v. Lamoureux*, [1920] A. C. 319.

**1720. Avoids the guarantee—Threat of criminal proceedings—Against principal—Surety father of debtor.**—*WILLIAMS v. BAYLEY*, No. 41, *ante*.

**1721. — — —.]—**(1) A contract of suretyship is not *uberrimæ fidei*, but is one which a small amount of *mala fides* or want of disclosure in its inception will vitiate.

(2) A sum was provided by A. under an agreement, by which it was to be applied in paying the liability of B. to a co., with the object on the part of A. of saving B. from a criminal prosecution. The co. intended to prosecute, but pending negotiations for the contract counsel advised them that no crime had been committed:—*Held*: the agreement was void on three grounds—first, that the co. had not disclosed the fact that they had abandoned their intention; secondly, that it was against public policy as being an agreement to stifle a public prosecution; thirdly, that it was made under pressure.—*DAVIES v. LONDON & PROVINCIAL MARINE INSURANCE CO.* (1878), 8 Ch. D. 469; 38 L. T. 478; 26 W. R. 791; *sub nom.* *LONDON & PROVINCIAL MARINE INSURANCE CO. v. DAVIES*, *DAVIES v. LONDON & PROVINCIAL MARINE INSURANCE CO.*, 47 L. J. Ch. 511.

*Annotations*:—*As to* (1) *Reid*. *National Provincial Bank of England v. Gnanusk*, [1913] 3 K. B. 335; *Moody v. Cox & Hatt*, [1917] 2 Ch. 71. *As to* (2) *Reid*. *Whitmore v. Farley* (1880), 43 L. T. 192; *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72.

**1722. — Promissory note.**—Pltf., whose whole income was derived from a life estate in property producing about £195 *per annum*, in 1857, when she was twenty years old, under pressure put upon her by her stepfather, who was one of her guardians, & with whom she resided, joined him in signing a joint & several promissory note for £150, being £100 already due from him to deft., & a further advance of £50, with interest thereon. In 1859, also under pressure exercised by her stepfather, she signed a bond, for the payment in Sept. 1865, of £600, the amount then due to deft. in respect of the former loan, together with interest thereon in the meantime. In 1866 deft. recovered judgment against pltf.'s stepfather, but agreed not to issue execution against him if he would get pltf. to execute another bond. Accordingly pltf., who was then twenty-nine years of age, under pressure as before, signed a bond for securing payment to deft. of £705, the amount then due to him in respect of the original loan, together with interest thereon. Pltf. received no consideration for signing the note or the bonds.

before the second guarantee was given.—*WARD v. NATIONAL BANK OF NEW ZEALAND* (1886), 4 N. Z. L. R. C. A. 35.—N.Z.

**Sect. 5.—Coercion: Sub-sects. 1 & 2. Sect. 6.]**

In 1872 deft. commenced proceedings against plff. on the bond of 1806, & she thereupon filed her bill to set aside the bonds & restrain deft. The evidence showed that deft. was aware of the circumstances under which the bonds had been executed by plff. — *Held*: the bonds must be declared fraudulent as against plff., & deft. be restrained from further proceedings against her. — *KEMPSON v. ASHREE* (1874), 10 Ch. App. 15; 44 L. J. Ch. 105; 31 L. T. 525; 39 J. P. 164; 23 W. R. 38, L. C. & L. J.

*Annotations*: — *Refd.* *Bainbridge v. Browne* (1881), 18 Ch. D. 188; *London & Westminster Loan & Discount Co. v. Bilton* (1911), 27 T. L. R. 184.

**1723. — Fidelity bond.]—ANDREWS v. SOUTHWAIT** (1885), *Diprose & Gammon*, 73.

**SUB-SECT. 2. HUSBAND AND WIFE.**

*See, generally, HUSBAND & WIFE.*

**1724. Cancellation of instrument—Undue influence—Creditor acting in concert with husband.]—BATTEN, CARNE & CARNE'S BANKING CO. v. REED** (1902), *Times*, Apr. 14, C. A.

**1725. — Wife having no independent advice.]—**Where a wife who was possessed of large separate estate, gave a guarantee to a bank in order to help her husband & a co. in which he was largely interested which was in pecuniary difficulties, alleging that she acted of her own free will, without any pressure having been put upon her & that she would not have taken advice from any one, but it appeared that she acted in passive obedience to her husband's directions, & would have signed anything that he asked her to sign, & had no means of forming an independent judgment if she had desired to do so: — *Held*: the transaction could not stand. — *BANK OF MONTREAL STUART*, [1911] A. C. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117, P. C.

*Annotations*: — *Mentd.* *Nocton v. Ashburton*, [1911] A. C. 932; *Weston v. Fairbridge*, [1923] 1 K. B. 667.

**1726. Discharge from liability—Wife having no independent advice.]—Held**: applts. could not enforce a charge on resp.'s share in her father's estate, obtained through their agent, who was also exor. & trustee for her under her father's will, by pressure through her husband, whose debts were to be thereby secured, concealment of material facts, & without independent advice. — *TURNBULL & Co. v. DUVAL*, [1902] A. C. 429; 71 L. J. P. C. 84; 87 L. T. 154; 18 T. L. R. 521, P. C.

*Annotations*: — *Appld.* *Chaplin v. Brammall*, [1908] 1 K. B. 233. *Refd.* *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188; *Howes v. Bishop*, [1909] 2 K. B. 390. *Mentd.* *Shears v. Jones* (1922), 128 L. T. 218.

**1727. — ]—BISCHOFF'S TRUSTEE v. FRANK**, No. 1660, *ante*.

**1728. — Influence of creditor on husband.]—**An arrangement having been made between plffs. & deft.'s husband that the former would supply the latter with goods on credit provided deft. guaranteed the price, plffs. sent to deft.'s husband a form of guarantee to be signed by deft. Deft. signed the guarantee without consideration at the request of her husband, who returned it to plffs. Deft. had no independent advice & no information from her husband as to the nature

& contents of the document, though she asked him for such information, & she did not understand the document when she signed it: — *Held*: as plffs. had left it to deft.'s husband to obtain her signature to the guarantee, knowing of the relationship existing between them, & as he had obtained her signature to it by his influence, plffs. could not enforce the guarantee against deft. — *CHAPLIN & Co., LTD. v. BRAMMALL*, [1908] 1 K. B. 233; 77 L. J. K. B. 366; 97 L. T. 860, C. A.

*Annotations*: — *Refd.* *Howes v. Bishop*, [1909] 2 K. B. 390. *Mentd.* *Shears v. Jones* (1922), 128 L. T. 218.

**1729. — Undue influence.]—HOWES v. BISHOP**, No. 45, *ante*.

**1730. On whom burden of proof lies—On wife.]—**Where a *feme covert*, having separate property, joins in a security for money advanced to her husband, the ct. acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents & profits of that property, & not by sale or mtge. The death of the husband, after the filing of the bill, & before the hearing, makes no difference. If the *feme covert* insists upon undue influence by the husband, she must prove it; & it is not for plff. to prove a negative. — *FIELD v. SOWLE* (1827), 4 Russ. 112; 38 E. R. 747.

*Annotations*: — *Mentd.* *Johnson v. Gallagher* (1861), 3 D. G. F. & J. 491; *Shattock v. Shattock* (1866), L. R. 2 Eq. 182; *Re Armstrong, Ex p. Gilchrist* (1886), 17 Q. B. D. 521.

**1731. — Creditor—Wife having no independent advice.]—BISCHOFF'S TRUSTEE v. FRANK**, No. 1660, *ante*.

**1732. Presumption as to influence of husband.]—BISCHOFF'S TRUSTEE v. FRANK**, No. 1660, *ante*.

**SECT. 6.—MATERIAL ALTERATION OF INSTRUMENT.**

*See, generally, BONDS*, Vol. VII., pp. 235-237; *BILLS OF EXCHANGE*, Vol. VI., pp. 372-387; *CONTRACT*, Vol. XII., pp. 359-368.

**1733. Removal of seal—Of one surety—Co-surety not discharged—Several bond.]—COLLINS v. PROSSER**, No. 702, *ante*.

**1734. Addition—How made—Whether in writing—Proof.]—**Declaration against surety on a bond for securing a loan of money. Plea, that after the making & sealing of the bond a material addition was made to the condition by plff. without deft.'s knowledge, namely, that the giving day of payment to the principal should not discharge the sureties, whereby the bond was void. The plea did not allege in what way the addition was made, nor that it was in writing: — *Held*: bad on demurrer to the replication. — *HARDEN v. CLIFTON* (1841), 1 Q. B. 522; 1 Gal. & Dav. 22; 10 L. J. Q. B. 159; 5 Jur. 962; 113 E. R. 1232.

*Annotation*: — *Mentd.* *Miller v. Jordan* (1846), 8 Q. B. 615.

**1735. — Name of second surety—Consent of other surety.]—**A sheriff is bound to let his prisoner arrested upon *mesne process* at large, upon reasonable sureties, & a bond with five sureties, three of whom are respectively worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty. The addition of another obligor after the bond has been executed, but before the sheriff has accepted it, with the assent of the sheriff & the prior obligors,

**PART X. SECT. 5, SUB-SECT. 2.**

**17301. On whom burden of proof lies—On wife.]—Held**: a wife was liable on the guarantee signed by her, as she had

not satisfied the onus that was upon her, of showing that she had been induced by the undue influence of her husband to do an immoderate & irrational act; & that plffs. were aware

of this. — *GOLD MEDAL FURNITURE CO. v. STEPHENSON* (1913), 23 W. L. R. 664; 4 W. W. R. 7; 10 D. L. R. 1; 23 Man. L. R. 159. — *CAN.*

**Annotations:** -*Reid, Farquharson v. King*, [1902] A. C. 325; Colonial Bank of Australasia v. Marshall, [1906] A. C. 559; London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777. **Mentd.** Union Credit Bank v. Mersey Docks & Harbour Board, Same v. Same & North & South Wales Bank, [1899] 2 Q. B. 205; Wise v. Dunning [1901], 71 L. J. K. B. 165; Hordman v. Wheeler, [1902] 1 K. B. 361; Bell v. Marsh, [1903] 1 Ch. 528; Imperial Bank of Canada v. Bank of Hamilton, [1903] A. C. 49; Kapitigalla Rubber Estates v. National Bank of India, [1909] 2 K. B. 1010; Morison v. London County & Westminster Bank [1913], 108 L. T. 379; Joachimsen v. Swiss Bank Corp., [1921] 3 K. B. 110.

*Sect. 6.—Material alteration of instrument. Sects. 7 & 8. Part XI. Sects. 1, 2, 3, 4, 5 & 6. Part XII. Sect. 1.]*

**1742. ——— Limitation of surety's liability.]**—*ELLESMERE BREWERY Co. v. COOPER*, No. 1081, *ante*.

**1743. Erasure—Signature of surety—Without surety's knowledge.]**—Several directors of a banking company, amongst whom was deft., signed a document whereby they severally undertook to pay a sum of money to the bank, the intention, however, being that they should only be bound each for a proportion thereof; deft. & some others paid their proportion, & the secretary then struck out their names without the knowledge of deft., being under the impression that the legal effect of the document was what had been intended. An action was brought against deft. on this docu-

ment, to recover the whole amount secured:—*Held*: the document was in the custody of the bank as distinguished from the individual directors, & the above material alteration therefore discharged deft.—*BANK OF HINDOSTAN, CHINA & JAPAN, LTD. v SMITH* (1867), 36 L. J. C. P. 241; 16 L. T. 518.

#### SECT. 7.—FAILURE OF CONSIDERATION.

*See Part V., Sect. 2, sub-sect. 2, F., ante.*

#### SECT. 8.—NON-FULFILMENT OF CONDITIONS PRECEDENT.

*See Part V., Sect. 2, sub-sect. 2, ante.*

## Part XI.—Rights and Liabilities in Bankruptcy Proceedings.

### SECT. 1.—IN GENERAL.

**Right of surety to present bankruptcy petition.]**—*See BANKRUPTCY*, Vol. IV., p. 116, Nos. 1045–1018.

**Party to bill of exchange in position of surety.]**—*See BANKRUPTCY*, Vol. IV., pp. 121–123, Nos. 1100–1121.

**Power to make receiving order against surety—Security held from principal debtor not realised.]**—*See BANKRUPTCY*, Vol. IV., p. 160, No. 1496.

**Right of retainer of trustee or executor against bankrupt beneficiary—Guarantee by testator.]**—*See BANKRUPTCY*, Vol. IV., p. 418, Nos. 3771–3776.

**Priority of debt.]** *See BANKRUPTCY* Vol. IV., p. 483, No. 4351.

**Agreement not to oppose discharge of bankrupt—Guarantee given to creditor as inducement.]**—*See BANKRUPTCY*, Vol. IV., p. 517, No. 5011.

### SECT. 2.—PROOF OF DEBTS.

**By creditor against bankrupt surety.]**—*See BANKRUPTCY*, Vol. IV., pp. 264–269, Nos. 2192–2523.

**By creditor against bankrupt principal debtor.]**—*See BANKRUPTCY*, Vol. IV., p. 355, Nos. 3331–3333.

**By surety against bankrupt principal debtor.]**—*See BANKRUPTCY*, Vol. IV., pp. 269–272, Nos. 2524–2553; pp. 275, 276, Nos. 2581–2583.

**By surety against bankrupt co-surety.]**—*See BANKRUPTCY*, Vol. IV., p. 272, Nos. 2551–2560.

**By parties to bills of exchange.]**—*See BANKRUPTCY*, Vol. IV., pp. 279–295.

**By assignee of judgment on bill of exchange.]**—*See BANKRUPTCY*, Vol. IV., p. 315, No. 2917.

**Against joint & separate estate of partners.]**—*See BANKRUPTCY*, Vol. IV., pp. 437–439, 449, 451, 452, 465, Nos. 3953, 3958–3963, 4055, 4085, 4086, 4191–4198.

**Where security given by way of guarantee.]**—*See BANKRUPTCY*, Vol. IV., p. 384, Nos. 3530–3535.

**Where guarantee security for annuity.]**—*See BANKRUPTCY*, Vol. IV., p. 270, Nos. 2539, 2540; p. 298, No. 2794.

**Obligors under bastardy bonds.]**—*See BANKRUPTCY*, Vol. IV., p. 300, Nos. 2818, 2819.

**Wife surety for husband.]**—*See BANKRUPTCY*, Vol. IV., p. 482, No. 4341.

**Where surety party to fraud by bankrupt.]**—*See BANKRUPTCY*, Vol. IV., p. 332, No. 3113.

**Effect of proof on rights of sureties.]**—*See BANKRUPTCY*, Vol. IV., p. 351, No. 3288.

**Right of set-off.]**—*See BANKRUPTCY*, Vol. IV., p. 396, No. 3619.

### SECT. 3.—PROPERTY AVAILABLE FOR DISTRIBUTION AMONG CREDITORS.

**Bond given as security for wife's portion.]**—*See BANKRUPTCY*, Vol. V., p. 654, No. 5810.

**Rule in Waring's case.]**—*See BANKRUPTCY*, Vol. V., pp. 711 *et seq.*

**Whether surety a creditor.]**—*See BANKRUPTCY*, Vol. V., p. 856, Nos. 7181, 7182.

**Transactions to relieve surety.]**—*See BANKRUPTCY*, Vol. V., pp. 893, 891, Nos. 7359–7366.

**On disclaimer of lease.]**—*See BANKRUPTCY*, Vol. V., p. 951, Nos. 7792–7793.

### SECT. 4.—COMPOSITION SCHEMES AND DEEDS OF ARRANGEMENT.

**Duty of trustee to sue surety.]**—*See BANKRUPTCY*, Vol. V., p. 1100, Nos. 8982–8983.

**Limitation of liability on guarantee of trustee.]**—*See BANKRUPTCY*, Vol. V., p. 1123, No. 9137.

**Fraud on other creditors & surety for composition.]**—*See BANKRUPTCY*, Vol. V., p. 1135, No. 9221.

**Right to sue surety for composition.]**—*See BANKRUPTCY*, Vol. V., p. 1138, Nos. 9246, 9247.

**Guarantee giving secret advantage over other creditors.]**—*See BANKRUPTCY*, Vol. V., p. 1110, No. 9258.

**Guarantee given in consideration of signing petition for annulment of adjudication.]**—*See BANKRUPTCY*, Vol. V., p. 1149, No. 9315.

**No reservation of rights against sureties.]**—*See BANKRUPTCY*, Vol. V., p. 1154, Nos. 9358, 9359.

**Provision giving surety advantages.]**—*See BANKRUPTCY*, Vol. V., pp. 1164, 1165, Nos. 9429–9431.

**Whether bar to action on accommodation bill.]**—*See BANKRUPTCY*, Vol. V., p. 1175, No. 9509.

**Bond given as surety not mentioned in statutory statement.]**—*See BANKRUPTCY*, Vol. V., p. 1187, No. 9587.

**Position of sureties & co-debtors.]—See BANKRUPTCY, Vol. V., p. 1186, No. 9574; pp. 1190 *et seq.***

#### SECT. 5.—RIGHT OF SURETY TO DIVIDENDS RECEIVED BY CREDITOR.

*See Part V., Sect. 3, sub-sect. 8, B., ante.*

#### SECT. 6.—INDEMNITIES.

**Of interim receiver.]—See BANKRUPTCY, Vol. IV., p. 204, No. 1884.**

**Power of trustee to grant to agent.]—See BANKRUPTCY, Vol. IV., p. 213, No. 1981.**

**For loss to bankrupt's estate due to negligence or misconduct.]—See BANKRUPTCY, Vol. IV., p. 224, Nos. 2105, 2106.**

**For costs—When assignee's name used by solvent partner to bring action.]—See BANKRUPTCY, Vol. IV., p. 231, No. 2163.**

**Trustee bringing action where estate insufficient to pay costs.]—See BANKRUPTCY, Vol. V., p. 991, No. 8099.**

**Against covenants in leases—On proof of debt by tenant.]—See BANKRUPTCY, Vol. IV., p. 260, Nos. 2160–2164.**

**Right of proof—Indemnity bond.]—See BANKRUPTCY, Vol. IV., pp. 275, 276, Nos. 2581–2583.**

**Covenant to indemnify.]—See BANKRUPTCY, Vol. IV., pp. 276–278, 302, Nos. 2584–2593, 2828.**

**Of accommodation acceptor—By drawer.]—See BANKRUPTCY, Vol. IV., p. 288, Nos. 2694–2700.**

**Whether trustee entitled to—Covenant on sale of leaseholds.]—See BANKRUPTCY, Vol. IV., p. 230, No. 2158; p. 377, No. 3176.**

**By solvent partner proving against estate of co-partner.]—See BANKRUPTCY, Vol. IV., p. 406, Nos. 4199–4201.**

**Duty of trustee—Where bankrupt bond to indemnify.]—See BANKRUPTCY, Vol. V., pp. 637–638, No. 5732.**

**Property divisible among creditors—Right to or money recoverable under indemnity.]—See BANKRUPTCY, Vol. V., pp. 673, 698, Nos. 5957, 5958, 6136.**

**From trustee—Bankrupt trading without consent of trustee.]—See BANKRUPTCY, Vol. V., p. 729, No. 6322.**

**Against covenants—Action by trustee for specific performance.]—See BANKRUPTCY, Vol. V., p. 981, No. 8048.**

**Action by trustee—For breach of covenant by partner of bankrupt.]—See BANKRUPTCY, Vol. V., p. 975, No. 7981.**

**Action by creditors in name of trustee.]—See BANKRUPTCY, Vol. V., pp. 1018, 1019, Nos. 8311–8317.**

**Trustees of deed of arrangement, etc.—Right to contribution & indemnity.]—See BANKRUPTCY, Vol. V., p. 1103, Nos. 9005–9008.**

**By debtor to surety of deed of arrangement.]—See BANKRUPTCY, Vol. V., p. 1186, No. 9571.**

**Administration of estate of deceased insolvent—Executrix carrying on business—Whether entitled to indemnity.]—See BANKRUPTCY, Vol. IV., p. 505, No. 4553.**

**Application of doctrine of mutual credit & set-off.]—See BANKRUPTCY, Vol. IV., p. 401, Nos. 3650, 3657.**

**Right of surety to stand in place of receiver.]—See RECEIVERS.**

**Right of surety for liquidator to re-open accounts.]—See COMPANIES, Vol. X., p. 871, No. 5936.**

## Part XII.—Indemnity.

#### SECT. 1.—IN GENERAL.

*See Part VII., Sect. 2, sub-sect. 1.*

**1744. Distinguished from guarantee.]—GUILD & Co. v. CONRAD, No. 12, *ante*.**

**1745. Distinguished from maintenance of action.]—Pltfs. & debts. were rival manufacturers of an apparatus for conveying cash from one part of business promises to another. Debts. obtained contracts for the hire of their apparatus from three of pltfs.' customers, who were under contracts to use pltfs.' apparatus at the time, & they agreed to indemnify the customers against any claims by pltfs. against them for breach of contract. Two of these customers were originally customers of debts., & the third gave a contract to pltfs. in the belief that he was dealing with debts. The pltfs. in each case sued the customer for breach of contract & in two instances recovered damages & costs, which debts. paid under their contract of**

indemnity. Pltf. claimed relief against debts. on the ground of maintenance:—*Held*: debts. in giving these contracts of indemnity were acting in the legitimate defence of their commercial interests & were not liable for maintenance.

Such contracts [of indemnity] are well known to the law & are in no way offensive to it. They are of the most varied kinds. Sometimes, as in the case of fire insurance or the ordinary forms of marine insurance, the indemnity is against the accidents of life. But frequently the insurance is against claims which may be made by third parties. The whole of the contracts of insurance of employers against claims by employees under Employers' Liability Act & Workmen's Compensation Act are of this kind. . . . Marine insurances against claims arising out of collisions furnish another example. Contracts of re-insurance afford another example. Nothing is more common than

#### PART XII. SECT. 1.

**1744i. Distinguished from guarantee.]—The sister of debt. became ill, & debt. consulted pltf. & made arrangements with pltf. stating, "I will see her through." Following this an account was opened in pltf.'s books in which debt. was debtor & from time to time the account was rendered to debt.:—*Held*: the promise in this case was an original one—as distinguished**

from collateral—because it bound the debt. to pay independently of the liability of any one else.—*McARTHUR v. BANMAN* (1922), 70 D. L. R. 81; [1922] 3 W. W. R. 552; 16 Sask. L. R. 61.—*CAN.*

**1744ii. —.**—A co. gave G. a contract & a sub-contract for part of the work was given to M. Before his contract was completed G. absconded & the president of the co. said to

M.: "You will keep on with the work exactly as you were to do with G.; you will finish your contract. I will pay you. You are not dealing with G. any more, you are dealing with us":—*Held*: the undertaking was not a contract to answer for a debt of G. but was a new & independent contract.—*MORIN v. HAMMOND LUMBER Co.*, [1923] 1 D. L. R. 519; [1923] S. C. R. 140.—*CAN.*

**Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2, A. (a).]**

that contractors putting up machinery or carrying out engineering works should indemnify the persons employing them against claims for nuisance or trespass in connection therewith. Indemnities against losses or claims arising out of the misbehaviour of servants or employees form a recognised branch of business. . . . Unless there is something improper in the nature of such a contract arising out of the circumstances attending its origin, the cts. have never shown any disapprobation of such contracts or any disinclination to enforce them (FLETCHER MOULTON, L.J.).—**BRITISH CASE & PARCEL CONVEYORS, LTD. v. LAMSON STORE SERVICE CO., LTD.**, [1908] 1 K. B. 1006; 77 L. J. K. B. 619; 98 L. T. 875, C. A.

**Annotations:—Distd. Ford v. Radford** (1920), 36 T. L. R. 658. **Refd. Scott v. National Soc. for Prevention of Cruelty to Children & Parr** (1909), 26 T. L. R. 789; **Neville v. London "Express" Newspaper**, [1919] A. C. 368.

**Distinguished from insurance.]—See INSURANCE.**

**1746. Joint contract of indemnity.—Not joint & several.]—**The representative of a deceased partner, the account between him & the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern upon being paid a certain sum of money, & having an indemnity against all claims upon the partnership the assignment is executed, the money paid, & a joint covenant of indemnity given by the surviving partners:—**Held: the covenant is not to be considered in equity as a joint & several covenant.**—**SUMNER v. POWELL** (1823), Turn. & R. 423; 37 E. R. 1163, L. C.; *affg.* (1816), 2 Mer. 30.

**Annotations:—Refd. Stamford, Spalding & Boston Banking Co. v. Ball** (1862), 4 De G. F. & J. 310. **Mentd. Devaynes v. Noble** (1831), 2 Russ. & M. 495; **Lloyd v. Lloyd** (1837), 2 My. & Cr. 192; **Crossley v. Dobson** (1818), 2 De G. & Sm. 486; **Beresford v. Browning** (1875), 1 Ch. D. 30.

**SECT. 2.—HOW RIGHT ARISES.**

**SUB-SECT. 1.—IN GENERAL.**

**1747. From contract express or implied.—Or from relationship of parties.]—**The claim to indemnity mentioned in R. S. C., Ord. 16, r. 48, is a claim to indemnity as such, to be enforced either at law or in equity arising from contract express or implied, or possibly by reason of some statutory provision. An implied contract to indemnify may be based either upon an inference of fact to be deduced from the circumstances of any particular case, or upon the obligations caused by the relation subsisting between two parties, e.g. the obligation of a *cestui que trust* to indemnify his trustee against liability incurred by the trustee as such. A right to damages is not a right to indemnity as such within the rule.

A co. contracted to purchase from B. certain property, subject as they alleged, to three building agreements only, & to the tenants' rights thereunder, & acting in accordance with the provisions of those agreements treated them as determined. That purchase was not completed. In an action brought by the tenants against the co. alleging a further agreement whereby B.'s rights were modified, & that the co. had bought with notice of such agreement, & claiming a declaration that the agreements were still sub-

sisting & consequential relief:—**Held: the claim of deft. co. against B., if substantiated, was one for damages only, & an application of the co. to serve B. with a third party notice was refused.**

If A. requests B. to do a thing for him, & B. in consequence of his doing that act is subject to some liability or loss. Then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequence of his doing it (COTTON, L.J.).—**BIRMINGHAM & DISTRICT LAND CO. v. LONDON & NORTH WESTERN RY. CO.** (1886), 34 Ch. D. 261; 56 L. J. Ch. 956; 55 L. T. 699; 35 W. R. 173; 3 T. L. R. 179, C. A.

**Annotations:—Consd. Hammond v. Bussey** (1887), 20 Q. B. D. 79; **Kruger v. Moel Tryvan Ship Co.** (1907), 13 Com. Cas. 1. **Appld. Groves v. Webb & Kenward** (1916), 85 L. J. K. B. 1533. **Refd. Johnston v. Salvage Assocn.** (1887), 19 Q. B. D. 458; **Tritton v. Bankart** (1887), 56 L. J. Ch. 629; **Hooper v. Bromet, Raphael, Third party** (1903), 89 L. T. 37; **The Devonshire & St. Winifred**, [1913] P. 13; **Eastern Shipping Co. v. Quah Beng Kee**, [1924] A. C. 177.

**1748. ———.]—Deft. & A. were joint trustees of a settled fund, A. being a member of the firm of solrs. acting in the management of the trust. A. received the proceeds of sale of part of the trust funds as solr. & misapplied them, & the moneys were lost. After the death of A. an action was commenced against deft. as the surviving trustee claiming a declaration that he was liable to pay pltf. the sum so misapplied. Deft. obtained an order under R. S. C., Ord. 16, r. 48, for leave to serve a third party notice on the surviving partners of the firm of solrs. claiming to be indemnified against liability in the action:—**Held: this was not a claim to indemnify deft. against pltf.'s claim in the action within above rule, the right of deft. to recover from the surviving partners a sum equal to the lost trust fund being an independent right & not one depending on the liability of deft. in the action.****

A right to indemnity may arise under an express or implied contract, or by reason of an obligation resulting from the relation of the parties (CHITTY, J.).—**WYNNE v. TEMPEST**, [1897] 1 Ch. 110; 66 L. J. Ch. 81; 75 L. T. 624; 45 W. R. 183, 13 T. L. R. 128; 41 Sol. Jo. 127.

**1749. ———.]—**Though a right of indemnity generally arises by contract, express or implied, it exists whenever the relation between parties is such that either in law or in equity there is an obligation upon one party to indemnify the other.

The owners of a wharf granted applt. co. the right to berth their ships at it subject to payment & liability for any damage caused. Resp., who was managing director of applt. co., gave instructions, without the co.'s authority, that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was unloaded the wharf collapsed. In an action by the owners of the wharf against applt. co. for damages, they served a third party notice upon resp., & claimed that he should indemnify them against any damages for which they should be held liable. By the rules of ct. applicable, as by R. S. C., Ord. 16, r. 48, third party procedure is available "where deft. claims to be entitled to contribution or indemnity over against a person".—**Held: applt. co. had a right of indemnity against resp., & were entitled to join him as a third party & obtain relief against him.**—**EASTERN SHIPPING CO. v. QUAH BENG KEE**, [1924] A. C. 177; 93 L. J. P. C. 72; 130 L. T. 462; 40 T. L. R. 109; 16 Asp. M. L. C. 270, P. C.

**PART XII. SECT. 2, SUB-SECT. 1.**

**1. From contract express or implied.]—**The right of indemnity is given by the contract itself.—**PATNE v. COUGHELL** (1895), 17 P. R. 39.—**CAN.**



## SUB-SECT. 2.—BY CONTRACT.

## A. Implied.

## (a) In Respect of Acts Done at Request or Order of Another.

**1750. Indemnity may be implied.]**—*Deft.*, attorney of O. authorised *pltf.* as brokers to distrain the goods on A.'s premises for rent due to O., whereupon the distress was made. Some of the goods being privileged from distress & claimed by the owner, *pltf.* required an indemnity which *deft.* gave on the part of O. & afterwards said he would give a further guarantee. The owners of the privileged goods having sued & recovered against *pltf.*s:—*Held*: *deft.* was liable to make good the loss they had sustained. - *TOPLIS v. GRANE* (1839), 5 Bing. N. C. 636; 2 Arn. 110; 7 Scott, 620; 9 L. J. C. P. 180; 132 E. R. 1245.

*Annotations*:—*Appld.* *Dugdale v. Lovering* (1875), L. R. 10 C. P. 196. *Consd.* *Sheffield Corpn. v. Barclay*, [1905] A. C. 392. *Refd.* *Ibbett v. De La Salle* (1860), 6 H. & N. 233; *Cory v. Lambton & Hutton Collieries* (1916), 86 L. J. K. B. 401.

**1751.** —. —.]—*Pltf.*s. were in possession of certain trucks, which were claimed by *deft.*, & also by the proprietors of the K. colliery. A correspondence took place between *pltf.*s. & *deft.*, in which *pltf.*s. asked for an indemnity if they should deliver up the trucks to *deft.*. *Deft.*, without giving any answer as to the indemnity, wrote requiring *pltf.*s. to send the trucks back to him, which they thereupon did. The K. colliery proprietors then brought an action against *pltf.*s. for conversion of the trucks, & their claim proving well founded, *pltf.*s. were obliged to pay a sum of money, in settlement of the action, which they sought to recover from *deft.* upon a contract of indemnity:—*Held*: there was evidence of an implied promise to indemnify.

The principle upon which in such cases a contract of indemnity is implied is not confined to cases of principal & agent, or employer & employed.—*DUGDALE v. LOVERING* (1875), L. R. 10 C. P. 196; 44 L. J. C. P. 197; 32 L. T. 155; 23 W. R. 391.

*Annotations*:—*Apprvd.* *Sheffield Corpn. v. Barclay*, [1905] A. C. 392. *Consd.* *Kruger v. Moel Tryvan Ship Co.* (1907), 13 Com. Cas. 1; *Cory v. Lambton & Hutton Collieries* (1916), 86 L. J. K. B. 401. *Refd.* *Birmingham & District Land Co. v. L. & N. W. Ry.* (1886), 34 Ch. D. 261; *Re Senger, Ex p. Seaward* (1891), 7 T. L. R. 616; *Bank of England v. Cutler*, [1908] 2 K. B. 208; *Groves v. Webb & Kenward* (1916), 85 L. J. K. B. 1533.

**1752.** —.]—*Testatrix* directed her trustees to pay the interest or annual rent of £2,000 to A. during her life, & after her death to divide that sum among her children; & to pay the interest or annual rent of a similar amount to B. in liferent with the fee to her children. The trustees were empowered by the deed to realise or to continue to "hold any or all of such shares or stocks" as might belong to *testatrix* at her decease "should they consider it advisable or expedient to do so, without any personal responsibility for loss, if any, thereby sustained"; with power also "to lend or place out on such securities heritable or movable as they shall consider advantageous the foresaid legacies of £2,000 & £2,000 respectively the securities to be conceived in favour of my trustees & that for the purposes of this trust &

no otherwise." *Testatrix* at her death held £850 stock of an unlimited bank. The trustees at the desire of A. & without consulting B., set £200 of this stock aside as part of the fund appropriated to Mrs. A. & realised the remainder. They afterwards on the narrative of the purposes of the trust deed & of the sums invested for the two specific legacies of £2,000 & that they had paid the residue, received their discharge from A. & B. Statements & separate accounts of interest on the investments allocated to each were sent half-yearly to A. & B. All the investments stood in the names of *testatrix*'s trustees. The bank became insolvent & calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole trust estate. B. objected to any portion of her legacy being taken:—*Held*: (1) the trustees had the power to sever & had severed the two legacies & had placed them in separate investments for behoof of the respective beneficiaries & therefore the trustees had no right to relief from the investments allotted to B. & her family for liabilities incurred on those allotted to A. & her family.

(2) No doubt any one who requests another to incur a liability which would otherwise have fallen upon himself is, in general, bound at law as well as in equity, to indemnify him; this principle applies to many cases, & where a trust is for the benefit of the maker of the trust it may apply to a trustee (*LORD BLACKBURN*). - *FRASER v. MURDOCH* (1881), 6 App. Cas. 855; *sub nom.* *ROBINSON v. MURDOCH*, 45 L. T. 417; 30 W. R. 162, H. L.

*Annotations*:—*As to* (1) *Distd.* *Re Craven, Watson v. Craven*, [1911] 1 Ch. 358. *Refd.* *Re Brooks, Coles v. Davis* (1897), 76 L. T. 771; *Re Hall, Foster v. Metcalfe* (1902), 72 L. J. Ch. 74; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705; *Re Towndrow, Gintion v. Machen*, [1911] 1 Ch. 682; *Re Wrang, Wrang v. Palmer*, [1919] 2 Ch. 58. *As to* (2) *Consd.* *Hobbs v. Wylet* (1887), 36 Ch. D. 256. *Refd.* *Re Kidd, Kidd v. Kidd* (1891), 42 W. R. 571; *Hardoon v. Bellios*, [1901] A. C. 118; *Matthews v. Ruggles-Bruce*, [1911] 1 Ch. 191.

**1753.** —.]—*LEIGH v. DICKESON*, No. 876, ante.

**1754.** —.]—*BIRMINGHAM & DISTRICT LAND CO. v. LONDON & NORTH WESTERN RY. CO.*, No. 1747, ante.

**1755.** —.]—A contractor for the erection of a building agreed to employ sub-contractors selected by the architect to do certain parts of the work. The architect selected *deft.* to do the carving work, & the contractor sent him a written order to execute the whole of the carving, the order concluding as follows: "You agree in accepting this order to sign & send per return of post the enclosed accident indemnity." The indemnity was to hold the contractor & any insurance co. with whom he might be insured harmless against all claims under Workmen's Compensation Act, 1897 (c. 37), by any person in the *deft.*'s employment upon such work in respect of any accident. *Deft.* did not return any answer to the order, nor did he sign the indemnity form, but he went on with the work. An accident happened to a workman employed by him upon the work, for which the contractor had to pay compensation under Workmen's Compensation Act, 1897 (c. 37). The contractor claimed indemnity from *deft.*:—*Held*: *deft.* executed the work upon the footing of the order given to him

## PART XII. SECT. 2, SUB-SECT. 2.—A. (a).

**1750 I. Indemnity may be implied.]**—S. sent goods to the railway station at B., consigned to A. L. T. & N., the third party, claimed the goods, & they were handed over to him. S. sued *deft.*, the Commissioner of Railways, for the value of the goods. A third

party notice was taken out, & N. was a party at the trial. The action having resulted in *pltf.*'s favour, *deft.* applied for an indemnity against N. for the amount of judgment & costs:—*Held*: there was an implied contract of indemnity between N. & *deft.*—*SHERREY & TAIT v. RAILWAYS COMR., NOYES, THIRD PARTY* (1902), 4

W. A. L. R. 96.—AUS.

**1750 II.** —.]—*TRAVERS v. RICHARDSON* (1920), 20 S. R. N. S. W. 367; 37 N. S. W. N. 101.—AUS.

**1750 III.** —.]—*KERR v. SASKATCHEWAN REALTY & IMPROVEMENT CO.* (1914), 28 W. L. R. 561; 6 W. W. R. 1094; 20 D. L. R. 925.—CAN.



**Sect. 2.—How right arises: Sub-sect. 2, A. (a) & (b).]**

by the contractor & of the indemnity enclosed with it, & that he was liable to indemnify the contractor.—*GREENWOOD, LTD. v. HAWKINGS* (1906), 23 T. L. R. 72.

**1756.** —J—A charterparty contained a clause exempting the shipowner from liability for stranding & other accidents of navigation, even when occasioned by the negligence of the master; the master to sign clean bills of lading without prejudice to the charter. In mistake, & *bonâ fide*, the master signed bills of lading presented by the charterers which did not give the shipowner the exemption given by the charterparty. Owing to the negligent navigation of the master, there was a total loss of the cargo, & the holders of the bills of lading recovered damages against the shipowner:—*Held*: since the contract between the shipowner & the charterers was that the shipowner was not to be liable for the master's negligence, the charterers were bound to indemnify the shipowner against the claims of the holders of the bills of lading.—*KRUGER & CO., LTD. v. MOEL TRYVAN SHIP CO., LTD.*, [1907] A. C. 272; 76 L. J. K. B. 985; 97 L. T. 143; 23 T. L. R. 677; 51 Sol. Jo. 623; 10 Asp. M. L. C. 465; 13 Com. Cas. 1, II. L.; *affg.* S. C. *sub nom.* MOEL TRYVAN SHIP CO. v. KRUGER & Co., [1907] 1 K. B. 809, C. A.

*Annotations*:—*Consd.* Groves v. Webb & Kenward (1916), 114 L. T. 1082. *Refd.* The Devonshire & St. Winifred, [1913] P. 13. *Mentd.* *Re* Auchmuty (1908), 99 L. T. 462; *Nollemeent* (Owners) v. Bunge & Born, [1917] 1 K. B. 160; Guarantee Trust Co. of New York v. Hannay, [1918] 2 K. B. 623; Pyman S.S. Co. v. Admiralty Lords Comrs. (1918), 119 L. T. 735.

**1757.** —J—Plff. was the reversioner of certain premises. Defts., who were builders, had entered into a contract with the Comrs. of Works to build on land adjoining pltf.'s premises. The contract contained a clause whereby defts. indemnified the Comrs. from all claims that might be made against them in respect of damage or injury occasioned from any circumstances connected with the execution of the work to any property or to any person. During the excavations defts. found that pltf.'s wall required underpinning, & they did the necessary work under the orders of the Comrs.' architect without having first obtained pltf.'s consent. Pltf. brought an action for trespass against defts., & defts. claimed indemnity from the Comrs. as third parties in the event of their being held liable to pltf.:—*Held*: defts. were liable in damages to pltf., but that as the Comrs.' architect had given defts. an unconditioned order to do the work of underpinning because it was urgent, & which order they were bound to obey, defts. were entitled to indemnity.—*KIRBY v. CHESSUM & SONS, WORKS COMRS., THIRD PARTIES* (1914), 79 J. P. 81; 30 T. L. R. 660; 12 L. G. R. 1136, C. A.

**1758.** —J—Plffs., who were wharfingers, agreed to warehouse some wheat for defts. Defts. engaged a lighterman to lighter from the ship's side the wheat to pltf.'s warehouse. Plffs., while the wheat was still in the lighters, at the request of defts., issued clean warrants, by means of which defts. sold the wheat as undamaged wheat to a purchaser. The wheat was damaged while in the lighters, & plffs., having issued clean warrants, paid to the purchaser the amount of the damage done to the wheat:—*Held*: defts. had impliedly undertaken to indemnify plffs. for any damage occasioned to plffs. by the issue of the warrants.—*GROVES & SON v. WEBB & KENWARD* (1916), 85

L. J. K. B. 1533; 114 L. T. 1082; 32 T. L. R. 424; 13 Asp. M. L. C. 386, C. A.

*Annotation*:—*Refd.* Cory v. Lambton & Hetton Collieries (1916), 86 L. J. K. B. 401.

**1759.** — *Unless manifestly illegal or tortious.* —If one at the request of S. promise to beat D. & he promise to save him harmless, this is a void consideration; but if one request S. to enter into the manor of Dale & drive out cattle, & that he will save him harmless if he do so, & after trespass is brought against him & recovery had, he shall have his action. So if a sheriff pretending to have a writ, where he has none, arrest one, & request an innkeeper to entertain him in his house, or hire one to conduct the prisoner to the gaol, & promise to keep him without damage, if an action be brought, & recovery had thereupon, the party shall have an action on the case against the sheriff upon this promise, for he who does a thing which may be lawful, & the illegality thereof appear not to him, he who employs the party & assumes to save him harmless, shall be charged (*per* CUR.).—*FLETCHER v. HANCOT* (1622), Hut. 55; 123 E. R. 1097; *sub nom.* BATTERSEY'S CASE, Win. 48.

*Annotations*:—*Refd.* Betts v. Gibbins (1831), 2 Ad. & El. 57; Shackell v. Rosier (1836), 2 Bing. N. C. 634; Burrows v. Rhodes, [1899] 1 Q. B. 816.

**1760.** —J—(1) The rule that a tortfeasor cannot recover upon a promise to indemnify made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an obviously illegal character. It does not extend to a case in which there is any *bonâ fide* doubt whatever whether in point of law the act was authorised.

(2) The rule as to contribution between joint tortfeasors must be similarly confined. Contribution is indemnity; & the same consideration that will support a promise to indemnify will also support a promise to contribute, *et e converso*. In cases where an express promise will be supported, an implied promise arising out of the circumstances of the case will also be available.—*BETTS v. GIBBINS* (1831), 2 Ad. & El. 57; 4 Nev. & M. K. B. 64; 4 L. J. K. B. 1; 111 E. R. 22.

*Annotations*:—*As to* (1) *Distd.* Shackell v. Rosier (1836), 2 Hodg. 17. *Appl.* Toplis v. Grane (1839), 5 Bing. N. C. 636; Dugdale v. Lovering (1875), L. R. 10 C. P. 196. *Refd.* Bartlett v. Dimond (1845), 5 L. T. O. S. 56; The Englishman, The Australia, [1895] P. 212; Burrows v. Rhodes, [1899] 1 Q. B. 816; Moxham v. Grant, [1900] 1 Q. B. 88; Sheffield Corp'n. v. Barclay, [1905] A. C. 392; Leslie v. Tellable Advertising & Addressing Agency, [1915] 1 K. B. 652; Cory v. Lambton & Hetton Collieries (1916), 86 L. J. K. B. 401. *Generally, Refd.* Weld-Blundell v. Stephens, [1919] 1 K. B. 520. *Mentd.* Tanner v. Scovell (1845), 14 M. & W. 28.

**1761.** — *Publication of libel.* —In consideration that pltf. had published a libel at deft.'s request, & had at the like request consented to defend an action brought against pltf. for such publication, deft. promised to indemnify pltf. from the costs of the action:—*Held*: the promise was void.—*SHACKELL v. ROSIER* (1836), 2 Bing. N. C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L. J. C. P. 193; 132 E. R. 245.

*Annotations*:—*Refd.* Bradlaugh v. Newdigate (1883), 11 Q. B. D. 1; Breyer v. Royal British Nurses' Assocn. (1897), 76 L. T. 735; Burrows v. Rhodes, [1899] 1 Q. B. 816; Weld-Blundell v. Stephens, [1920] A. C. 956. *Mentd.* Lound v. Grimwade (1888), 39 Ch. D. 605.

**1762.** —J—Defts. gave to plffs., who were printing & publishing a paper for them, an undertaking that they, defts., would indemnify plffs. against any claims whatever that might be made against them in respect of any libel that might appear in the paper. A libel was inserted in the paper with the knowledge of plffs.' staff, & an action was brought against plffs. in respect thereof which they had to compromise by paying

a certain sum of money & costs. In an action on the undertaking to indemnify:—*Held*: such a contract could not be enforced in law.—*SMITH (W. H.) & SON v. CLINTON & HARRIS* (1908), 99 L. T. 840; 25 T. L. R. 31.

*Annotation*:—*Mentd.* *Noville v. Dominion of Canada News Co.*, [1915] 3 K. B. 556.

*See, generally, LABEL & SLANDER.*

**1763.** ———.]—Declaration, in *assumpsit*, alleged that deft. issued a *fi. fa.* on a judgment against M., which the sheriff delivered to pltf., his officer, to execute; & pltf., at deft.'s request, seized goods, believing them to be M.'s; whereupon G. claimed them, & gave notice to the sheriff not to sell them; & in consideration of the premises, & that pltf., at the request of deft., would pay no attention to the claim or notice, & would proceed to a sale, deft. promised pltf. to indemnify him for so doing; that pltf. did thereupon pay no attention, etc., & sold the goods, & levied, & at deft.'s request, delivered the balance to deft.; that afterwards G., by reason of the premises, impleaded pltf. together with the sheriff in the county ct., in trespass on tort, for seizing & selling & recovered against pltf. & the sheriff the value of the goods, damages & costs; which pltf., being liable, as deft. knew, to indemnify the sheriff, paid to G.; but deft. did not indemnify. On special demurrer:—*Held*: a good declaration; for consideration sufficiently appeared; & it was no objection that pltf.'s disregard of the claim was not shown with sufficient certainty to have been otherwise than an illegal act; or that pltf., consistently with the allegations, might have sold in the mere performance of his duty; or that it was not sufficiently shown that G. recovered solely by being entitled to the goods seized, & not by any irregularity in pltf.'s acts, or how much damage accrued from the selling, how much from the seizing; or that the action in the county ct. was against the sheriff together with pltf.—*ELLISTON v. BERRYMAN* (1850), 15 Q. B. 205; 117 E. R. 436.

**1764.** ———.]—Pltfs., who were money-lenders, & as such, issued from time to time circulars to the public, employed defts. to address & send out circulars on their behalf. No circular was to be sent to a minor. Owing to the negligence of defts. a circular was sent to a minor, & in respect thereof pltfs. were convicted & fined under Betting & Loans (Infants) Act, 1892 (c. 4), s. 2, & Money-lenders Act, 1900 (c. 51), s. 5. Pltfs. claimed to be indemnified by defts. in respect of the fine & the costs they had had to pay:—*Held*: as pltfs. had been convicted of sending the circular without having reasonable ground for believing the addressee to be of full age, the claim was not maintainable.—*LESLIE (R.), LTD. v. RELIABLE ADVERTISING & ADDRESSING AGENCY, LTD.*, [1915] 1 K. B. 652; 84 L. J. K. B. 719; 112 L. T. 947; 31 T. L. R. 182.

*Annotations*:—*Distd.* *Proops v. Chaplin* (1920), 37 T. L. R. 112. *Reid.* *Weld-Blandell v. Stephens*, [1920] A. C. 956.

**1765.** ———.]—Where a person at the request of another does an act on his behalf which is apparently legal, but which occasions injury to a third party, for which the person doing the act is liable, the latter is entitled to an indemnity from the person at whose request the act was done, provided that he acted without negligence, & that the injury to the third party was the natural & necessary consequence of that particular act being

done.—*CORY (W.) & SON, LTD. v. LAMBTON & HETTON COLLIERIES, LTD.* (1916), 86 L. J. K. B. 401; 115 L. T. 738; 10 B. W. C. C. 180; 13 Asp. M. L. C. 530, C. A.

(b) *In Respect of Money paid under Compulsion of Law.*

**1766. General rule.**—A. being the owner of a steamship mortgaged it to B., & subsequently, under circumstances held to show acquiescence by B., entered into an agreement in contemplation of a partnership with C., by the terms of which C. was to work the ship for A. till further notice, paying all the expenses & receiving all the profits, A. agreeing to indemnify him against loss, if any, upon a periodical statement of accounts. Subsequently to this agreement B. gave notice to C. of the mtg., & required possession of the ship. The ship was being employed in voyages at a distance from England, between S. & T., & was at that time at S., under engagements which had been entered into by C. with third parties, with respect to its next voyage to T. The ship was given up to B.'s agent at T. at the termination of its next voyage thither. At the time of such delivery C. owed to the crew of the ship a large sum for wages, which entitled them to proceed against the ship in the Admiralty. C. & shortly after the delivery of the ship the crew took such proceedings, & the ship was seized by the officers of the ct. B., after suffering much delay & loss, paid the wages & obtained possession of the ship. In an action of trover for the ship, & for money paid, brought by B. against C.:—*Held*: B. was entitled to recover the wages from C. under the count for money paid.

Of course there is, upon the surface, the proposition that, by the law of this country, differing, it is said, in that respect from the civil law, nobody can make himself the creditor of another person by paying that person's debts against his will or without his consent: a proposition which is expressed by the common formula of the count for money paid for deft.'s use, at his request. That is the general rule, unquestionably; but it is subject to this modification, that money paid to discharge the debt of another cannot be recovered, unless it was paid at his request, or under compulsion in respect of a liability imposed upon that other (*WILLES, J.*).—*JOHNSON v. ROYAL MAIL STEAM PACKET CO.* (1867), L. R. 3 C. P. 38; 37 L. J. C. P. 33; 17 L. T. 445; 3 Mar. L. C. 21.

*Annotations*:—*Distd.* *The Ripon City*, [1898] P. 78. *Reid.* *Edmunds v. Wallingford* (1885), 11 Q. B. D. 811. *Mentd.* *The Heather Bell*, [1901] P. 113; *Law Guarantee & Trust Soc. v. Russian Bank for Foreign Trade*, [1905] 1 K. B. 815.

**1767. Payment of rent to redeem goods distrained on.**—*EXALL v. PARTRIDGE*, No. 947, *ante*.

**1768. Payment of debt to redeem goods seized by sheriff.**—As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, & to be reimbursed by the debtor against the money paid to redeem them, & in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor; & the right to indemnity exists although there may be no agreement to indemnify, & although there may be in that sense no privity between the owner of the goods & the debtor.

## PART XII. SECT. 2, SUB-SECT. 2.— A. (b).

m. *Payment on breach of fidelity bond.*—M., & defts. as his sureties,

executed a bond conditioned for the good behaviour of M.:—*Held*: there was an implied contract on the part of M., upon execution of the bond, to repay to his sureties any money that

they might have to pay by reason of his default.—*EXCHANGE BANK OF CANADA v. SPRINGER, EXCHANGE BANK OF CANADA v. BARNES* (1881), 29 Gr. 270.—CAN.

**Sect. 2.—How right arises: Sub-sect. 2, A. (b), (c),**

Deft. bought the business of an ironmonger in his own name for his two sons; he paid the greater part of the purchase-money. The banking account of the business was kept by him, & he drew the cheques on that account. A society having obtained judgment in an action against deft., certain goods of his sons were seized by the sheriff: the sons claimed the goods; but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, & the goods were sold. They realised £1,300, & this sum was paid into ct. in the action by the society against deft. as a security for what might be found due to the society from deft. upon taking certain accounts. Deft.'s sons were afterwards adjudicated bkpts., & pltf. was appointed their trustee. Deft. agreed with pltf. that, in consideration of his sons' goods having been seized & sold on behalf of the society in respect of an alleged claim against him, he would pay £300 *per annum* to pltf. until he should have paid a sufficient sum to pay the trade creditors of his sons in full. Pltf. having brought the present action to recover £1,200 due by virtue of the above mentioned agreement, or in the alternative £1,300, the value of the goods seized:—*Held*: even if deft.'s express promise to pay £1,200 was not legally binding upon him, nevertheless the action was maintainable; for although the decision upon the interpleader summons did not estop deft. from showing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, & the goods of his sons had been legally taken for his debt; deft., therefore, was bound to indemnify his sons, & pltf., as their trustee in bkpy., was entitled to have judgment entered for him for the sum of £1,200, which he was willing to accept instead of £1,300, the value of the goods seized.—*EDMUNDS v. WALLINGFORD* (1885), 11 Q. B. D. 811; 54 L. J. Q. B. 305; 52 L. T. 720; 49 J. P. 549; 33 W. R. 647, C. A.

*Annotations*:—*Apld.* *The Orchis* (1890), 15 P. D. 38. *Consd.* *Re Button, Ex p. Havildale*, [1907] 2 K. B. 180.

**Compulsory payments on account of mesne tenant.—To superior landlord.]—See DISTRESS**, Vol. XVIII., pp. 319, 321, Nos. 530-549.

**1769. Contribution to bottomry bond by owner of freight.]—Where the master of a ship damaged by perils of the seas hypothecated at a foreign port, by one bottomry bond, for necessary repairs, the ship, freight, & cargo amongst which were pltf.'s goods, & the ship & freight having realised less than the sum borrowed, pltf. was obliged to contribute towards the difference, & also to pay his proportion of the costs of a suit instituted by the obligee of the bond:—*Held*: pltf. might maintain an action against the owner of the ship on an implied promise to indemnify him.—*BENSON v. DUNCAN* (1849), 3 Exch. 614; 18 L. J. Ex. 169 3 L. T. 559; 14 Jur. 218; 15 E. R. 1003, Ex Ch.; *affg.* S. C. *sub nom.* *DUNCAN v. BENSON* (1847), 1 Exch. 537.**

*Annotations*:—*Refd.* *The Union* (1860), 30 L. J. P. M. & A. 17; *The Oliver* (1862), Lush. 484; *Lloyd v. Gilbert* (1865), 6 B. & S. 100; *Miedbratt v. Fitzsimon*, *The Energie* (1875), 32 L. T. 579. *Mentd.* *Hallett v. Wigram* (1850), 9 C. B. 580; *Atkinson v. Stephens* (1852), 7 Exch. 567; *Stainbank v. Shepard* (1853), 13 C. B. 418; *Grey v. Gibbs* (1857), 2 H. & N. 26; *The Lizzie* (1868), 19 L. T. 71; *The Eugenio* (1873), L. R. 4 A. & E. 125; *The Onward* (1873), L. R. 4 A. & E. 38; *Atwood v. Sellar* (1879), 4 Q. B. D. 342.

**PART XII. SECT. 2, SUB-SECT. 2.—**  
**A. (d).**

**n. Representation made to purchasers of equity of redemption.—That**

**mortgagee would discharge mortgage.]—**  
Purchasers of an equity of redemption were induced to purchase the lands by mortgagee's promise to discharge the

**1770. Money paid to obtain release of ship.]—**  
*JOHNSON v. ROYAL MAIL STEAM PACKET CO.*, No. 706, *ante*.

**1771. —.]—Pltfs. were mtgees. of forty-eight sixty-fourth shares in a vessel. The master having brought an action in rem against the vessel & arrested her, pltfs. paid the amount of his claim in order to obtain the release of the vessel from arrest & enable them to take possession under their mtge. Pltfs. then sued defts., the owners of sixteen sixty-fourth shares, to recover the amount paid to the master:—*Held*: as the mtgor. & other co-owners were severally liable for the disbursements paid by the master & as pltfs. could not obtain possession of their shares as long as the vessel was under the arrest of the A., they were entitled to recover from defts. the amount paid by them.—*THE ORCHIS* (1890), 15 P. D. 38; 59 L. J. P. 31; 62 L. T. 407; 38 W. R. 472; 6 T. L. R. 197; 6 Asp. M. L. C. 501, C. A.  
*Annotations*:—*Expld. & Distd.* *The Ripon City*, [1898] P. 78. *Refd.* *The Heather Bell*, [1901] P. 143.**

**(c) In Respect of Voluntary Acts for Benefit of Another.**

**1772. General rule.]—The general principle is, beyond all question, that work & labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be found upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. . . . With regard to salvage, general average, & contribution, the maritime law differs from the common law (*BOWEN, L.J.*).—*FAIRCKE v. SCOTTISH IMPERIAL INSURANCE CO.* (1886), 34 Ch. D. 234; 56 L. J. Ch. 707; 56 L. T. 220; 35 W. R. 143; 3 T. L. R. 141, C. A.**

*Annotations*:—*Refd.* *Re Winn, Reed v. Winn* (1887), 57 L. T. 332; *Re Coventry & Nuneaton Tram. Co.* (1888), 4 T. L. R. 458; *Re Winchelsea's Policy Trusts* (1888), 39 Ch. D. 168; *Patten v. Bond* (1889), 60 L. T. 583; *Strutt v. Tippet* (1889), 61 L. T. 460; *Re Walker, Meredith v. Walker* (1893), 68 L. T. 517; *The Gas Float Whitton (No. 2)*, [1896] P. 42; *The Ripon City*, [1898] P. 78; *Re Phillips*, [1911] 2 K. B. 669. *Mentd.* *Maryan v. Blyth* (1890), 39 W. R. 422; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Securities & Properties Corp. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566; *Keighley, Maxfield v. Durant*, [1901] A. C. 240; *Re National Motor Mail Coach Co., Clifton's Claim*, [1903] 2 Ch. 515; *Re McKerrall, McKerrall v. Gowan* (1912), 6 B. W. C. C. N. 153; *Re Becket, Farnell v. Paine*, [1912] 2 Ch. 72.

**Voluntary payment without request.]—See CONTRACT**, Vol. XII., pp. 522 *et seq.*

**Exception to rule in maritime law.]—See SHIPPING.**

**(d) In Respect of Acts done on Faith of Representation or Conduct.**

**1773. Goods seized by sheriff—Indemnity by judgment creditor.]—DASHWOOD v. MANLOVE** (1691), Nels. 192; 21 E. R. 823.

**1774. —.]—A levy was made on the goods of a trader after he had committed an act of bkpy., & the money levied was paid over to the party; an action of trover was afterwards brought by the assignees against him, the sheriff, & the bailiff, in which damages were recovered; & these, together with the costs, were paid by the**

mtge. & accept in its place an assignment of another mtge., which agreement mtgor. had failed to carry out:—*Held*: the purchasers of the equity

**bailliff:—Held:** there was no implied promise on the part of pltf. in the original suit to indemnify the bailliff or to contribute to the damages & costs in the action of trover; but the bailliff might maintain money had & received to recover back the levy money paid over.—*WILSON v. MILNER* (1810), 2 Camp. 452, N. P.

**Annotations:—***Consd. Betts v. Gibbins* (1834), 2 Ad. & El. 57. *Mentd. Garland v. Carlisle* (1837), 11 Bl. N. S. 421; *Standish v. Ross* (1849), 3 Exch. 527.

**1775. ———.]—**Where a claim is made by a person, as partner of deft., on property seized by the sheriff, the ct. will not grant that officer relief under Interpleader Act, 1831 (c. 58), but will compel pltf. to indemnify the sheriff, if he denies the partnership.—*HOLMES v. MENTZE* (1835), 4 Ad. & El. 127; 4 Dowl. 300; 1 Har. & W. 606; 5 Nev. & M. K. B. 503; 5 L. J. K. B. 62; 111 E. R. 735.

**Annotations:—***Mentd. Garbett v. Voale* (1843), 13 L. J. Q. B. 98; *Re Tamplin, Ex p. Barnett* (1890), 59 L. J. Q. B. 194; *Peake v. Carter*, [1916] 1 K. B. 652.

**1776. Goods of bankrupt seized by commissioners. —Indemnity by creditors.]—**Comrs. of bkpts. issued their warrant to seize goods of a bkpt. on board ship; the goods were consigned to persons in Holland who had not paid bkpt. for them. The masters refused to deliver the goods notwithstanding the warrant; & this occasioned the comrs. themselves to demand the goods in person, which were still refused. The ct. ordered [the masters] to deliver the goods upon payment of the freight money; & they to be indemnified by the creditors against the bill of lading, which was sent to the consignees.—*ANON.* (1709), 2 Eq. Cas. Abr. 98; 22 E. R. 84.

**1777. Order of court made on untrue statement —Liability to third party.]—**Where persons, even without *mala fides*, make or adopt a statement, the contrary of which they ought to have known by reasonable diligence to be the truth, & a wrongful order is made by the ct. grounded on such statement, all such persons are liable to indemnify the persons who suffer through such an order from all the consequences.—*Re SPENCER* (1870), 39 L. J. Ch. 841; 21 L. T. 808; 18 W. R. 240.

**Annotations:—***Consd. Re Dangar's Trusts* (1889), 41 Ch. D. 178. *Reid. Marsh v. Joseph*, [1897] 1 Ch. 213.

**1778. Representation on sale of goods.—Resale to third party on similar representation.]—**The third party represented to defts. that what was sold by him to them was of a certain quality, & defts. represented it to be of the same quality when they re-sold it to pltf's. That is a ground for a claim for indemnity. All that is necessary is that defts. should have a *bona fide* claim for indemnity against the third party. It need not go to the whole of pltf's' claim against them (*MATHEW, J.*).—*JACOBS, HART & Co. v. BROWN*, [1884] W. N. 23; Bitt. Rep. in Ch. 230.

were not entitled to claim indemnity against the mtgce.—*MOORE v. DEATH* (1894), 16 P. R. 296.—**CAN.**

**c. Representation on sale of land.—Agreement to forfeit sum if land not resold.]—***CRIPPEY v. HITCHNER* (1911), 18 W. L. R. 259.—**CAN.**

**d. Representation made in letter of credit.]—***STEWART v. SCOTT* (1803), Hume, 91.—**SCOT.**

**e. ———.]—***BALFOUR, JUNIOR & Co. v. RUBSEL* (1815), 18 Fac. Coll. 335.—**SCOT.**

**f. ———.]—***ROSS v. LINDSAY & ADAMS* (1820), Hume, 116.—**SCOT.**

**g. ———.]—***KEMBLE'S, MASTERMAN & JOHNSTON v. MITCHELL* (1831), 9 Sh. (Cl. of Sess.) 648; 6 Fac. Coll. 417.—**SCOT.**

### (e) Between Joint Tortfeasors.

See TORT.

### (f) When Implication Excluded.

**1779. Contrary intention shown in contract.]—**Pltf. took of deft. a house, at a yearly rent, under an agreement by the terms of which the latter undertook, that, up to the date of the agreement, he had paid or would pay or discharge "all arrears of rent, rates, taxes, or assessments"; & the former agreed, that, "from & after that day, the same should be kept paid by him for the period he might occupy the premises." At the expiration of the first quarter, the superior landlord distrained for rent:—*Held:* there was no implied duty in deft. to indemnify pltf. against this claim, although the agreement between them stipulated for a yearly rent: pltf. having, by the subsequent clause, expressly undertaken to keep the reserved rent paid. *UPTON v. FERGUSSON* (1833), 3 Moo. & S. 88.

### B. From Relationship of Parties.

**1780. Banker & customer.—Indemnity by bank —Unauthorised transfer of securities to London agent.]—**A. kept a banking account with D. & Co. B. & Co. were the London bankers & correspondents of D. & Co., with whom they had deposited securities. A. indorsed two bills of exchange & handed them to D. & Co., & these were transmitted by them to B. & Co. who discounted one of them & received the proceeds of the other. When the bills were deposited by A. the account was in his favour, & it continued to be so till the bkpcy. of D. & Co. A. was credited with the bills when paid in & debited with interest on each payment by the bank to him in cash from the day of such cash payment & credited with interest from the time when such bill paid in by him became due:—*Held:* D. & Co. had no right to transfer the property in the bills & A. was entitled to be indemnified from the surplus security held by B. & Co.—*Re DILWORTH, Ex p. ARMISTEAD* (1828), 2 Gl. & J. 371, L. C.

**Annotations:—***Reid. Re Forster, Ex p. Bond* (1840), 1 Mont. D. & De G. 10. *Mentd. Re Dilworth, Ex p. Thompson* (1828), Mont. & M. 102; *Re Dilworth, Ex p. Benson* (1832), Mont. & B. 120; *Re Pearce, Ex p. Littledale* (1855), 1 Jur. N. S. 385.

**1781. ——— —Forged bill of lading.]—**A bill of exchange drawn upon pltf., by his correspondent abroad against a bill of lading, was sent through defts., who were bankers, for presentation & collection. The bank presented the bill to pltf. with this memorandum: "The bank holds bill of lading & policy for 251 bales of cotton, etc." Pltf. accepted the bill without asking to see the bill of lading, & afterwards retired it before it was

**t. ———.]—***PARK v. GOULD & Co.* (1851), 13 Dowl. (Cl. of Sess.) 1049; 23 Sc. Jur. 485.—**SCOT.**

### PART XII. SECT. 2, SUB-SECT. 2.—A. (f).

**a. (Conveyance by mortgagor of equity of redemption —Implied indemnity by purchaser against mortgage debt —Express agreement to contrary.)—**Although when a mtgce. conveys his equity of redemption, subject to the mtgce., there is an implied obligation on the part of the purchaser to indemnify the mtgce. against the mtgce. debt, evidence is admissible of an express agreement between the parties to the contrary.—*BRITISH CANADIAN LOAN Co. v. TEAR* (1893), 23 O. R. 664.—**CAN.**

### PART XII. SECT. 2, SUB-SECT. 2.—B.

**b. Vendor & purchaser.—Indemnity by vendor.—Portion of land claimed by third party.]—**W. sold lands to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land was claimed by R., & D. instituted proceedings under the covenant against B. W. executed to his vendee an mtgce. to indemnify him against all damages, costs, & charges in respect of the action of covenant. B. compromised with R.:—*Held:* W.'s estate was liable only for the value of the land claimed, & not the amount paid by his vendee on the occasion of the compromise.—*HART v. BOWN* (1859), 7 Gr. 97.—**CAN.**

**c. ——— Indemnity to vendor.—Land**

Sect. 2.—How right arises: Sub-sect. 2, B.]

due, paid the money, & received the bill of lading, which proved to be a forgery:—*Held*: the memorandum did not amount to a guarantee by the bank that the so-called bill of lading was genuine; & pltf. had no equity to recover back the money.—*LEATHER v. SIMPSON* (1871), L. R. 11 Eq. 398; 40 L. J. Ch. 177; 24 L. T. 286; 19 W. R. 431; 1 Asp. M. L. C. 5.

*Annotation*:—*Apprvd.* Guaranty Trust Co. of New York v. Hannay, [1918] 2 K. B. 623.

**1782. ——— Forged transfer of stock.]—**

A banker in good faith sent to a corp'n. a transfer of corp'n. stock which purported to be executed by T. & H., the two registered holders of the stock, with a request to the corp'n. to register the stock in the name of the banker. The corp'n. in good faith acted upon this request & granted a fresh certificate to the banker who transferred the stock to third parties, & they were registered as holders. Afterwards it was discovered that T. had forged H.'s signature, & H. recovered against the corp'n. judgment whereby they were compelled to buy equivalent stock & register it in H.'s name, & to pay him the missing dividends with interest:—*Held*: both parties having acted *bona fide* & without negligence the banker was bound to indemnify the corp'n. against the liability to H., upon an implied contract that the transfer was genuine.—*SHEFFIELD CORPN. v. BARCLAY*, [1905] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83; 69 J. P. 385; 54 W. R. 49; 21 T. L. R. 642; 49 Sol. Jo. 617; 3 L. G. R. 992; 10 Com. Cas. 287; 12 Mans. 248, 11. L.

*Annotations*:—*Appld.* A.-G. v. Odell, [1906] 2 Ch. 47. *Consd.* Moel Tryvan Ship Co. v. Kruger, [1907] 1 K. B. 809. *Follid.* Bank of England v. Cutler, [1908] 2 K. B. 208. *Consd.* Bamfield v. Goole & Sheffield Transport Co., [1910] 2 K. B. 94; Groves v. Webb & Kenward (1916), 85 L. J. K. B. 1533; G. N. Ry. v. L. E. P. Transport & Depository, [1922] 2 K. B. 742. *Refd.* Kirby v. Chessum (1913), 30 T. L. R. 15; Guaranty Trust Co. of New York v. Hannay, [1918] 2 K. B. 623; Brandon v. Michelham (1919), 35 T. L. R. 617. *Mentd.* Itubon v. Great Fingall Consolidated Co., [1906] A. C. 439; *Re* Auchmuty (1908), 99 L. T. 462; Morrison v. London County & Westminster Bank, [1911] 3 K. B. 356.

**1783. ——— Indemnity to bank—Bills paid at request—Against forged bill of lading.]—**A customer of a bank having desired them to procure to be accepted bills of exchange which a correspondent of his would draw against bills of lading he should send, & the bank having got their agents to accept the bills of exchange on a document which was sent to them as, & purported to be, the bill of lading referred to, but which was in fact a forgery, no goods having been shipped, & the transaction being a fraud on the part of the customer's correspondent:—*Held*: they were entitled to recover from their customer the amount they had paid in respect of the bills of exchange.—*WOODS v. THIEDERMANN* (1862), 1 H. & C. 478; 10 W. R. 846; 158 E. R. 973.

*Annotation*:—*Refd.* Guaranty Trust Co. of New York v. Hannay (1918), 87 L. J. K. B. 1223.

**1784. ——— Forged power of attorney.]—**

A broker applied to the Bank of England for a power of attorney for the sale of consols believing himself to be instructed by the stockholder, & *bona fide* induced the bank to transfer the consols to a purchaser upon a power of attorney to which the stockholder's signature was forged:—*Held*:

*sold subject to mortgage.]—CANANAN v. MERK* (1883), 2 O. R. 636.—*CAN.*

**d. ——— Rebuttal of presumption of indemnity.]—**Although where land is sold subject to an outstanding mrgo., there arises a pre-

sumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mrgo., yet this presumption may be rebutted by parol evidence.—*CORBY v. GRAY* (1887), 15 O. R. 1.—*CAN.*

the broker must be taken to have given an implied warranty that he had authority, & that he was therefore liable to indemnify the bank against the claim of the stockholder for restitution.—*STARKEY v. BANK OF ENGLAND*, [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 19 T. L. R. 312; 8 Com. Cas. 142, H. L.; *affg.* S. C. *sub nom.* *OLIVER v. BANK OF ENGLAND*, [1902] 1 Ch. 610, C. A.

*Annotations*:—*Follid.* Bank of England v. Cutler, [1908] 2 K. B. 208. *Consd.* Yonge v. Toynbee, [1910] 1 K. B. 215; Edwards v. Porter, McNeill v. Hawes, [1923] 2 K. B. 538. *Refd.* Salvesen v. Roderi Akt. Nordstjerner, [1905] A. C. 302; Sheffield Corp'n. v. Barclay, [1905] A. C. 392; A.-G. v. Odell, [1906] 2 Ch. 47.

**1785. ——— Under the statutes authorising the issue of India stock, transfers of that stock are invalid unless they are entered & registered in a book kept at the Bank of England, & are signed therein by the transferor or his attorney. For the purpose of enabling the Bank to be satisfied that the party claiming to transfer India stock is the person entitled to it, it is the custom of the Bank to keep a list of stockbrokers, whose identification of intending transferors will be accepted by them. The Bank will also accept identifications made by some of their own officials, or by the representatives of private banks. In the case of transfers of amounts exceeding £2,000 the Bank usually makes an independent inquiry as to the identity of the transferor, but in the case of smaller amounts it is practically impossible to do so. Deft. was on the above-mentioned list of stockbrokers. A woman fraudulently personated another who was a registered holder of India stock, & having procured herself to be introduced to deft. as the holder of that stock, instructed him to prepare a transfer. Deft. accordingly sent to the Bank a "ticket," that is, a statement of the names of the transferor & transferee, the nature of the stock, & the amount to be transferred, from which ticket the Bank prepared a transfer in the transfer book, & the personator attended & forged the holder's signature in the book, deft. identifying her as being the holder. The transfer being for a nominal consideration, deft., according to the usual practice in such cases, received a fee of one guinea for his services & attendance at the Bank from the transferor. The stock was subsequently transferred to G., who purchased it *bona fide* & for value. On discovery of the forgery the original stockholder claimed to be reinstated on the register as the holder of the stock, & the Bank, in satisfaction of that claim, purchased stock of a like amount & transferred it into her name. The Bank then sued deft. for indemnity in respect of their loss as upon a breach of warranty of the identity of the transferor:—*Held*: there was evidence on which the ct. could find, & the proper inference of fact was, that deft. requested plfts. to permit the entry & registration of the forged transfer, which involved the legal consequence that deft. contracted to indemnify plfts. against any liability resulting therefrom; & plfts. were entitled to recover as damages the loss to which they had been put by having to purchase stock as aforesaid.—*BANK OF ENGLAND v. CUTLER*, [1908] 2 K. B. 208; 77 L. J. K. B. 889; 98 L. T. 336; 24 T. L. R. 518; 52 Sol. Jo. 442, C. A.**

*Annotations*:—*Refd.* Bamfield v. Goole & Sheffield Transport Co., [1910] 2 K. B. 94; Guaranty Trust Co. of New York v. Hannay, [1918] 2 K. B. 623.

**e. ——— The right to indemnify of a vendor of land sold subject to a mortgage applies only as against a purchaser in fact, & therefore where at the request of the actual purchaser the land in ques-**

**1786.** ——— **Transfer of stock under order of court.**—The Bank of England have an implied indemnity for acting upon a transfer of government stock by a stockholder in the form prescribed by National Debt Act, 1870 (c. 71), & since an instrument executed by the person appointed to execute it by an order under sect. 14 of Jud. Act, 1884 (c. 61), has the same effect as if it had been executed by the person originally directed to execute it, the Bank are indemnified for acting upon a transfer of stock executed by a person appointed to execute it, on the neglect or refusal of the stockholder, by an order under that sect. The ct. will not throw doubt on its order by directing any person to indemnify the Bank in the event of the order having been wrongly made.—*SAVAGE v. NORTON*, [1908] 1 Ch. 290; 77 L. J. Ch. 198; 98 L. T. 382.

**1787. By person under disability—Supply of necessaries—Lunatic.**—Whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. Accordingly an obligation may be implied on the part of a lunatic, whether so found or not, to repay a person who has supplied necessaries for him, when the necessaries supplied are suitable to the position in life of the lunatic. But the provision of money or necessaries must be made under circumstances which would justify the ct. in implying the obligation, i.e. with the intention on the part of the person making the provision to be repaid for so doing, & to constitute a debt against the lunatic's estate.

A lady of unsound mind who was never found a lunatic, & whose income was under £96 a year, was confined from 1855 down to her death in 1881 in a private lunatic asylum at a cost of £140 a year. Her brother received the income of her property, & applied it in part payment of the £140, paying the deficiency out of his own pocket until his death in 1875. After his death his son, who was his exor., continued to receive & apply the lady's income in the same manner, & the deficiency was made good partly by him & partly by his brother & sisters. No claim was ever made by any of these persons against the lady's estate during her life, nor did any of them appear to have kept any account against her. After her death:—*Held*: the deficiency was provided under circumstances from which no implied obligation could arise.—*Re RHODES, RHODES v. RHODES* (1890), 41 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342; 38 W. R. 385, C. A.

*Annotations*:—*Apud. Re Clabbon* (1904), 73 L. J. Ch. 853. *Consid. Birkenhead Union Grdn. v. Brookes* (1906), 95 L. T. 359. *Apud. Re J.*, [1909] 1 Ch. 574. *Reid. Heading v. Heading* (1902), 51 W. R. 221; *Nash v. Inman*, [1908] 2 K. B. 1. *Mentd. Catt v. Wood*, [1908] 2 K. B. 458.

**1788.** ——— **Criminal lunatic.**—Under the Criminal Lunatics Act, 1884 (c. 64), s. 10 (3), which incorporates by reference the language of Lunatic Asylums Act, 1853 (c. 97), s. 104, the cost of the maintenance of a criminal lunatic can be recovered by the Crown against property to which the lunatic has become entitled, as being due under an implied obligation to pay for that maintenance as a necessary; & this is a statutory liability for the whole amount expended in respect of which there is no limitation against the Crown.—*Re J.*, [1909]

1 Ch. 574; 78 L. J. Ch. 348; 100 L. T. 281; 21 Cox, C. C. 708, C. A.

**1789.** ——— **Infant pauper.**—The rule that, where necessaries are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property extends to the case of an infant pauper supported by guardians in discharge of their statutory duty. This liability is not cut down by Poor Law Amendment Act, 1849 (c. 103), s. 16, which gives special means of recovering one year's maintenance; & the guardians can therefore recover six years' arrears of moneys expended for the maintenance of an infant pauper.—*Re CLABDON*, [1904] 2 Ch. 465; 73 L. J. Ch. 853; 91 L. T. 316; 68 J. P. 588; 53 W. R. 43; 20 T. L. R. 712; 48 Sol. Jo. 673; 2 L. G. R. 1292.

*Annotations*:—*Fold. Birkenhead Union Grdn. v. Brookes* (1906), 95 L. T. 359. *Consid. Re Benson, Knarborough Grdn. v. Benson* (1918), 87 L. J. Ch. 622. *Reid. St. Mary, Islington Union v. Biggenden*, [1910] 1 K. B. 105.

**1790.** ——— **Pauper.**—A pauper who has been maintained in the workhouse by the guardians in discharge of their statutory duty can be sued by the guardians under their common law right for the expenses of his maintenance in the workhouse, & the guardians can recover up to the amount of six years' arrears of such maintenance.

The liability of the pauper to repay the guardians depends, not upon any supposed or implied contract, but upon the obligation imposed upon the pauper at common law to refund to the guardians the amount expended by them in his maintenance if he has sufficient funds to enable him to do so, & this common law right of the guardians to recover six years' arrears of maintenance is not taken away or in any way affected by Poor Law Amendment Act, 1849 (c. 103), s. 16, which gives special means of recovering one year's maintenance from the pauper.—*BIRKENHEAD UNION GUARDIANS v. BROOKES* (1906), 95 L. T. 359; 70 J. P. 406; 22 T. L. R. 583; 50 Sol. Jo. 511; 4 L. G. R. 988, D. C. *Annotations*:—*Reid. St. Mary, Islington Union v. Biggenden*, [1910] 1 K. B. 105.

**Principal & agent.**—*See AGENCY*, Vol. I., pp. 323, 528-530, Nos. 408, 1802 1913.

**Auctioneer & client.**—*See AUCTION & AUCTIONEERS*, Vol. III., pp. 36, 37, Nos. 259 272.

**Bills of exchange.**—*See BILLS OF EXCHANGE*, Vol. VI., pp. 128, 129, 161, Nos. 856 863, 1035 1037.

**Directors of company.**—*See COMPANIES*, Vol. IX., pp. 472-474, Nos. 3093 3107.

**Executor carrying on testator's business.**—*See EXECUTORS*, Vol. XIV., pp. 609, 610, Nos. 6398 6411.

**Husband & wife.**—*See HUSBAND & WIFE*.

**Landlord & tenant.**—*See LANDLORD & TENANT*.

**Master & servant.**—*See MASTER & SERVANT*.

**Mortgagor & mortgagee.**—*See MORTGAGE*.

**Partners.**—*See PARTNERSHIP*.

**Receiver & manager of company.**—*See COMPANIES*, Vol. X., pp. 801, 802, Nos. 5070 5084.

**Registered holder of shares in company.**—*See COMPANIES*, Vol. IX., pp. 201, 205, Nos. 1263 1272.

**Salvage.**—*See SHIPPING*.

**Solicitor & client.**—*See SOLICITORS*.

**Stockbroker & client.**—*See STOCK EXCHANGE*.

**Surety.**—*See Part VII., Sect. 2*.

**Transferor & transferee of shares—For calls on**

tion was conveyed to his nominee by deed absolute in form, but for the purpose of security only, this nominee was held not liable to indemnify the vendor.—*WALKER v. DICKSON* (1892), 20 A. R. 96.—*CAN.*

**f. — — — — —.**—*SMALL v. THOMPSON* (1897), 28 S. C. R. 219.—*CAN.*

**g. — — — — —.**—*A covenant by a purchaser with his vendor that*

he will pay the mtge. moneys & interest secured by a mtge. upon the land purchased, & will indemnify the vendor from all loss, costs, charges, & damages sustained by him by reason of any default, is a covenant of indemnity

**Sect. 2.—How right arises:** Sub-sect. 2, B.; sub-sect. 3. **Secls. 3 & 4.]**

**shares.]—See COMPANIES, Vol. IX., pp. 328–331, Nos. 2068–2087.**

**Trustees & cestui que trust.]—See TRUSTS & TRUSTEES.**

**Tug & tow.]—See SHIPPING.**

#### SUB-SECT. 3.—BY STATUTE.

**1791. Indemnity to employer for injury caused to servant by third party—Contributory negligence of servant—Workmen's Compensation Act, 1906 (c. 58), s. 4 (2), 6–8.]—**Where an accident, in respect of which an employer has been compelled under the above Act to pay compensation, was caused by the combined negligence of another person & of his own servants, the employer cannot maintain an action for indemnity against that other person under sect. 6 of the Act.

A steamer belonging to plffs. was approaching a staith, which was being used by & under the control of defts., for the purpose of taking a cargo of coal there from defts. Two workmen employed by plffs., were in attendance on the steamer in a boat for the purpose of taking a rope from the steamer to the staith. In consequence of plffs.' servants in charge of the steamer complying with a direction given by the staith master employed by defts., the propeller was set in motion, with the result that the boat was upset, one of the workmen being drowned & the other injured. Plffs., having been compelled to pay compensation in respect of the accident under the above Act, brought an action against defts. for indemnity under sect. 6 of the Act. A comr. of assize, by whom the action was tried, found that both the staith master & those in charge of the ship had been negligent, the former in giving the direction that he did, & the latter in complying with it, without ascertaining whether it was safe to do so, & that their combined negligence had caused the accident; & upon these findings he held that plffs., through their servants, having been guilty of negligence which contributed to the accident, could not maintain the action:—**Held:** the judgment of the learned comr. was correct.—**CORY & SON, LTD. v. FRANCE, FENWICK & CO., LTD.,** [1911] 1 K. B. 114; 80 L. J. K. B. 341; 103 L. T. 649; 27 T. L. R. 18; 55 Sol. Jo. 10; 11 Asp. M. L. C. 499, C. A.

**Annotations:—***Consd.* Smith's Dock Co. v. Readhead (1912), 5 B. W. C. C. 419. *Refd.* Paul v. G. E. Ry. (1920), 36 T. L. R. 344; The Moliere (1925), P. 27. *Mentd. Re* Polemis & Furness, Withy, (1921) 3 K. B. 560.

**See, also, MASTER & SERVANT.**

**Indemnity to person injured by non-appearance of witness in County Court.]—See County Courts Act, 1888 (c. 43), s. 111.**

**Under orders made under Lunacy Acts.]—See Lunacy Act, 1890 (c. 5), s. 133; Lunacy Act, 1922 (c. 60), s. 2 (7); LUNATICS.**

**By partners in respect of conduct of partnership business.]—See Partnership Act, 1890 (c. 39), s. 24 (2); PARTNERSHIP.**

morely; & if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability.—**SMITH v. PEARNS** (1897), 24 A. R. 82.—**CAN.**

**h. ———.]—**  
**SCOTT** (1898), 2 Terr. L. R.

#### PART XII. SECT. 3.

**1793 i. Against illegal act—Indemnity**

**Indemnities of trustees.]—See Trustee Act, 1893 (c. 53), s. 24, 45; TRUSTEES.**

**Indemnities on transfer of land.]—See Land Transfer Act, 1897 (c. 65), s. 7; REAL PROPERTY. Contracts of marine insurance.]—See Marine Insurance Act, 1906 (c. 41), s. 1; INSURANCE.**

#### SECT. 3.—VALIDITY OF INDEMNITY.

**Void & illegal contracts, generally, see CONTRACT, Vol. XII., pp. 234 *et seq.***

**1792. Against illegal act—Usurious contract.]—****BASSETT & PROWE'S CASE** (1584), 2 Leon. 166; 74 E. R. 447.

**1793. — Indemnity to sheriff or his officer.]—****MEAD & BIGOTT'S CASE** (1590), 3 Leon. 236; 74 E. R. 656.

**1794. ———.]—**A contract to indemnify a sheriff in doing what he ought to do, is good. A contract to indemnify him in doing what he ought not to do, bad. The sheriff may take a bond from plff. in replevin to prosecute, etc., make return, etc., & indemnify the sheriff against the replevin.—**BLACKETT v. CRISSOP** (1697), 1 Ld. Raym. 278; 1 Lut. 680; 91 E. R. 1082.

**Annotations:—***Consd.* Short v. Hubbard (1824), 2 Bing. 349. *Refd.* Morgan v. Griffith (1740), 7 Mod. Rep. 380; Perreau v. Bevan (1826), 5 B. & C. 281.

**1795. ———.]—**A rentcharge is within Distress for Rent Act, 1737 (c. 19), s. 23; upon a replevin, therefore, of a distress for such a rent, the sheriff may take & assign a bond as in a replevin for any other kind of rent:—**Held:** a bond so taken by the sheriff, & conditioned for appearance at the next county ct.; prosecuting the plaintiff with effect; making a return if adjudged; & indemnifying the sheriff from all charges & damages by reason of the replevin, was authorised by above Act.—**SHORT v. HUBBARD** (1824), 2 Bing. 349; 9 Moore, C. P. 667; 3 L. J. O. S. C. P. 35; 130 E. R. 340.

**Annotation:—***Refd.* Edmonds v. Challis (1849), 7 C. B. 413.

**1796. — Use of premises as brothel.]—**A lessee of a house, which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, & not to use the house as a brothel; & the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee which was being administered:—**Held:** the assignment, & everything arising out of it, was so tainted with the immoral purpose that plff. could not recover.—**SMITH v. WHITE** (1866), L. R. 1 Eq. 626; 35 L. J. Ch. 454; 14 L. T. 350; 30 J. P. 452; 14 W. R. 510.

**Annotation:—***Refd.* Uphill v. Wright, [1911] 1 K. B. 506.

**See, also, BONDS, Vol. VII., pp. 171, 172, Nos. 94–96, 101–103.**

**v. INGERSOLL** (1842), 3 Ont. Dig. 6425.—**CAN.**

**1793 ii. ———.]—****CORBETT v. O'REILLY** (1851), 8 U. C. R. 130.—**CAN.**

**1793 iii. ———.]—****CORBETT (SHERIFF) v. HOPKIRK** (1852), 9 U. C. R. 479.—**CAN.**

**1793 iv. ———.]—****ROBERTSON v. BROADFOOT** (1854), 11 U. C. R. 407.—**CAN.**

**to sheriff or his officer.]—**An indemnity bond was given to the sheriff by an execution creditor for the sale of the debtor's goods, & the creditor afterwards directed the sheriff not to sell, but, notwithstanding, he went on & sold. In an action by the sheriff on the bond for damages recovered against him in consequence of the sale:—**Held:** deft. was entitled to a verdict on an issue that the sheriff was damnedified of his own wrong.—**McMAHON**



**1797. — Indemnity to sureties on bail bond.]**—Debtor having been arrested pursuant to a warrant obtained by his trustee in bkpcy. on the ground of his attempting to evade attendance for examination under sect. 25 of Bkpcy. Act, 1914 (c. 59), an order was made for his release subject to the payment by two sureties of £200 into ct. in lieu of their jointly entering into a bond to the senior registrar in bkpcy., the £200 to abide the further order of the ct.

Pursuant to the order, the sureties paid £100 each into ct., & debtor's release was accordingly ordered. Bkpt. duly attended for examination under sect. 25 of the Act, & consequently the £200 had not been estreated. Facts were subsequently discovered which led the trustee to the conclusion that the two sums of £100 were not the moneys of the sureties, but were the moneys of bkpt., & were handed to the trustees respectively by bkpt. or his wife. The Crown did not set up any claim to the £200 :—*Held* : owing to the illegality of the conduct of bkpt. in having thus indemnified his sureties, neither they nor the trustee were entitled to the money, & as no one else seemed to be entitled to it, it must remain in ct. —*Re GURWICZ, Ex p. TRUSTEE*, [1919] 1 K. B. 675 ; 88 L. J. K. B. 740 ; 121 L. T. 96 ; [1919] B. & C. R. 203.

— **To bail on criminal charge.]**—*See CONTRACT*, Vol. XII., pp. 261, 262, Nos. 2131–2139.

— **Maintenance of action.]**—*See ACTION*, Vol. I., pp. 68, 69, Nos. 567–570.

**1798. In fraud of marriage settlement.]**—Settlement of a jointure by a father upon the marriage of his son. Bond of indemnity, of the same date by the son of the father, void, as a fraud upon the contract. —*PALMER v. NEAVE* (1805), 11 Ves. 165 ; 32 E. R. 1051.

**1799. Indemnity procured by fraud of servant.]**—A sheriff cannot recover on an indemnity which has been procured by the fraud of his own officer. A plea to an action on such a bond, that it was obtained by the sheriff & others in collusion with him by fraud & covin, is a good plea. —*RAPHAEL v. GOODMAN* (1838), 8 Ad. & El. 565 ; 3 Nev. & P. K. B. 547 ; 1 Will. Woll. & 11. 363 ; 7 L. J. Q. B. 220 ; 112 E. R. 952 ; *previous proceedings* (1837), 1 Jur. 21.

*Annotations* : — *Reid*. *Merry v. Chapman* (1839), 3 Per. & Dav. 25. *Mentid. Masters v. Ibberson* (1849), 5 C. B. 100 ; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259.

#### SECT. 4.—ASSIGNABILITY OF INDEMNITY.

**1800. How far capable of assignment—By trustee in bankruptcy.]**—A lessee assigned the lease to assignee No. 1, who assigned it to assignee No. 2, each assignment containing a covenant by the assignee to pay the rent, & keep his assignor indemnified against the covenants in the lease. Assignee No. 1 became bkpt., assignee No. 2 died, & the lessee, who had been called upon to pay the rent, bought from bkpt.'s trustee, & took an assignment of, bkpt.'s right to indemnity, withdrawing a proof he (the lessee) had carried in, & releasing the estate

of bkpt. :—*Held* : the right of the trustee in bkpcy. of assignee No. 1 to sue the exors. of assignee No. 2 upon his covenant to indemnify was "property" within sect. 168 of Bkpcy. Act, 1883 (c. 52), & assignable by the trustee ; & damages in an action by the trustee against the exors. would not be confined to the dividend payable to the lessee in respect of his proof against the estate of assignee No. 1, but would extend to the whole amount of the obligation under the covenants to pay & indemnify entered into by such assignee. —*Re PERKINS, POYSEY v. BEYFUD*, [1898] 2 Ch. 182 ; 67 L. J. Ch. 454 ; 78 L. T. 606 ; 46 W. R. 595 ; 11 T. L. R. 164 ; 42 Sol. Jo. 591 ; 5 Mans. 193, O. A.

*Annotations* : —*Apld.* *British Union & National Insur. v. Rawson*, [1916] 2 Ch. 476. *Reid.* *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insur. Co.'s Case*, [1911] 2 Ch. 617 ; *Ellis v. Torrington* (1910), 89 L. J. K. B. 369.

**1801. — Covenant to indemnify executors.]**—The exors. of a mtgor. who died insolvent assured the mortgaged property to a transferee, who covenanted to pay to the mtgees. the principal moneys secured to them & to indemnify the exors. & the estate & effects of deceased mtgor. against all proceedings in respect of the non-payment of the mtge. debts :—*Held* : a deed by which the exors. purported without consideration to assign the benefit of the covenant of indemnity to an assignee was inoperative & the covenant was not capable of assignment. —*TENNANT v. MORPHEW* (1914), 84 L. J. Ch. 517 ; 112 L. T. 285.

*Annotation* : — *Distd.* *British Union & National Insur. v. Rawson*, [1916] 2 Ch. 476.

**1802. —** (1) Pltf. co. recovered judgment against a married woman in respect of unpaid calls on shares against which deft. had indemnified her. Not having any separate property, she assigned the benefit of her right of indemnity to pltf. co., who, after written notice of the assignment, sued deft. for the full amount of their judgment :—*Held* : although the married woman had paid nothing, nevertheless she was entitled to have the amount of the calls paid by deft. either to pltf. co. or to herself ; this right was capable of assignment ; & pltf. co. assignees were entitled to have it enforced by order directing payment to themselves.

(2) Inasmuch as the measure of the liability of the indemnifier is the liability, not the capacity, of the indemnified to pay, the fact that the married woman had no immediate separate property afforded no defence to the action, because the liability under the judgment remained & could be enforced against any future separate property she might acquire. *Semble* : in the case of an insolvent debtor, the result of the decisions is to give to a contract to indemnify him the same effect as if it were a guarantee to the principal creditor of payment of the debt. *BRITISH UNION & NATIONAL INSURANCE CO. v. RAWSON*, [1916] 2 Ch. 476 ; 85 L. J. Ch. 769 ; 115 L. T. 331 ; 32 T. L. R. 665 ; 60 Sol. Jo. 679, O. A.

*Annotations* : — *As to* (1) *Reid.* *Ellis v. Torrington* (1910), 89 L. J. K. B. 369 ; *Norwich Union Fire Insur. Soc. v. Colonial Mutual Fire Insur.*, [1922] 2 K. B. 461.

#### PART XII. SECT. 4.

*k. How far capable of ass.*  
—**Covenant to indemnify partner of firm against mortgage—Assignment by firm for benefit of creditors.]**—The benefit of a covenant by a third person to indemnify the assignor, a partner in a firm, against a mtge. made by him does not pass to his assignee under an assignment for the general benefit of

creditors, made by the members of the partnership. —*BALL v. TENNANT* (1894), 21 A. R. 692.—*CAN.*

1. — **Covenant by purchaser of mortgaged lands to indemnify vendor.]**—The obligation of a purchaser of mtged. lands to indemnify his grantor against the personal covenant for payment, may be assigned even before the institution of an action for the recovery

of the mtge. debt, & if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same. —*MALONEY v. CAMPBELL* (1897), 28 S. C. R. 228.—*CAN.*

*As to* (2) *See* *BRITISH UNION & NATIONAL INSURANCE CO. v. RAWSON* (1898), 29 S. C. R. 126.—*CAN.*  
n. — *See* *GOODEHILL v. MOORE* (1899), 31 O. R. 86.—*CAN.*



## SECT. 5.—PROOF OF INDEMNITY.

## SUB-SECT. 1.—IN GENERAL.

See Stat. Frauds, s. 4.

**1803. Necessity for writing—Indemnity to indorser if promissory note enforced.**—A promise by the indorser of an unpaid note, to indemnify the holder if he will proceed to enforce payment against the other parties on the note, must be in writing, or it is void under Stat. Frauds.—*WINCKWORTH v. MILLS* (1796), 2 Esp. 484, N. P.

**1804. — Indemnity to defend action.**—(1) Pltf., an occupier of land, at the request of deft., & upon a promise of indemnity, resisted a suit of the vicar for tithes:—*Held*: this was not a promise required by Stat. Frauds to be in writing. (2) The vicar having succeeded in the suit pltf.'s attorney paid the vicar the costs recovered from pltf. Pltf. gave his attorney a promissory note for the amount, & before the promissory note became due, sued deft.:—*Held*: to be sufficient proof of an allegation that pltf. had paid the vicar's costs.—*ADAMS v. DANSEY* (1830), 6 Bing. 506; 4 Moo. & P. 245; 8 L. J. O. S. C. P. 165; 130 E. R. 1376.  
*Annotation*:—*Expi.* *Green v. Cresswell* (1839), 10 Ad. & El. 453.

**1805. — Indemnity to co-sureties.**—*THOMAS v. COOK*, No. 258, *ante*.

**1806. — Indemnity against execution of bail bond.**—If pltf. become bail for a stranger, in consideration of deft.'s request, & of deft. promising to indemnify pltf. against the consequences, no action lies upon such promise unless it be in writing, under Stat. Frauds, s. 4.—*GREEN v. CRESSWELL* (1839), 10 Ad. & El. 453; 2 Per. & Dav. 430; 9 L. J. Q. B. 63; 4 Jur. 169; 113 E. R. 172; *previous proceedings* (1837), 1 Jur. 813.

*Annotations*:—*Dist.* *Batson v. King* (1859), 4 H. & N. 739; *Heard v. Kigham* (1862), 13 C. L. N. S. 314; *Cripps v. Hartnoll* (1863), 4 B. & S. 414. *N.F.* *Wildes v. Dudlow* (1871), L. R. 19 Eq. 198. *Fold.* *Davys v. Buswell*, [1913] 2 K. B. 47. *Reid.* *Hargreaves v. Parsons* (1844), 4 L. T. O. S. 213; *Mountstephen v. Lakeman* (1871), 25 L. T. 755; *Guild v. Conrad*, [1891] 2 Q. B. 885.

**1807. — — — — —**Pltf. having promised to indemnify G. against the consequences of a bail bond into which G. had entered at pltf.'s request, & G. being forced to make a payment in consequence, it was agreed between pltf. & deft. that pltf. should obtain the money by discounting a bill drawn by pltf. & accepted by deft. Pltf. sued deft. on the bill; & deft. pleaded that it was accepted for pltf.'s accommodation:—*Held*: a jury might find for deft. on this issue, although pltf. was not liable on his promise to indemnify, it not being in writing.—*CRESSWELL v. WOOD* (1839), 10 Ad. & El. 460; 113 E. R. 175.

**1808. — Indemnity against liability incurred at promisor's request—Bill of exchange.**—One D. wanting money, he & deft. applied to pltf. to draw a bill, to be accepted by D. & indorsed by deft., & deft. promised pltf. that he should not be called upon. The jury found that D. & deft. were both principals in the transaction:—*Held*: pltf., having paid the bill, was entitled to recover the amount without proof of a promise in writing under sect. 4 of Stat. Frauds.—*BATSON v. KING*

(1859), 4 H. & N. 739; 28 L. J. Ex. 327; 157 E. R. 1032.

*Annotations*:—*Reid.* *Cripps v. Hartnoll* (1862), 8 Jur. N. S. 1010; *Mountstephen v. Lakeman* (1871), 25 L. T. 755; *Davys v. Buswell*, [1913] 2 K. B. 47.

**1809. — — — — —**—*GUILD & Co. v. CONRAD*, No. 12, *ante*.

**1810. — — — — —**—*Promissory note.*—*WILDES v. DUDLOW*, No. 260, *ante*.

**1811. — — — — —**—*Re BOLTON*, No. 261, *ante*.

## SUB-SECT. 2.—CONSIDERATION.

Consideration generally, see CONTRACT, Vol. XII., pp. 172 *et seq.*

**1812. Agreement to relinquish action.**—A promise to discharge one suit in consideration of relinquishing another is void.—*ROSS v. MOSS* (1597), Cro. Eliz. 560; *Moore, K. B.* 539; 78 E. R. 805, Ex. Ch.

*Annotation*:—*Dbtd.* *Harris v. Venables* (1872), L. R. 7 Exch. 235.

**1813. Past consideration—Money paid to promissor—Subsequent indemnity as to claim by person claiming part.**—A. having paid to B. the whole of a demand claimed by B., but part of which is due to C. B. afterwards engages to indemnify A. against any claim by C., this promise is supported by a sufficient consideration, although it was made after the payment of the money.—*SUFFIELD (LORD) v. BRUCE* (1817), 2 Stark. 175, N. P.

**1814. Promissory note & cognovit.**—Pltf. having given deft. promissory notes & a *cognovit* for £500 as a composition for certain claims, deft., in consideration of the money so secured to be paid engaged to indemnify him against certain liabilities:—*Held*: the security, not the actual payment, was the consideration, & pltf. might sue on the guarantee, though he had not paid the £500.—*IKIN v. BROOK* (1830), 1 B. & Ad. 121; 8 L. J. O. S. K. B. 379; 109 E. R. 733.

**1815. Consideration sufficient to support promise to contribute.**—*BETTS v. GIBBINS*, No. 1760, *ante*.

**1816. Execution of separation deed.**—A deed of separation between pltf. & his wife having been drawn up, but not executed by pltf.:—*Held*: his executing such deed was a legal consideration for a promise by deft. to pay certain debts & expenses, for which pltf. was solely liable.—*JONES v. WAITE* (1842), 9 Cl. & Fin. 101; 4 Man. & G. 1101; 5 Scott, N. R. 951; 6 Jur. 653; 8 E. R. 353, H. L.; *affg.* (1839), 5 Bing. N. C. 341, Ex. Ch.; *sub nom.* *WAITE v. JONES* (1835), 1 Bing. N. C. 656.

*Annotations*:—*Expi.* *Crough v. Lambert* (1839), 10 Sim. 174. *Consd.* *Wilson v. Wilson* (1848), 1 H. L. Cas. 538. *Reid.* *Evans v. Jones* (1838), 3 J. P. 274; *Lound v. Grimwade* (1888), 39 Ch. D. 605.

**1817. Agreement to prosecute action.**—An agreement by pltf. (an attorney), deft., & B. set forth that, "in consideration" of B. having agreed to pay to deft. his claim against B., & certain costs, out of the proceeds to arise from the recovery by B. in an action of B. against J., deft. undertook to pay pltf. all costs incurred by him in prosecuting the action of B. against J., pltf. thereby agreeing

for the promise, & it was unnecessary to allege such promise to be in writing.—*MARIN v. ARTHUR* (1858), 16 U. C. R. 483.—*CAN.*

*p.* *Agreement to indemnify purchaser of goods from assignee in insolvency—Against creditors.*—Pltf. purchased goods from F. as assignee in insolvency of W. & K.; creditors of W. & K., disputing F.'s right to sell, took the goods from pltf., who sued these creditors & their bailiff for such

**PART XII. SECT. 5, SUB-SECT. 1.**  
**1805 l. Necessity for writing—Indemnity to co-sureties.**—*RAE v. RAE* (1857), 6 L. Ch. R. 490. *IR.*

**PART XII. SECT. 5, SUB-SECT. 2.**  
**a. Agreement that purchaser should indemnify vendor against mortgage on land sold.**—Declaration, that in consideration that pltf. would sell & convey to deft. certain lands, which were

then subject to a mtge., deft. promised to pay off said mtge. & save pltf. harmless therefrom; that in pursuance of said agreement pltf. so sold & conveyed; that deft. not having saved harmless pltf. from said mtge., & the sum of £123 being due thereon, pltf. was obliged to pay it, of which deft. had notice, but hath not repaid the same to pltf., or indemnified him for such payment:—*Held*: good for that it showed a sufficient consideration

with debt. to bring the same :—*Held* : in *assumpsit* on this agreement, the consideration was rightly described to be that *pltf.*, at the request of *deft.*, would, with *B.*'s assent, prosecute the action of *B.* against *J.*—*DALLY v. POOLLY* (1844), 6 Q. B. 115 E. R. 185.

**1818. Creation of charge on estate.**—A charge created by *C. S.* upon his estates to secure the payment of a sum of money borrowed for *H. S.* is a good consideration, not only for a collateral charge upon the estates of *H. S.* to indemnify *C. S.* & his estate from the payment of the money borrowed, but also for a settlement of the *S.* estates upon his family.

*A.*, being a trustee for the younger children of *H. S.*, advanced a sum of £5,185 3s. 4d. upon the security of certain estates in *B.*, which *C. S.* on Jan. 20, 1832, demised to *A.* for three hundred years, to secure the repayment. The money was borrowed for *H. S.*, who was tenant in tail of the *S.* estates in remainder expectant on the death of his mother, the tenant for life, & on Jan. 21, 1832, *H. S.* demised the *S.* estates to *C. S.* for two thousand years, to indemnify him & the *B.* estates from the £5,185 3s. 4d. & interest, secured to *A.*; & by deeds dated Jan. 23 & 21, 1832, in further compliance with an agreement recited in this deed, he settled the *S.* estates upon various uses, for the benefit of his family. On the death of the tenant for life, *H. S.*, being greatly indebted to *F.*, executed a disentailing deed, & conveyed the *S.* estates to *F.* giving him a power of sale over the estates as a security for the money due; this was subsequently confirmed by another deed, & in a suit instituted by *F.*, insisting that the settlement of Jan. 23 & 21, 1832, was voluntary & void against the subsequent alienation for value made to *F.* who had notice of the settlement :—*Held* : the agreement made by *H. S.* with *C. S.* to indemnify him against the £5,185 3s. 4d. & to settle the *S.* estates, was such as this *ct.* would specifically perform, & it was a consideration sufficient to support the settlement. — *FORD v. STUART* (1852), 15 Beav. 193; 21 L. J. Ch. 511; 51 E. R. 629.

*Annotations* :—*Reid*, *Clarke v. Wright* (1861), 7 Jur. N. S. 1032. *Mentid*, *Kelson v. Kelson* (1853), 10 Hare, 385.

### SUB-SECT. 3. — STAMP DUTIES.

Stamp Duties generally, *see* REVENUE.

**1819. Necessity for agreement stamp—Agreement to indemnify bail.**—An agreement to indemnify *A.* from all costs, charges, damages, or other expenses which he may incur as bail for *B.* requires an agreement stamp, under Stamp Act, 1815 (c. 184), the arrest of *B.*, & consequently the liability of *A.*, being for more than £20, though the costs, etc., incurred, do not amount to that sum. — *WRIGLEY v. SMITH* (1834), 5 B. & Ad. 1117; 3 Nev. & M. K. B. 181; 3 L. J. K. B. 116; 110 E. R. 1106.

*Annotation* :—*Expld*, *Taylor v. Steele* (1847), 11 Jur. 806.

**1820. — Agreement to indemnify against actions.**—*FOX v. BAILEY* (1843), 1 L. T. O. S. 256.

### SECT. 6. — EXTENT OF LIABILITY.

#### SUB-SECT. 1. — AS REGARDS SUBJECT-MATTER.

##### *A. In General.*

**1821. Not limited by schedule.**—*A.* engages to indemnify *B.* against a debt due from *A.* to *C.*

taking, & debts, in such action having obtained a verdict, a new trial was granted to *pltf.*; *deft.* requested *pltf.* to proceed with the action, & promised,

if he would do so, to indemnify him against the costs then incurred or to be incurred, & to pay him the value of said goods in case he should fail to

*C.* of £50; *A.* & *B.*, in fact, owe to *C.* £74, & *C.* refuses to accept £50 from *A.* without payment of the remainder of his debt; & *C.* arrests *B.* for the whole debt. *A.* is liable to *B.* on his engagement to indemnify him.

The obligation is to discharge all debts due & owing, the particulars of which are set forth in the schedule, the debts are erroneously stated there, & the £50 specified there cannot be separated from the remainder, & as long as it subsisted as a ground for arresting *pltf.* he was entitled to insist on the indemnity (*LORD ELLENBOROUGH*). — *HANCOCK v. CLAY* (1817), 2 Stark. 100, N. P.

**1822. Not limited by recitals.**—There is no doctrine in equity any more than at law that the mere non-suing in respect of a specialty debt for any period short of the twenty years, constitutes such laches on the part of the specialty creditor as to deprive him of his right of suing in respect of such debt.

*B.* was liable under a covenant to pay six months after his death £500 to the trustees of his settlement; & was also entitled to the benefit of a covenant on the part of *S.*, contained in a deed dated 1800, to pay a similar sum forthwith in exoneration of the £500 covenanted to be paid by him; & *B.* had not during the life of *S.*, who died in 1809, or during the remainder of his own life, required payment of the sum. On his death in 1878, his exors. were sued by the trustees of his settlement for payment of the £500 :—*Held* : (1) *B.*'s exors. being bound under the covenant of *B.* to pay, were not prevented by any equitable doctrine of laches on the part of *B.* from suing the exors. & trustees of *S.* on her covenant; & the exor. of *S.* having been guilty of *deavastatit* by non-conversion of the estate of *S.* whereby it had been lost, *B.*'s exors. were held entitled to recover from the estate of her exors.; (2) a covenant of indemnity unlike a release, is not to be restricted by its recitals. — *Re BAKER, COLLINS v. RHODES, Re SEAMAN, RHODES v. WISH* (1881), 20 Ch. D. 230; 51 L. J. Ch. 315; 45 L. T. 658; 30 W. R. 858, C. A.

*Annotations* :—*As to* (1) *Consd. Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609. *Reid*, *Re Gale, Blake v. Gale* (1883), 22 Ch. D. 820; *Re Birch, Roe v. Birch* (1884), 27 Ch. D. 622.

**1823. Measure of liability—Necessary & reasonable charges.**—*B.* & *P.* being the owners of an unexpired term of seventy-two years in a certain house & premises, let them to *J. G.* for twenty-one years, under the usual covenants, to pay rent & to keep the house in repair; & afterwards they assigned the reversion to *G. B. J. G.* had previously assigned the residue of his term of twenty-one years to *pltf.*, with the usual covenants. *Pltf.* afterwards assigned the term to *deft.*, with similar covenants, to pay the rent & to keep the premises in repair, & with a covenant that *deft.* would observe & fulfil all the covenants of the former lease; & that he would, from time to time & at all times, save harmless & indemnify *pltf.* from all costs, damages, & expenses, which might be incurred by reason of any delay, breach, or default in payment or performance thereof. On the rent becoming due & unpaid, & the premises falling out of repair, *G. B.* brought an action against *J. G.* who suffered judgment by default. *J. G.* afterwards brought an action to recover the amount so paid by him, & his costs. *Pltf.* defended the action unsuccessfully, & he became liable to pay to *J. G.* the amount of the judgment

in said action :—*Held* : no sufficient consideration appeared for the alleged promise. — *MACKLIN v. KEIR* (1877), 28 C. P. 90.—*CAN.*

**Sect. 6.—Extent of liability: Sub-sect. 1, A., B. & C. (a).]**

by default, & also of the costs of that action. Pltf. then sued deft., not having paid that amount to J. G. & judgment not having been signed in the action against him:—*Held*: pltf. was entitled to recover from deft. the amount of the rent & repairs, & the costs of the action in which J. G. had suffered judgment by default, but he was not entitled to the costs of the action brought against him by J. G.

There is no doubt that at one time, very wild notions were entertained with respect to the contract of indemnity; but these notions are now exploded, & it is now considered, that, by a contract of indemnity, is meant that the party indemnified may recover all such charges as necessarily & reasonably arise out of the circumstances under which the party charged became responsible (*POLLOCK, (J.B.)—SMITH v. HOWELL* (1851), 6 Exch. 730; 20 L. J. Ex. 377; 17 L. T. O. S. 188; 155 E. R. 730).

**1824. — Legal obligation to pay.]—**Pltf. accepted a bill for the accommodation of R. R. afterwards compounded with his creditors, who executed a release in which the holder of the bill concurred, under a secret understanding between him, pltf. & R., that his rights against pltf. should not be prejudiced. It died, appointing pltf. his exor. Pltf., at the request of R.'s widow, renounced probate, & allowed the widow to take out administration, in consideration of which Mrs. R. & her brother gave him a memorandum undertaking to indemnify him against all his liabilities as surety for R. on several instruments & under the accommodation bill, but not beyond the amount of the assets. The holder of the bill pressed pltf. for payment, pltf. paid him, & filed his bill against Mrs. R. & her brother for indemnity out of the assets:—*Held*: however the case might have stood apart from the memorandum, Mrs. R. had thereby estopped herself from treating pltf.'s payment to the bill holder as voluntary, & not made in satisfaction of a legal liability, & that she had therefore no defence to the suit; & although the demand against her brother might be of a legal & not of an equitable nature, yet as he was surety in respect of a demand which as against his principal was the proper subject of a suit in equity, he was properly made a party to the suit. — *ATKINS v. REVELL* (1860), 1 De G. F. & J. 360; 45 E. R. 398, L. J.

**1825. — Must be certain.]—**A composition deed under Bkpcy. Act, 1861 (c. 131), s. 192, & fulfilling its requirements, made between debtor of the one part, & the creditors whose names were subscribed of the other part, by which each of the said creditors, covenanting for his own acts only, covenanted with debtor at all times to indemnify him from & against every bill of exchange, promissory note & other negotiable instrument on which the debtor may have incurred any liability, or which may have been indorsed or put into circulation by any or either of the said creditors, is not binding on a creditor who has not assented to or executed the deed, since such a covenant is wholly unreasonable, & the deed containing it is not such a deed as is contemplated by the statute.

**PART XII. SECT. 6, SUB-SECT. 1. — A.**

**1825 I. Measure of liability—Must be certain.]—***McDUGALL v. GARRICK* (1922), 63 D. L. J. 214; 17 Alta. L. R. 209; [1922] 1 W. W. L. 422.—*CAN.*

**g. Conveyance of land—As indemnity to indorser of promissory note.]**

—Where land is conveyed as security to indemnify an indorser of a promissory note, the conveyance enures to indemnify the indorser against liability in respect of indorsements of all subsequent notes given as renewals of the originals or as security for the original debt.—*WESTFALL v. STEWART*

A covenant by which creditors engage to indemnify debtor from liabilities upon an outstanding paper to which his name is attached & render themselves responsible to any unknown amount, seems to us entirely unreasonable. On this ground, without entering into any other question, we think that the deed cannot be supported (*WIGHTMAN, J.*)—*WOODS v. FOOTE* (1863), 1 H. & C. 841; 32 L. J. Ex. 199; 7 L. T. 836; 11 W. R. 383; 158 E. R. 1123; *sub nom.* *FOOTE v. WOOD*, 9 Jur. N. S. 178, Ex. Ch.

**Annotations:—***Consol. Balden v. Poll* (1864), 5 B. & S. 213. *Expld.* *Wigfield v. Nicholson* (1868), 37 L. J. Q. B. 155. *Refd.* *Hidson v. Barclay* (1864), 10 L. T. 387; *Leigh v. Pendlebury* (1864), 15 C. B. N. S. 815; *Nicholson v. Potts* (1864), 10 L. T. 192; *Oldis v. Armistron* (1864), L. R. 2 Exch. 406. *Mentd.* *Turquand v. Moss* (1864), 12 W. R. 960.

**1826. — Not capacity but liability to pay.]—***BRITISH UNION & NATIONAL INSURANCE CO. v. RAWSON*, No. 1802, *ante*.

**1827. Receiver appointed by court—Indemnity confined to assets in control of court.]—**In an action for dissolution of partnership a receiver & manager was, by a consent order, appointed to carry on the partnership business with a view to its sale as a going concern. In carrying on the business the receiver & manager made payments which the assets were insufficient to satisfy in full, & claimed to be indemnified by the partners personally in respect of the balance due to him:—*Held*: the receiver was an officer of the ct., & could only look to the assets under the control of the ct. for his indemnity.—*BOEHM v. GOODALL*, [1911] 1 Ch. 155; 80 L. J. Ch. 86; 103 L. T. 717; 27 T. L. R. 106; 55 Sol. Jo. 108.

**B. Interest.**

**1828. Interest on amount paid.]—**A. & B., by deed jointly & severally covenanted with C. to pay her an annuity during her life, & by another deed of the same date A. & B. covenanted with each other that each should pay one half of the annuity, & indemnify the other against all actions, "damages, demands, sums of money & expenses, which might be incurred by reason of the non-payment thereof":—*Held*: B., having in consequence of A.'s insolvency made several payments of A.'s moiety of the annuity, was not entitled to interest on the sums he had so paid.—*BELL v. FREE* (1818), 1 Swan. 90; 1 Wils. Ch. 51; 37 E. R. 24.

**Annotation:—***Dtd.* *Re Maria Anna & Steinbank Coal & Coke Co., McKewan's Case* (1877), 6 Ch. D. 447.

**1829. — Negligence in not suing sureties.]—**Where deft. conveyed an estate to pltf. with a covenant for quiet enjoyment, & also gave an indemnity bond with sureties against "all costs, claims, demands, damages & expenses whatsoever," pltf. having been obliged to pay divers sums for arrears of an annuity charged on the estate, sued deft. on the bond to recover them back with interest; the jury found that pltf. had been negligent in not suing the sureties on the bond at the time the payments were made:—*Held*: this finding prevented pltf. from recovering the interest.—*ANDERTON v. ARROWSMITH* (1839), 2 Per. & Dav. 408; 1 Jur. 793.

**Annotation:—***Expld.* *Petro v. Duncombe* (1851), 2 L. M. & P. 107.

(1907), 13 B. C. R. 111. *CAN.*

**PART XII. SECT. 6, SUB-SECT. 1. — B.**

**f. Covenant by assignee of lease.]—**Deft. took an assignment of a lease from pltf., covenanting to perform all the covenants in it on pltf.'s part,

**1830. Interest paid by party indemnified.]**—Deft. conveyed part of a building estate in fee simple as beneficial owner to plffs. Plffs. had notice both on the face of & outside the conveyance that previous purchasers of parts of the estate had rights of way over a road. As between plffs. & deft., however, the former were to take the land discharged from those rights. The conveyance contained no express covenants for title nor any qualification of the implied covenants. Plffs. entered on the land & blocked up the road; & a previous purchaser claimed £500 damages from them for doing so. Plffs. gave notice to deft. & under protest, went to arbitration. An award was made giving the previous purchaser £510. Plffs. still disputed his right, & he brought an action in which, on a special case, plffs. were held liable to pay him the £510 & interest, & the costs of the arbitration proceedings & of the action. They paid these sums, & brought this action claiming from deft. repayment of the money thus paid & of their own costs of the arbitration & action:—*Held*: (1) plffs. were entitled to bring an action for damages under deft.'s implied covenants for title; & their knowledge of the previous purchaser's rights did not prevent them from making this claim; (2) deft. was liable to indemnify them, & must repay the £510 & interest & the costs which they had paid to the previous purchaser; & (3) deft. must also pay to them subsequent interest on the £510 & their costs of the arbitration proceedings as between solr. & client but need not pay their costs of the special case.—*GREAT WESTERN RY. CO. v. FISHER*, [1905] 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279.

**1831. Subsequent interest.]**—*GREAT WESTERN RY. CO. v. FISHER*, No. 1830, *ante*.

#### C. Costs.

##### (a) Under Express Indemnity.

**1832. Construction of Indemnity—Indemnity to pay costs of all defendants—Costs awarded to some.]**

—A condition of a bond, after reciting that one A. had filed a bill in the Ct. of Ch. against nine parties, naming them, & the now deft., as defts., was, that deft. should pay all such costs as the ct. should award to all the said defts.:—*Held*: the construction of this condition was, that deft. was bound to pay costs to all or any of the said defts., except himself, to whom costs should be awarded.—*VESEY v. MANTELL* (1842), 9 M. & W. 323; 11 L. J. Ex. 99; 152 E. R. 137.

**1833. Application of indemnity—To cost of defending action—Indemnity against expenses of conducting bankruptcy proceedings.]**—A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorised by him to defend. *Q.*: whether an attorney may lawfully guarantee petitioning creditor against the expenses of working the commission of bkpy. on condition of being employed as attorney in it.—*GILLETT v. RIPPON* (1829), Mood. & M. 408, N. P.

**1834. ——— Indemnity for levying distress.]**—A landlord signed a warrant of distress in the following form: "I hereby authorise R., or his agent, as my agent, to seize & distrain the goods on the premises, now in the possession of G., for £9, being the amount of rent due to me; & for your so doing this shall be your sufficient warrant,

authority & indemnification against all costs & charges in respect to any law expenses, action or actions that may arise, as well as any other & all charges or expenses which you or your agent may be at or brought against you or your agent on this account." H. the servant of R. having distrained, an action of trover was brought against him by the tenant for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action plff. was non-suited:—*Held*: assuming that H. had done nothing wrong, the indemnity extended to the costs of defending the action brought against him. *IBBERT v. DE LA SALLE* (1860), 6 H. & N. 233; 30 L. J. Ex. 41; 158 E. R. 96.

**1835. ——— Defence reasonable Indemnity against breach of covenant.]**—Under a covenant to indemnify against all actions & claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants, are recoverable as damages.—*MURRELL v. Fysh* (1883), 1 Cab. & El. 80.

**1836. ——— —.]**—The owners of a certain sulphate of ammonia instructed a firm of lightermen to convey it in a barge to a ship & engage a tug for the purpose. While the tug was towing the barge with the cargo on board the barge collided with another barge, & the cargo was damaged. The owners of the cargo brought an action against the owners of the barge & the owners of the tug, in which the owners of the tug served a third-party notice on the owners of the barge, claiming to be entitled to be indemnified by them, upon the ground that the towage was upon their usual terms that they would not be answerable for any loss or damage which might happen to any barge or its cargo while in tow, & that their customers undertook to indemnify them from any such loss or damages. At the trial of the action, the President found that the owners of the barge were free from blame & ordered the owners of the cargo to pay their costs, & further found that the damage was due to the negligence of the tug, & holding that there was no privity of contract between the owners of the cargo & the owners of the tug, gave judgment for the owners of the cargo against the owners of the tug for the damage, together with their costs & the costs payable by them to the owners of the barge. The judge further held, that, under the terms of the contract between the owners of the barge & the owners of the tug, the owners of the tug were entitled to be indemnified by the owners of the barge not only in respect of the damage & the costs of the owners of the cargo, & the costs payable by the owners of the cargo to the owners of the barge, but also in respect of their own costs in defending the action:—*Held*: on appeal by the owners of the barge, there being no privity of contract between the owners of the tug & the owners of the cargo, the owners of the tug were liable to the owners of the cargo, but were entitled to be indemnified by the owners of the barge & as they had given the owners of the barge full notice of the claim & full opportunity of intervening & paying or resisting it, & had acted reasonably in defending the action, they were entitled to recover not only the actual damage, but also the costs payable by them to the owners of the cargo & their own costs in the action. *THE MILLWALL*,

& to indemnify him against them. The lessor sued plff. for breach of the covenants to repair, etc., & recovered, deft. having notice of the action, & having sanctioned the defence:—*Held*:

under deft.'s covenant plff. was entitled to recover the damages & costs in that suit, but not interest.—*SPENCE v. HECTOR* (1865), 24 U. C. R. 277.—*CAN.*

#### PART XII. SECT. 6, SUB-SECT. 1. — C. (a).

**1. General rule.]**—In contracts of indemnity, the liability of the party indemnified to a third person is not

*Sect. 6.—Extent of liability: Sub-sect. 1, C. (a)*

[1905] P. 155; 74 L. J. P. 82; 21 T. L. R. 346; *sub nom.* GASELEE v. DARLING, THE MILLWALL, 93 L. T. 429; 10 Asp. M. L. C. 113, C. A.

*Annotations*:—*Held*, The Devonshire & St. Winifred, [1913] P. 13. *Mentd.* The Seacombe, The Devonshire, [1912] P. 21; Colchester Corp'n. v. Cepp (1913), 11 L. G. R. 349; The Adriatic (1915), 85 L. J. P. 12; The Wellington (1915), 32 T. L. R. 49.

**1837.** — *Several defences pleaded.*—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1851. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, & what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain the purchaser from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line in the deed of 1854. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within 4 ft. of a boundary fence. At the trial of the action it was held that deft. was affected with notice of the building stipulations, & that pltf. had only committed a trivial breach of a trivial covenant, & that such a breach did not disentitle pltf. from having the building stipulations strictly enforced, & judgment was given for pltf. with costs, deft. being directed to remove certain buildings erected by him on the land.

The third party to the action had sold the property to deft., & upon such sale had written a letter agreeing to indemnify deft., as purchaser, against all "costs, damages, & expenses" which deft. might suffer or incur "by reason of the building stipulations & conditions being other than those set out in the copy":—*Held*: (1) the third party was liable to pay deft. the difference in the value of the plot in consequence of the amount of land available for building under the provisions of the deed of 1851 being less than under the supposed copy; & also the costs of the defence that pltf. was disentitled to sue in consequence of his having broken one of the covenants; (2) deft., having had actual notice of the provisions of the deed of 1851 before he commenced to build, the third party was not liable for the cost of building or removing the buildings; (3) deft. was not entitled to recover from the third party the costs of pltf. incurred in the action & paid by deft., or deft.'s own costs so far as they related to the following defences set up by deft.: viz. a denial that the provisions of the deed of 1851 applied to the plot purchased by him or that he had notice of such provisions; that the liquidator of the co. formerly owning the land to which the deed of 1851 applied, had, under a power given by that deed to the "vendors, their heirs or assigns," by an agreement in writing, approved of by the ct., released or waived the covenant which it was alleged had been broken; that no building scheme was contained in the deed of 1854, & if there was it had come to an end by mutual consent of the various purchasers of the land comprised in it.—*HOOPER v. BROMET* (1904), 90 L. T. 234, C. A.

**1838.** — *To costs of action brought after formation—Indemnity to pay costs incurred in formation of company.*—In consideration of A.'s

having consented & agreed with B. to allow his, A.'s, name to be placed on the list of the provisional committee of a projected railway co., & to take certain shares therein, & to pay deposits thereon, B. undertook & promised "to indemnify A. from all personal responsibility, & to hold him harmless against all costs, charges, & expenses which then had been, or might thereafter be, incurred in & about the formation of the co., their meetings, advertisements, surveys, & other expenses of carrying out the co., applying for an Act of Parliament, or anything relating thereto." C., an advertising agent, afterwards unsuccessfully sued A. for moneys paid for the insertion of advertisements in divers newspapers at the request of the secretary of the co.:—*Held*: the extra costs incurred by A. in the defence of that action were not costs, charges, & expenses incurred in & about the formation of the co., within the indemnity.—*LEWIS v. SMITH* (1850), 9 C. B. 610; 19 L. J. C. P. 278; 137 E. R. 1030.

**1839.** — *To costs of winding up proceedings—Indemnity confined to debts in schedule.*—Pltf. & defts., being members of the committee of a projected railway co., by an agreement under seal, which recited that divers debts & liabilities had been incurred, & that it was probable that further disputes would arise respecting the liability of the members & the committee of management; & that pltf., being desirous of being relieved from all such questions & disputes, had proposed to contribute & pay a certain sum to defts. towards the payment of these claims, upon their agreeing to indemnify him in the manner therein mentioned, & to guarantee him that the sums mentioned in the first schedule to the agreement had been paid; defts. guaranteed that the sums mentioned in the first schedule had been paid; & also, "that they would indemnify & save harmless pltf. from all claims expressly mentioned & referred to in the second schedule, & from all costs, damages, & expenses which he might sustain or be put to by reason thereof, & at their own costs & charges defend him against all actions & suits which should be commenced or prosecuted against him for the recovery thereof or any part or parts thereof." After the making of this agreement an order was obtained in the Ct. of Ch. for winding up the affairs of the co. Pltf. was adjudged to be a contributory; & a certain sum was directed to be collected, such sum being composed of one of the sums mentioned in the second schedule to the agreement, & the rest of it consisting of costs & expenses occasioned by & incidental to the proceedings in the winding-up. Pltf., having been ordered to pay a certain proportion of the sum directed to be collected, & having paid the same, brought an action against defts. under the agreement:—*Held*: the agreement merely protected pltf. against the claims mentioned in the schedules, & against the costs & expenses to which pltf. might be put by reason of the enforcement of those claims; & consequently pltf. was not entitled to recover beyond the amount of the sum mentioned in the second schedule, & which was included in the amount directed to be collected; & the costs & expenses which he had been compelled to pay were not of the character contemplated by the agreement, & could not be recovered by him from defts.—*TANNER v. WOOLMER* (1853), 8 Exch. 482; 22 L. J. Ex. 259; 21 L. T. O. S. 22; 155 E. R. 1440.

only contemplated at the time of the indemnity, but is the very moving cause of that contract; & in cases of

such nature costs reasonably incurred in resisting, or reducing, or ascertaining the claim may be recovered.—*TRIPIN*

*v. CHUNDER SENGUR MOOKERJEE* (1880), 1 L. R. 5 Cal. 811; 6 C. L. R. 167.—*IND.*

**1840. — To costs after appointment of assignees—Indemnity for issuing fiat in bankruptcy.]—**A. gave a guarantee to B., an attorney, that, in consideration of B. issuing out a fiat against C., he, A., would pay B. the costs. B. employed an agent at a distance in the matter:—*Held*: A. was not liable to B. for the costs after the appointment of assignees.—**LUCAS v. ROBERTS** (1855), 3 C. L. R. 987; 24 L. J. Ex. 227; 25 L. T. O. S. 101; 1 Jur. N. S. 527; 3 W. R. 415.

**1841. — To costs of appeal.]—**(1) Pltff. recovered judgment against defts. for damages & costs in an action for injuries sustained by reason of the negligence of defts.' sub-contractors, who were brought in as third parties, & who had undertaken to be answerable for all accidents & damages that might occur during the progress of the work, & to indemnify & bear defts. harmless therefrom. Defts. appealed but the third parties, who received notice of the appeal, did not give any sanction or co-operation to the appeal, which was dismissed with costs:—*Held*: the third parties were not compelled by the indemnity to pay to defts. the costs of the appeal.

(2) In the absence of special circumstances, a person indemnifying another against the costs of an action must pay them as between party & party, & is not bound to pay them as between solr. & client.—**MAXWELL v. BRITISH THOMSON HOUSTON Co.**, [1904] 2 K. B. 342; 73 L. J. K. B. 644.

**1842. — To costs of action pending at date of indemnity.]—**The London County Council purchased part of the site of pltff.'s property under the London County Council (Improvements) Act, 1899, & agreed to repay to pltff. any damages he might have to pay to the owner of adjoining property for injury which might be done to certain ancient lights on such adjoining property by rebuilding pltff.'s premises on that part of the site which was not purchased. At the date of the agreement an action was pending by the said owner of the adjoining property against pltff. for damages in respect of such injury:—*Held*: the agreement to repay such damages was not an indemnity against the costs of such action, & defts. were not liable to pltff. for such costs.—**POTTER v. LONDON COUNTY COUNCIL** (1905), 70 J. P. 35; 4 L. G. R. 346.

**1843. — To all costs paid by indemnified party—Damage to road by extraordinary traffic.]—**For the purpose of erecting a new lunatic asylum for the joint use of a county council & a county borough council large quantities of materials were conveyed in waggons drawn by traction engines, & otherwise, over two roads in the borough by the contractor employed by the visiting committee of the asylum. The roads had not been adapted to such traffic, though they were fit for the traffic that might have been expected on them. The visiting committee were elected partly by the county council, & partly by the county borough council, & had purchased the site for the asylum from the latter council. Their contract with the contractor contained provisions by which he undertook to indemnify them against claims in respect of damage caused by excessive weight or extraordinary traffic over any highway in carrying out the works & against all costs & expenses in respect

thereof:—*Held*: the traffic was extraordinary & deft. was entitled to be indemnified by the third party for damages recovered by pltffs. & for all costs that he had been put to in defending the action, & for such costs as deft. had to pay to pltffs.; & the costs of the proceedings between pltffs. & the third party, to which deft. was not in fact a party, should be included in the bill by pltffs. against deft., in order that the latter might recover them from the third party; but that deft. should not pay these costs to pltffs. unless he got them from the third party.—**COLCHESTER CORPN. v. GEPF** (1912), 76 J. P. 337; 10 L. G. R. 930; *on appeal* (1913), 77 J. P. 181, C. A.

(b) Under Implied Indemnity.

**Recovery as damages of costs of actions by or against third parties.]—***See* DAMAGES, Vol. XVII., pp. 109–114, Nos. 209–240.

**1844. Covenant for title—Costs of arbitration proceedings.]—**Deft. conveyed premises to pltff., & covenanted for good title. An action of formedon was afterwards brought against pltff. by a party having better title, & pltff. compromised it for £550:—*Held*: pltff., in an action for the breach of covenant, might recover the whole sum so paid, & his costs as between attorney & client, in the compromised suit, though he had given no notice of that suit to deft., for in an action on a general guarantee, the only effect of such want of notice to the indemnifying party was to let in proof on his part, that the compromise was improvidently made, & it lay on him to establish that fact, which was not done in the present case.—**SMITH v. COMPTON** (1832), 3 B. & Ad. 407; 1 L. J. K. B. 116; 110 E. R. 110.

*Annotations*:—**Consd.** G. W. Ry. v. Fisher, [1905] 1 Ch. 316. **Refd.** Broom v. Hall (1859), 7 C. B. N. S. 503; Gray v. Lewis, Parker v. Lewis (1873), 8 Ch. App. 1035.

**1845. —.]—****GREAT WESTERN RY. Co. v. FISHER**, No. 1830, *ante*.

**1846. Notice by defendant to third party to come in & defend action.]—**In an action by A. against B., B. gave notice to C. against whom B. had a remedy over, to come in & defend the action. C. refused to do so, but did not prohibit B. from continuing the defence. B. suffered judgment by default, & watched the proceedings under the writ of inquiry, putting A. to the proof of his claim. At the trial of the action over by B. against C. the jury included in their verdict the costs incurred by B. in the former action, no objection being then taken by C. to the right of B. to recover such costs. The Ct. refused to disturb the verdict, being of opinion that there was evidence to go to the jury that C. had sanctioned the incurring of these costs.—**BLYTH v. SMITH** (1843), 5 Man. & G. 405; 6 Scott, N. R. 300; 12 L. J. C. P. 203; 7 Jur. 918; 134 E. R. 622.

*Annotations*:—**Refd.** Broom v. Hall (1859), 7 C. B. N. S. 503; Mors-Le-Blanch v. Wilson (1873), L. R. 8 C. P. 227; Clare v. Dobson, [1911] 1 K. B. 35.

**1847. Breach of covenant in underlease—If made subject to covenants in head lease.]—**The High Ct. has jurisdiction to order a third party to pay to an unsuccessful deft. the costs payable by such deft. to pltff. The contract of a sub-tenant to perform the covenants of the head-lease is a contract of indemnity. Pltff. let to deft. a house for twenty-one years, with the option to determine

**1841 i. Application of indemnity—To costs of appeal.]—**An order was made indemnifying the next friend of infant pltffs. out of their money for the costs of an appeal, where the appeal was advised by more than one counsel, & one of the judges of the lower Ct.

had dissented from the rest.—**COTTINGHAM v. COTTINGHAM** (1885), 11 P. R. 13.—**CAN.**

**t. — To assignee for benefit of creditors—Action brought on behalf of insolvent estate.]—**An assignee for the

benefit of creditors, under Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon direct or implied promise of indemnity.—**JOHNSTON v. DULMAGE** (1898), 30 O. R. 233.—**CAN.**



**Sect. 6.—Extent of Liability: Sub-sect. 1, C. (b) & (c).]**

the lease at the end of seven or fourteen by deed containing covenants by deft to render & paint & leave in repair. Deft., after having occupied for five years, sublet the house to H. for the remainder of the first seven years by a writing, with a clause that the letting should be subject in all respects to the terms of the existing lease & the covenants & stipulations contained therein. At the end of the seven years, deft. having determined the lease in the exercise of his option, pltf. claimed from deft., & deft. claimed from H., the amount at which the dilapidations had been assessed by pltf.'s surveyor. H. declined to pay or give the deft. an indemnity, or to take any responsibility in the matter. Pltf. sued deft., who brought in H. as third party. The issues, as between pltf. & deft., & deft. & H., were referred separately to an official referee, who reported that the sum claimed by pltf. was due from deft. to pltf., & that a similar sum was due from H. to deft. A div. ct., on adopting the second report, ordered H. to pay all costs as between pltf. & deft.:—*Held*: (1) these were costs within the discretion of the High Ct., & this order was not appealable; (2) H.'s contract was a contract of indemnity under which deft. was entitled to recover from H. all the costs of an action by pltf. against deft. reasonably defended.—*HORNBY v. (ARDWELL)* (1881), 8 Q. B. D. 329; 51 L. J. Q. B. 89; 45 L. T. 781; 30 W. R. 263, C. A.

*Annotations*:—As to (1) *Consd. Piller v. Roberts* (1882), 21 Ch. D. 198. *Reid. Morgan v. Hardy* (1886), 17 Q. B. D. 770; *Hooper v. Bromet, Raphael, Third Party* (1903), 89 L. T. 37. As to (2) *Distd. Pontifex v. Foord* (1884), 12 Q. B. D. 152. *Consd. Birmingham & District Land Co. v. L. & N. W. Ry.* (1886), 34 Ch. D. 261; *Hammond v. Bussey* (1887), 20 Q. B. D. 79. *Reid. Hooper v. Bromet, Raphael, Third Party* (1903), 89 L. T. 37; *Clare v. Dobson*, [1911] 1 K. B. 35.

**1848.** — — —.]—Pltf. sued deft. for breach of a covenant to repair contained in a lease of a dwelling-house for a term of twenty-one years from Michaelmas, 1801. Deft. obtained leave to serve & served a third party notice claiming contribution or indemnity from a sub-lessee to whom he had let the premises from Midsummer, 1869, for the remainder of the original term less ten days. The underlease contained a covenant to repair, which was in terms precisely similar to those of the covenant in the original lease, & for breach of which deft. claimed relief against the sub-lessee:—*Held*: (1) inasmuch as the terms of the covenant to repair must in each case be construed with reference to the age & character of the premises at the time of the demise, the covenant in the underlease could not be construed as a covenant to indemnify deft. against or to perform the covenant in the original lease; (2) deft.'s claim was not one for contribution or indemnity from the third party, within Ord. 16, r. 52, & no directions as to trial could be given under that rule.—*PONTIFEX v. FOORD* (1884), 12 Q. B. D. 152; 53 L. J. Q. B. 321; 49 L. T. 808; 32 W. R. 310, D. C.

*Annotations*:—As to (2) *Appld. Catton v. Bennett* (1884), 28 Ch. D. 161. *Consd. Speller v. Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96; *Tritton v. Pankart* (1887), 56 L. J. Ch. 629.

**1849.** — — —.]—An underlease made in 1887 contained covenants by the underlessee to repair in general terms & to repair within three months after notice in writing, & a proviso for re-entry on breach of the underlessee's covenants. The underlease showed on its face that the reversion was a leasehold reversion. The head lease made in 1855 contained covenants to repair & a proviso

for re-entry in substantially the same terms as those of the covenants & proviso in the underlease of 1887. The head landlord served on his lessee a notice in writing to repair; that lessee served a similar notice on his underlessee, who failed to do the repairs within three months. The head landlord thereupon brought an action for the recovery of the demised premises. The repairs were subsequently executed & the lessee applied for & obtained relief against forfeiture.

In an action by the lessee against the underlessee for breach of covenant to repair in the underlease:—*Held*: pltf. could not recover the costs of the proceedings for relief.—*CLARE v. DOBSON*, [1911] 1 K. B. 35; 80 L. J. K. B. 158; 103 L. T. 506; 27 T. L. R. 22.

**1850. Costs of counter-claim defended with knowledge of third party.**—Pltfs. having undertaken the repairs of a steamship for the owners, employed defts., an engineering co., to construct a new crank shaft. Defts. agreed to do so, upon the terms of their not being responsible for failure of material or workmanship beyond the replacement of faulty work supplied by them.

In an action by pltfs. against the shipowners to recover the price of the shaft which had been supplied by defts., the shipowners counter-claimed for damages for breach of contract in consequence of the shaft having broken down on a voyage.

Pltfs., after communicating with defts., who thereupon repudiated all responsibility, defended the counter-claim.

The shipowners succeeded on their counter-claim, the shaft being found to have been of faulty workmanship.

In an action by pltfs. to recover from defts. the costs of the shipowners' counter-claim, as damages resulting from defts.' breach of contract:—*Held*: the terms on which defts. had supplied the shaft did not relieve them from paying these costs; & pltfs. were entitled to recover the costs of the counter-claim except so far as they were increased by any issue other than the faultiness of the material or workmanship of the shaft.—*PRINCE OF WALES DRY DOCK CO. (SWANSEA), LTD. v. FOWNES FORGE & ENGINEERING CO., LTD.* (1904), 90 L. T. 527; 9 Asp. M. L. C. 555, C. A.

**1851. Action properly instituted by next friend of infant.**—Where an action, properly instituted under the advice of counsel, & conducted with diligence & propriety by a next friend in the interest of an infant, has been dismissed with costs & damages to be paid by the next friend, the infant will be held bound to indemnify the next friend against such costs & damages, & the costs, charges, & expenses properly incurred by him on the infant's behalf in relation to such action; but no declaration of charge in respect of such costs will be made upon the infant's property where such property in not being administered by the ct.—*STEEDEN v. WALDEN*, [1910] 2 Ch. 393; 79 L. J. Ch. 613; 103 L. T. 135; 26 T. L. R. 590; 54 Sol. Jo. 681.

**1852. Agreement to be bound by result of arbitration between others.—Indemnity to pay costs of arbitration.**—A. sold goods to B. who resold them to pltfs., who resold them to defts., who resold them to the ultimate purchasers. All the contracts were in similar terms & contained similar arbn. clauses. The ultimate purchasers claimed the right to reject the goods as not being in accordance with their contract, & each purchaser in turn claimed the right to throw back the goods on his immediate vendor. Defts. agreed with pltfs. that, as between themselves & pltfs., they would be bound by the result of an arbn. between A. &

B.:—*Held*: they had not thereby impliedly agreed to pay to plffs. any costs plffs. might be liable to pay to B.—*JACKSON (THOMAS) & Co., LTD. v. HENDERSON, CRAIG & Co., LTD.* (1916), 115 L. T. 36, C. A.

**1853. Judgment against two defendants—Appeal by one successful—Right of indemnity against non-appealing defendant.]**—Plff. sued to recover damages against two defts. jointly & severally. His case was, that a motor-van belonging to second deft. ran into an omnibus belonging to first defts., knocking the steering-wheel out of the driver's hand, in consequence of which the omnibus damaged his shop widow. At the trial the jury found for plff. against both defts., & judgment was entered accordingly. First defts. appealed; second defts. did not, nor were they made parties to the appeal. Plff., however, gave second defts. notice that should the appeal be allowed he would apply for an order of indemnity against any costs he should be ordered to pay first defts. The appeal was allowed, & judgment entered for applts., with costs, against plffs. in the ct. below & of the appeal. In respect of those costs plffs. asked for an order against second defts.:—*Held*: as the second defts., although no parties to the appeal, had nevertheless appeared on notice to oppose the order being made as to costs against them, they were liable to indemnify plff. so far as he had been ordered to pay first defts.' costs at the trial, but with regard to the costs of the appeal no order would be made against second defts.—*RICHER v. LONDON GENERAL OMNIBUS CO. NO. 2* (1916), 60 Sol. Jo. 337.

**Indemnity to trustees—In respect of expenses of administration.]**—*See TRUSTS & TRUSTEES.*

**In respect of breaches of trust by co-trustees.]**—*See TRUSTS & TRUSTEES.*

**Indemnity to licensing justices—As to costs on case stated.]**—*See INTOXICATING LIQUORS.*

**Indemnity of official receiver.]**—*See BANKRUPTCY, Vol. IV., pp. 199, 200, Nos. 1836-1841.*

**Indemnity of trustee in bankruptcy.]**—*See BANKRUPTCY, Vol. IV., pp. 228, 299, Nos. 2321-2150.*

**Third party procedure.]**—*See PRACTICE.*

### (c) What Costs Recoverable.

**1854. As between solicitor & client.]** *SMITH v. COMPTON, No. 1844, ante.*

**1855. —.]** In an action by a lessee against the assignee of the lease for breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in the lease, plff. sought to recover, among other heads of damage, the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney, incurred in unsuccessfully defending an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment:—*Held*: the lessee was entitled to recover both the extra costs paid by him to his attorney & the taxed costs.—*HOWARD v. LOVEGROVE* (1870), 1 L. R. 6 Exch. 43; 40 L. J. Ex. 13; 23 L. T. 396; 19 W. R. 188.

**1856. —.]**—An official receiver, acting as interim receiver, instructed certain auctioneers

to pay off a bill of sale given by the debtor, & to take an assignment of it to themselves. The trustee chosen by the creditors sued the auctioneers in order to test the validity of the bill of sale, & the auctioneers brought in the official receiver as third party. The action was dismissed with costs:—*Held*: under the implied indemnity given by the official receiver, the auctioneers were entitled to receive from him the difference between the costs incurred by them as between solr. & client, & the costs as between party & party which they received from the trustee, & the official receiver was entitled to be paid out of the estate his own costs & the amount he had paid under his indemnity to the auctioneers.—*Re WELLS & CROFT, Ex p. OFFICIAL RECEIVER* (1895), 72 L. T. 359; 11 T. L. R. 300; 2 Mans. 41; 15 R. 169.

**1857. —.]** *GREAT WESTERN RY. CO. v. FISHER, No. 1830, ante.*

**1858. —.]**—In an action in which defts. claimed an indemnity from a third party & which was settled by a payment from the third party to plffs., judgment being given for plffs. for party & party costs against defts., the ct. gave judgment for defts. against the third party (1) for solr. & client costs as between plffs. & defts., since otherwise defts. would not receive a complete indemnity; & (2) for the costs of the proceedings of defts. against the third party, the latter costs to be taxed as between party & party, since there was no difference in principle between the scale applicable in a claim to an indemnity & the scale applicable in any other form of action.—*SIMPSON & MILLER v. BRITISH INDUSTRIES TRUST, LTD.* (1923), 39 T. L. R. 286.

**1859. As between party & party—Statutory indemnity.]**—“Full compensation” for damage sustained by reason of the exercise of any of the powers of the Act under Public Health Act, 1875 (c. 55), s. 308, does not include extra costs of legal proceedings which have been incurred, over & above the taxed party & party costs, by a person against whom the local authority has unsuccessfully proceeded under the Act. Proceedings having been taken under Public Health Act, 1875 (c. 55), ss. 91-96, by resps., a local authority, against applt. in respect of a nuisance, an order to abate the nuisance was made against applt. by the justices. He appealed against the order to quarter sessions, who dismissed the appeal, subject to a case. On the hearing of the case a div. ct. ordered that the order of quarter sessions should be quashed with costs, & that resps. should pay to applt. his costs of the appeal to the High Ct. to be taxed. The costs of the two appeals were taxed & paid to applt. In prosecuting the appeals applt. reasonably incurred costs to a greater amount than the taxed costs which he received, & he claimed from resps. the difference between the taxed costs & the amount so expended by him, as compensation under Public Health Act, 1875 (c. 55), s. 308:—*Held*: he was not entitled to recover the amount so claimed by him.—*BARNETT v. ECCLES CORPN.*, [1900] 2 Q. B. 423; 69 L. J. Q. B. 834; 83 L. T. 66; 16 T. L. R. 463; *sub nom. Re BARNETT & ECCLES CORPN.*, 64 J. P. 602, C. A.

**Annotations:—***Distd. G. W. Ry. v. Fisher*, [1905] 1 Ch. 316. *Held. Hobbs v. Winchester Corpn.* (1910), 70 L. J. K. B. 1123; *Wiffen v. Bailey & Romford U.C.*, [1914] 2 K. B. 5.

## PART XII. SECT. 6, SUB-SECT. 1.—C. (c).

**1854 I. As between solicitor & client.]**—Defts., having paid to other persons the moneys claimed by plff., brought

in those persons as third parties for indemnity, whereupon the third parties paid plff. the amount of his claim & costs:—*Held*: defts. were entitled to be paid by the third parties, their cost of defence to be taxed between

solr. & client, & their costs of the claim over against the third parties to be taxed between party & party.—*KING v. FEDERAL LIFE ASSURANCE CO.* (1895), 17 P. R. 65.—*CAN.*



*Sect. 6.—Extent of liability: Sub-sect. 1, C. (c);*

**1860.** ———.]—*MAXWELL v. BRITISH THOMSON HOUSTON CO.*, No. 1841, *ante*.

**1861.** ———.]—*SIMPSON & MILLER v. BRITISH INDUSTRIES TRUST, LTD.*, No. 1858, *ante*.

#### SUB-SECT. 2.—AS REGARDS TIME.

##### A. When Liability Arises.

**1862.** On accrual of liability to indemnified party.—*Payment before due date.*]—*BROWNE v. HANCOCKE* (1028), 112. 111; *Cro. Car.* 115; 124 *R. R.* 385.

*Annotation: Mentd.* *Chapple v. Durston* (1830), 1 *C. & J.* 1.

**1863.** ———.]—*COLLINGS v. HEYWOOD*, No. 1881, *post*.

**1864.** ———.]—*Payment not actually made.*]—*RANELAUGH (EARL) v. HAYES*, No. 898, *ante*.

**1865.** ———.]—If the indorser of a dishonoured bill promise the indorsee, that if he will sue the acceptor, he, the indorser, will pay the law expenses. To entitle the indorsee to recover, on this promise the amount of his attorney's bill on suing the acceptor, it is not necessary for him to prove that he paid the attorney, his being liable to do so is sufficient.—*BULLOCK v. LLOYD* (1825), 2 *C. & P.* 119, *N. P.*

*Annotation: N.F.* *Collings v. Heywood* (1839), 9 *Ad. & El.* 633.

**1866.** ———.]—*ADAMS v. DANSEY*, No. 1804, *ante*.

**1867.** ———.]—*Judgment recovered.*]—By an indenture reciting that A. had agreed to pay a debt owing from B. to C. A. covenanted with B. to indemnify B. in respect of such debt. A. omitted to pay C., who sued & obtained judgment against B. B. might recover the amount of the debt from A. before he had paid C.—*CARR v. ROBERTS* (1833), 5 *B. & Ad.* 78; 2 *Nev. & M. K. B.* 42; 2 *L. J. K. B.* 183; 110 *E. R.* 721.

*Annotations:—Consd.* *Ashdown v. Ingamells* (1880), 5 *Ex. D.* 280; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 *Ch.* 617. *Reid.* *Re Perkins, Poyser v. Beyfus*, [1898] 2 *Ch.* 182. *Mentd.* *Wissell v. School for Indigent Blind* (1882), 8 *Q. B. D.* 357.

**1868.** ———.]—*Deft. covenanted to pay on a given day all debts due from deft. & another on account of a partnership between them & pltf., & made default:—Held:* pltf. was entitled to recover a judgment debt, though he had not paid it.—*MEARS v. GREEN* (1846), 6 *L. T. O. S.* 413.

**1869.** ———.]—M. was the registered owner of one hundred shares in the T. co., but he really held them as the nominee & trustee of the N. co., & had executed a declaration of trust accordingly. Both the cos. being in liquidation, calls to a large amount were made upon M. in respect of the shares, which calls he did not pay.—*Held:* M. was entitled to rank as a creditor of the N. co. for the amount of the calls which had been made upon him, & interest thereon, & also for any future calls on the shares & interest thereon, he undertaking that the liquidator of the N. co. should be at liberty to pay over to the liquidator of the T. co. the dividends payable from time to time in the liquidation of the N. co. to M. in respect of the calls, & the liquidator of the T. co. consenting to accept what might be so paid or payable, in full satis-

faction of all claims against M. or his estate, in respect of the hundred shares.—*RE NATIONAL FINANCIAL CO., Ex p. ORIENTAL COMMERCIAL BANK* (1868), 3 *Ch. App.* 791; 16 *W. R.* 994; *sub nom.* *Re NATIONAL FINANCIAL CO., LTD., MAITLAND'S CASE*, 18 *L. T.* 895, *L. J.*

*Annotations:—Consd.* *James v. May* (1871), cited 2 *Ch. D.* at p. 603. *Reid.* *Re International Contract Co., Hughes' Claim* (1872), *L. R.* 13 *Eq.* 623; *Heritage v. Paine* (1876), 2 *Ch. D.* 594. *Mentd.* *Re North Brazilian Sugar Factories Co.* (1887), 57 *L. J. Ch.* 110.

**1870.** ———.]—In a suit by the assignor of a lease claiming from his assignee indemnity in respect of breaches of the covenants in the lease, the ct. will direct merely payment on account of breaches of covenant already committed, & will not make a general declaration of the assignor's right to indemnity, giving liberty to apply from time to time in case of future breach.—*LLOYD v. DIMMACK* (1877), 7 *Ch. D.* 398; 47 *L. J. Ch.* 398; 38 *L. T.* 173; 26 *W. R.* 458.

*Annotations:—Reid.* *Hughes-Hallett v. Indian Mammoth Gold Mines* (1882), 31 *W. R.* 285; *Wolmershausen v. Gullick*, [1893] 2 *Ch.* 511.

**1871.** ———.]—*HALSTED v. FRIEDLANDER* (1904), *Times*, July 25.

**1872.** ———.]—*Amount not ascertained.*]—*SINGLETON v. SELWYN*, No. 1890, *post*.

**1873.** On performance of consideration.]—A declaration, in assumpsit, stated that pltf. had commenced an action against A. to recover a sum due to them from A., & another action against B., as a party liable in respect of same debt; that, in consideration that pltf. would consent to stay the proceedings in the action against A. until a given day, & would proceed to trial with the action against B. at a certain sitting, or as soon after as the practice of the ct. would admit of, deft. promised that he would indemnify pltf. against all costs & expenses connected with the action against B., whether same should be decided in favour of pltf. or of B., & that he, deft., would pay same costs & expenses when requested by pltf. The declaration then averred that pltf., confiding in the promise of deft., did consent to stay, & did stay, the proceedings in the action against A., & that they duly proceeded to trial with the action against B., & obtained a verdict therein; that the verdict was afterwards set aside, & a new trial ordered, upon payment of costs by B.; that pltf. again set down the cause for trial; that, by the direction & at the request of the deft., the record was withdrawn; & that pltf. had incurred, & paid, certain costs & expenses in connection with the action: & assigned for breach, deft.'s refusal to reimburse them.—*Held:* the declaration disclosed a good cause of action, the final determination of the action against B. not being a condition precedent to pltf.'s right to sue for the costs, & the consideration being satisfied by pltf.'s staying proceedings against A., & going to trial against B.—*WILSON v. BEVAN* (1849), 7 *C. B.* 673; 18 *L. J. C. P.* 244; 13 *L. T. O. S.* 119; 137 *E. R.* 260.

**1874.** On actual loss to indemnified party.]—A person who enters into an agreement to indemnify another against the consequences of his doing a certain act, is not thereby necessarily made liable to pay a sum of money to him, as he may possibly fulfil his agreement in another way, & such an agreement is not broken until the person who is to be indemnified is compelled to make some payment from which he was to be saved harmless.

**1860 I.** As between party & party.]—W. sold land to H., & covenanted to indemnify him against a mortgage thereon:—*Held:* H. was not entitled to solr.

& client, but only to party & party, costs of an action on the covenant.—*HUTTOY v. WANZER* (1886), 11 *P. R.* 302.—*CAN.*

**1860 II.** ———.]—*KING v. FEDERAL LIFE ASSURANCE CO.* (1895), 17 *P. R.* 65.—*CAN.*

The liability upon such a contract before actual breach is therefore not a contingent liability which can be proved in a bkpcy. by virtue of Bankrupt Law Consolidation Act, 1849 (c. 106), s. 178.—*Re Kelson, Tritton & Co., Ex p. Wiseman* (1871), 7 Ch. App. 35; 25 L. T. 545; 20 W. R. 138, L. J.

1875. —[J.—]J., at the request of deft. W., his co-trustee, advanced several sums, part of the trust estate, to A. upon security not warranted by the trust. At the time of the advances J. knew that the land proposed to be mortgaged was deft. W.'s, that he had contracted to sell it to A., the intended mtgor., & that part of the loan would be paid to deft. in payment of the purchase-money. He did not know that there were other moneys due from A. to the deft. B., & which were also to be paid out of the loans. Upon a bill filed by J. against his co-trustee W. asking to have the securities realised, & the deficiency made good by the defendant W.:—*Held*: (1) he was not entitled to the relief asked; (2) assuming there was an understanding on the part of deft. to indemnify pltf., as against damages or loss, he would not be entitled to relief until a loss had arisen. To allow persons entitled to indemnity to bring actions *quia timet* before the right to indemnify exists would be a most mischievous extension of the jurisdiction of the ct.—*BUTLER v. BUTLER* (1877), 5 Ch. D. 554; 46 L. J. Ch. 548; 37 L. T. 33 *affd.* 7 Ch. D. 116, C. A.

*Annotations*:—As to (1) *Refd.* *Chillingworth v. Chambers* [1896] 1 Ch. 685; *Jackson v. Dickinson*, [1903] 1 Ch. 917 *Generally*, *Mentd.* *Blyth v. Fladgate, M. v. Blyth* *Smith v. Blyth*, [1891] 1 Ch. 337.

1876. —[J.—]—*HUGHES-HALLETT v. INDIAN MAMMOTH GOLD MINES CO.*, No. 913, *ante*.

1877. —[J.—]—There must be actual loss, & reasonable proof thereof, to support a claim for indemnity for consequential loss.—*THE CITY OF PEKING* (1890), 15 App. Cas. 438; 59 L. J. P. C. 88; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. L. C. 572, P. C.

*Annotations*:—*Refd.* *Mediana (Owners) v. Comet (Owners)*, *The Mediana*, [1900] A. C. 113. *Mentd.* *The Emerald* (1896), 80 L. T. 178, n.; *The Kingsway*, [1918] P. 314

### B. Duration of Liability.

1878. *Effect of death of indemnifier.*—*RAMSDEN v. OLDFIELD & APPEYARD* (1720), 2 Eq. Cas. Abr. 390; 22 E. R. 333, L. C.

1879. —Indemnity for misrepresentation in prospectus—Estate not benefited.]—*PEEK v. GURNEY*, No. 1885, *post*.

1880. *Statute of Limitations—Cause of action accrues at time of payment.*—S. & co., the owners of a ship of which H. was captain despatched the latter to Miramichi, with instructions to purchase a cargo of timber, & draw upon them for the amount. H. proceeded to Miramichi accordingly, & there purchased some timber from one L. for £154 11s. & drew a bill upon S. & co. for the amount, at sixty days' sight, in favour of the seller or his order. The bill was dated Sept. 4, 1826, & on Nov. 21, it was duly presented for acceptance & protested for non-acceptance. Pltf. was in Liverpool, & the ship under his command, from Oct. 1826, until Apr. 1827. It was not proved that pltf. received any notice of the dishonour of the bill, either from the then holder or from defts. who had got the cargo. In 1832, pltf. was arrested upon this bill at Miramichi, & paid it, in order to release himself from the arrest. In a special action of *assumpsit*, brought by pltf. against defts. for not paying the bill, for not accepting it, & for not indemnifying pltf. from all loss, etc., sustained by him from having drawn the J.—VOL. XXVI.

bill:—*Held*: (1) under these circumstances defts. could not insist on the want of proof of notice to pltf. of the dishonour of the bill, as a defence to the action; (2) a promise to indemnify was the promise which the law would, in this case, imply, & as there was no damnification till 1832, Stat. Limitations did not apply.—*HUNTLEY v. SANDERSON* (1833), 1 Cr. & M. 407; 3 Tyr. 469; 2 L. J. Ex. 204; 149 E. R. 483.

1881. —[J.—]—(1) On a contract to indemnify a pltf. against costs which he is afterwards called upon to pay the cause of action arises when he pays, not when the costs are incurred or the attorney's bill delivered to such pltf.

(2) Stat. Limitations runs from the time of payment.—*COLLINGE v. HEYWOOD* (1830), 9 Ad. & El. 633; 1 Per. & Dav. 502; 2 Will. Woll. & H. 107; 8 L. J. Q. B. 98; 112 E. R. 1352.

*Annotations*:—As to (1) *Consd.* *Spark v. Heslop* (1850), 1 E. & E. 563; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705. *Refd.* *Smith v. Howell* (1851), 6 Exch. 730. As to (2) *Consd.* *Reynolds v. Doyle* (1840), 2 Scott, N. R. 45. *Refd.* *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337.

1882. —[J.—]—Deft., on the eve of his departure to join the army of Don Pedro in Portugal, obtained from pltf., who was an agent of Don Pedro, the loan of his acceptance for £40 payable forty days after date:—*Held*: these facts established an implied contract on the part of deft. to indemnify pltf. against being called upon to pay the bill when at maturity; Stat. Limitations began to run from the time of the payment of the bill by pltf., & not from the time it became due.—*REYNOLDS v. DOYLE* (1840), 1 Man. & G. 753; *Drinkwater*, 1; 2 Scott, N. R. 45; 4 Jur. 992; 133 E. R. 536.

*Annotation*:—*Refd.* *Batson v. King* (1859), 4 H. & N. 739.

1883. —[J.—]—When a party is called upon to pay the debt of another his remedy over against such other runs from the time of actual payment by him & not from the time when he becomes merely liable to pay.

A. was the accommodation acceptor for B. of a bill of exchange which became due in 1856; he was sued upon it & paid the amount some time within the last six years: he thereupon sued B. for the same & upon B. pleading Stat. Limitations:—*Held*: the statute commenced to run against A. only from the time of payment by him & therefore he was entitled to recover.—*ANGROVE v. TUPPETT* (1865), 11 L. T. 708.

1884. —[J.—]—Under a deed of indemnity of Oct. 1841, in the nature of a family arrangement, K. the younger & an exor. of testator W., was indemnified by the rest of the family from any claim in respect of having allowed the investment of a considerable portion of testator's estate, £1,400, to two of the sons, G. & C., on their promissory notes.

These promissory notes had been barred by Stat. Limitations, no interest having been demanded in respect of them nor any acknowledgment taken. A creditor's suit had been instituted to administer the estate of G., & a claim to be indemnified against any claim in that suit had been carried into chambers in respect of the £400 so formerly advanced to the sons. This claim was disallowed:—*Held*: such claim was not barred by Stat. Limitations, & same allowed with costs to be added thereto.—*TUNSTALL v. BARTLETT, KNOWLES v. BARTLETT* (1866), 14 L. T. 400.

1885. —Misrepresentation in prospectus.]—A suit for indemnity against loss on shares taken in consequence of misrepresentations in a prospectus issued by the directors of a company a proceeding *ex delicto*, liable to be barred by

**Sect. 6.—Extent of liability: Sub-sect. 2, B. Sect. 7: Sub-sects. 1, 2, 3, 4 & 5.]**

Stat. Limitations, but not subject to doctrines as to delay which govern suits for the rescission of contracts on the ground of fraud. Such a suit for indemnity will not survive against the estate of a deceased director, unless the estate was benefited by the misrepresentation.—*PEEK v. GURNEY* (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19; 22 W. R. 29, H. L.; *affg.* (1871), L. R. 13 Eq. 79.

**Annotations:—***Consd.* *Twyer v. Grant* (1878), 4 C. P. D. 49; *Phillips v. Homfray* (1883), 24 Ch. D. 439. *Refd.* *Young v. Wallingford* (1883), 52 L. J. Ch. 590; *Hatchard v. Mère* (1887), 18 Q. B. D. 771; *Nocton v. Ashburton*, [1914] A. C. 932; *Quirk v. Thomas*, [1915] 1 K. B. 798; *Geipel v. Peach*, [1917] 2 Ch. 108. *Mentd.* *Pender v. Fox* (1872), 20 W. R. 966; *Eaglesfield v. Londonderry* (1876), 4 Ch. D. 693; *Phosphate Sewage Co. v. Hartmont* (1876), 34 L. T. 154; *Schroeder v. Mendl* (1877), 37 L. T. 452; *Cargill v. Bower* (1878), 10 Ch. D. 502; *Davies v. London & Provincial Marine Insce.* (1878), 38 L. T. 478; *Weir v. Ball* (1878), 3 Ex. D. 238; *Arkwright v. Newbold* (1881), 17 Ch. D. 301; *R. v. Most* (1881), 50 L. J. M. C. 113; *Smith v. Chadwick* (1882), 20 Ch. D. 37; *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459; *Re Southport & West Lancashire Banking Co.*, *Fisher & Sherrington's Case* (1885), 53 L. T. 832; *Newbigging v. Adam* (1886), 34 Ch. D. 582; *Derry v. Peek* (1889), 14 App. Cas. 337; *Glaeser v. Itolls* (1889), 42 Ch. D. 436; *Lange v. Barton* (1891), 7 T. L. R. 451; *Salaman v. Warner* (1891), 65 L. T. 132; *Aaron's Reefs v. Twiss*, [1896] A. C. 273; *Andrews v. Mockford*, [1896] 1 Q. B. 372; *Seaton v. Heath*, *Seaton v. Burnand* (1899), 68 L. J. Q. B. 631; *Cockett v. Keswick*, [1902] 2 Ch. 456; *Cavalier v. Pope*, [1905] 2 K. B. 767; *Chapman v. Great Central Freehold Mines* (1905), 22 T. L. R. 90; *Tackey v. McBain*, [1912] A. C. 186.

*See, generally, LIMITATION OF ACTIONS.*

**SECT. 7.—ENFORCEMENT OF LIABILITY.**

**SUB-SECT. 1.—IN GENERAL.**

1886. Right to have sum set aside to meet indemnity.]—*LACEY v. HILL, CROWLEY'S CLAIM*, No. 922, ante.

— In winding-up of company.]—*See COMPANIES*, Vol. X., p. 1057, No. 7391.

**SUB-SECT. 2.—PARTIES.**

1887. Who may sue—Indemnity to two—Right of one to sue alone.]—*E.*, as attorney for *ptf.s.*, exors. of *M.*, having sold an estate, to a share of the proceeds of which *W.* was entitled as legatee of *M.*, & deft. claiming *W.*'s share of such proceeds under an agreement with *W.*, *ptf.s.* paid the amount to deft. on receiving from him a guarantee addressed to *E.*, & also to *ptf.s.*, as exors. of *M.*, to indemnify them & each of them against any action by *W.* :—

**PART XII. SECT. 7, SUB-SECT. 1.**

*a. Indemnity against costs—Form of action to recover amount paid.*]—An action for money paid will not lie against a person who has engaged to indemnify another against the costs of an action brought against him for the amount of these costs, after they had been paid by the party indemnified. The action should be special on the indemnity.—*MILLER v. MUNRO* (1841), 6 O. S. 166.—*CAN.*

*b. Right to enforce contract—Indemnity to retiring partner of firm.*]—*Defts.*, husband & wife, executed in favour of *ptf.*, the husband's retiring partner, a bond to indemnify *ptf.* from every liability of the firm. Judgments were recovered by creditors of the firm :—*Held* : *ptf.* was entitled to have the judgments & costs paid, & the amounts necessary were for that purpose ordered to be paid into ct. by

*defts.*—*BOYD v. ROBINSON* (1891), 20 O. R. 404.—*CAN.*

*c. Condition precedent to action—Payment or demand.*]—In an action upon a covenant to indemnify, it is a condition of *ptf.*'s right to performance that he has paid or been called upon to pay the sum indemnified against.—*BAKER v. DALBY* (1894), 3 B. C. R. 289.—*CAN.*

*d. ———.*]—*SHAVER v. SPROULE* (1913), 24 O. W. R. 509; 4 O. W. N. 968; 9 D. L. R. 841.—*CAN.*

*e. ———.*]—*MCDONALD v. FRUCHEN* (1918), 42 O. L. R. 18; 13 O. W. N. 380; 41 D. L. R. 619.—*CAN.*

*f. ———.*]—It is not necessary that, before a suit on an indemnity bond can be filed, *ptf.* should already have been compelled to make the payment in respect of which he is seeking to be indemnified, it is sufficient that

*Held* : *ptf.s.* might sue on this guarantee without joining *E.*—*PLACE v. DELEGAL* (1838), 4 Bing. N. C. 426; 1 Arn. 185; 6 Scott. 249; 7 L. J. O. P. 227; 132 E. R. 851.

*Annotation:—Refd.* *Palmer v. Sparshott* (1842), 4 Man. & G. 137.

1888. ———.]—By an agreement between *A.* of the one part, & *B.* & *C.* of the other part, reciting that *B.* & *C.* had assigned certain property to *A.* for £150 apiece, & that it had been agreed that *A.* should retain £50 out of each of the purchase moneys, deft., in consideration of the two several sums of £50, & £50 so retained, promised *B.* & *C.* to indemnify "them & their & each of their estates" from the costs of a certain action :—*Held* : *C.* might sue *A.* alone upon this promise without joining *B.*—*PALMER v. SPARSHOTT* (1842), 4 Man. & G. 137; 4 Scott. N. R. 743; 11 L. J. C. P. 204; 134 E. R. 57.

1889. — Stranger to contract.—In position of cestui que trust.]—(1) To entitle a third person, not named as a party to a contract, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of *cestui que trust* under the contract.

By a deed of separation between husband & wife, the husband covenanted with the trustees to pay to them an annuity for the use of the wife & two eldest daughters, & also to pay to the trustees all the expenses of the maintenance & education of the two youngest daughters, provided that the trustees permitted them to go to such school as the husband should direct, & provided also that the covenants by the trustees were duly observed & performed : provided, also, that the two youngest daughters should live at such place, being reasonable & proper for the purpose, as the husband should direct, & should be maintained & educated at his expense, the husband & wife to have all reasonable access to them; & the trustees covenanted with the husband that they would, during the continuance of the separation, keep him indemnified against all liability for the maintenance of the wife & two eldest daughters, & against all molestation by them, & that the wife would not take any proceedings against the husband for alimony, except as aforesaid; & that they, the trustees, would, on the husband defraying all the expenses connected therewith, carry out his desires as to the school at which the two youngest daughters should be educated, & the place at which they should live, & would permit them, if they so desired, & without any interference on the part of the wife, to accept any invitation of the husband to reside with him.

On one of the two youngest daughters subsequently attaining sixteen, the husband refused any

a decree has been passed against him for such payment.—*CHIRANJI LAL v. NARAINI* (1919), 1 L. R. 41 All. 395.—*IND.*

*g. Covenant by vendor to indemnify purchaser of land—Compromise of claim against purchaser—Recovery of amount paid from vendor.*]—The purchaser of immovable property concerning which the seller has covenanted to indemnify the purchaser in the event of the title proving defective is not bound to wait until a suit is brought & he is deprived of the property, but, if a claim which the purchaser has reason to believe to be valid is brought against him, he may, after notice to the covenantor, compromise such claim & sue the covenantor on his covenant to recover the amount paid by him to effect the compromise.—*DURGA KUNWAR v. KALI CHARAN* (1913), 1 L. R. 35 All. 168.—*IND.*

longer to maintain her, whereupon she brought an action, by her next friend, against the husband & the trustees of the separation deed to enforce the husband's covenant, the trustees having refused to allow their names to be used as plffs. :—*Held* : upon the construction of the deed, pltf. was not in the position of *cestui que trust* under the covenant so as to entitle her to maintain the action, but liberty was given her, under R. S. C., 1883, Ord. 16, r. 2, to amend the writ, by adding the trustees, the wife, & the other daughters, or any of them, as plffs.

(2) The trustees refusing to be joined as co-plffs., the statement of claim was amended by making the wife a co-pltf. :—*Held* : she had such an interest as entitled her to sue, the deed being an arrangement between the husband & wife, & the trustees being introduced on her behalf in order to get over the difficulty that the husband & wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, & if they refused to sue she could sue in equity.—*GANDY v. GANDY* (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803; 1 T. L. R. 520, C. A.

*Annotations* :—*As to* (2) *Refd.* *Bishop v. Bishop*, *Judkins v. Judkins*, [1897] P. 138. *Generally*, *Refd.* *Clarke v. Birley* (1889), 41 Ch. D. 422; *Judkins v. Judkins* (1897), 66 L. J. P. 76. *Mentd.* *Davis v. Marrable*, [1913] 2 Ch. 421; *R. v. Taylor*, *R. v. Amendt*, [1915] 2 K. B. 593.

1890. Several covenantors.—May be joined as co-defendants.]—By their covenant contained in a deed of inspectorship, the creditors executing the deed made themselves separately liable to indemnify the inspectors against any loss they might sustain as such inspectors, the amount of the liability of each creditor to be proportionate to his scheduled debt. An inspector finding that the assets of the business were insufficient to meet the liabilities filed a bill against all the creditors who executed the inspectorship deed, praying contribution & accounts :—*Held* : (1) the inspectors were trustees for the creditors, & neither the separate liability, nor the separate nature of the defence of each creditor, some creditors having, as appeared from the bill, legal, & others equitable defences, precluded pltf. from commencing one suit against all the covenanting creditors, to obtain accounts & contribution; (2) the amount of pltf.'s liability need not be ascertained before he could file such a bill; (3) the circumstance that pltf. was a party to an existing suit in the same subject-matter instituted & conducted by a creditor, did not necessarily deprive pltf. of his right to institute the present suit.—*SINGLETON v. SELWYN* (1893), 3 New Rep. 27; 9 L. T. 408; 9 Jur. N. S. 1149; 12 W. R. 98.

Third party procedure.]—*See* PRACTICE.

### SUB-SECT. 3.—NECESSITY FOR NOTICE.

1891. Notice of loss.—Indemnity against acts of third person.]—If a man be bound to another to indemnify him, against the acts of a third person, no notice is necessary to be given by the obligee to the obligor of those acts. If deft. pleads that he has saved pltf. harmless, & afterwards in his rejoinder, says, he had no notice of the particular damage mentioned in the replication, the rejoinder is a departure.—*CUTLER v. SOUTHERN* (1867), 1 Saund. 116; 1 Lev. 194; 85 E. R. 125.

*Annotations* :—*Refd.* *Knight v. Preston* (1767), 2 Wils. 332; *Nash v. Palmer* (1816), 5 M. & S. 374; *Gwynne v. Burnell* (1811), 6 Bing. N. C. 453. *Mentd.* *Stukoley v. Butler* (1814), Hob. 168.

1892. ——— Expenses of action.]—*KING v. ATKINS* (1870), 1 Vent. 35, 78; 1 Sid. 442; 80 E. R. 54.

*Annotations* :—*Mentd.* *Santler v. Heard* (1775), 2 Wm. Bl. 1031; *Clarke v. Dunford* (1846), 15 L. J. C. P. 146.

1893. Notice of payment by party indemnified.—Obligation to pay.—Share of proceeds of bill of exchange.]—A bond, conditioned to save A. harmless from all actions, legal proceedings & costs, etc., which may be the consequence of A.'s delivering over to deft. a bill of exchange, part of the proceeds whereof a third person is entitled to, is forfeited by a payment over by A. to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action, though A. give no notice of the payment to deft.—*KER v. MITCHELL* (1786), 2 Chit. 487.

*See, further*, BONDS, Vol. VII., pp. 198, 199, Nos. 384–390.

### SUB-SECT. 4.—PROOF OF LIABILITY.

1894. Express indemnity.—To pay half of sum due.—Acknowledgment of debtor of amount due.]—*LADD v. GARROD* (1897), 1 Lat. 663; 125 E. R. 347.

1895. ——— Against action brought by third party.—Judgment given in action.]—Although where A. contracts to indemnify B. against a claim, & a judgment is obtained against B. in an action *bona fide* defended by him, & he pays the demand, A. cannot be heard to contend that the judgment was erroneous, the case is otherwise where there is no contract to indemnify, but only a claim to indemnify founded on a breach of trust.—*GRAY v. LEWIS, PARKER v. LEWIS* (1873), 8 Ch. App. 1035; 43 L. J. Ch. 281; 29 L. T. 12, 109; 21 W. R. 923, 928, L. J.

*Annotations* :—*Refd.* *Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co.*, [1894] 1 Ch. 578. *Mentd.* *Menior v. Hooper's Telegraph Works* (1874), 13 L. J. Ch. 336; *Russell v. Wakefield Waterworks Co.* (1870), L. R. 30 Eq. 474; *Lloyd v. Dimmock* (1877), 38 L. T. 173; *New Sombro Phosphate Co. v. Erlanger* (1877), 46 L. J. Ch. 7.

Third party procedure.]—*See* PRACTICE.

### SUB-SECT. 5.—DEFENCES.

1893. That no damage suffered.] A note given to the officers of a parish to indemnify them against the expenses of a bastard child is to be taken as an indemnity only as far as the parish have been put to expense. The maker may set up the defence that they were not damaged.—*WILDE v. GRIFFIN* (1804), 5 Esp. 142, N. P.

*Annotation* :—*Refd.* *Hodgson v. Williams* (1806), 6 Esp. 29.

1897. ———.]—A co. entered into a contract with a firm carrying on business in the Argentine Republic to indemnify them against a particular claimant, the co. being at liberty to use the name of the firm in defending any action brought by claimant. At the time when this contract was entered into an action in this country had been commenced by claimant. It was defended by the co. in the name of the firm, & in their pleadings the co. stated that E., who was a married woman, had become the surviving partner of the firm. Judgment was given against the firm, but no execution had been issued thereunder, & it appeared that E., who resided in the Argentine Republic, had no property in this country. E. brought an action against the co. to enforce the contract of indemnity.

It was objected by the co. that it had not been

*Sect. 7.—Enforcement of Liability: Sub-sect. 5.*  
*Sect. 8: Sub-sects. 1 & 2. Sects. 9 & 10.]*

shown that E. had any separate estate, & that she would therefore not be liable to claimant:—*Held*: as it appeared that E. had no property in this country, & as no steps had been taken to enforce the judgment in the Argentine Republic, she was not damnified by the judgment against the firm, & she was not therefore entitled to relief under the contract of indemnity.—*EDDOWES v. ARGENTINE LOAN & MERCANTILE AGENCY CO., LTD.* (1890), 63 L. T. 364, C. A.

## SECT. 8.—RIGHT OF INDEMNIFIER.

### SUB-SECT. 1.—SET-OFF.

Set-off generally, *see* R. S. C., Ord. 19, r. 3;  
 SET-OFF.

1898. *Set-off of securities in hands of party indemnified.*—In covenant upon a deed of indemnity, whereby plffs. covenanted to indemnify the Bank of England against advances to L. & B. on bills of exchange, to the amount of £100,000, & deft. & others agreed to sub-indemnify plffs. to the same amount in certain aliquot proportions, of which deft.'s proportion was £5,000, & plffs. alleged that they had been obliged to pay the whole £100,000 to the bank, & demanded of deft. his proportion of £5,000: in which action plffs. had judgment upon demurrer; the ct. refused to refer it to the master to compute the principal & interest due on the deed; considering that it was not a mere question of computation of principal & interest, but that it was open to deft. before the sheriff's jury to enter into questions of collateral satisfaction of plffs.' demands from securities & effects of L. & B., the principals, in their hands.—*DENISON v. MAIR* (1811), 14 East, 622; 104 E. R. 741.

1899. *Whether set-off sustainable.*—In an action of covenant for not indemnifying against losses no plea of set-off can be sustained.—*COOPER v. ROBINSON* (1818), 2 Chit. 161.

1900. —.—]—Count on a bond for £100, conditioned to indemnify pltf. against certain actions: breach, that pltf. was sued on one of them, & obliged to pay £9 10s. 5d. & was not indemnified. Plea: set-off of an amount averred to be equal to pltf.'s claim; but the plea did not show what amount was due on the bond. Demurrer:—*Held*: set-off could not be pleaded to a bond conditioned for indemnity; & a plea of set-off to a bond, under 8 Geo. 2, c. 24, s. 5, is not good, unless it shows what amount is justly due on the bond: & for both reasons the plea was bad.—*ATTWOOLL v. ATTWOOLL* (1853), 2 E. & B. 23; 1 C. L. R. 242; 22 L. J. Q. B. 287; 21 L. T. O. S. 99; 1 W. R. 325; 118 E. R. 677; *sub nom.* *ATTWOOL v. ATTWOOL*, 17 Jur. 789.

*Annotations*:—*Reid*. *Johnson v. Diamond* (1855), 11 Exch. 73; *Brown v. Tibbotts* (1862), 6 L. T. 385.

1901. —.—]—Pltf. signed & delivered to deft. the following document: "In consideration of your having at my request, agreed to become a director of the Surrey Gas Association, & to be act as director thereof, I hereby undertake & agree to guarantee, indemnify, & save you harmless from & against all losses, costs, charges, damages & expenses, which you may bear, incur, sustain, or be put to by reason thereof, or on account of actions as such director; & I do hereby further agree to accept a transfer of twenty-four of your shares in the said association when thereunto requested by you, such transfer to be at my own

expense, costs & charges, & I hereby undertake to pay all calls & instalments for & in respect of such shares." Pltf. having afterwards sued deft. for a debt:—*Held*: deft. might set off the expenses incurred by him as a director as money paid for pltf.'s use.—*HUTCHINSON v. SYDNEY* (1854), 10 Exch. 438; 3 C. L. R. 175; 24 L. J. Ex. 25; 24 L. T. O. S. 117; 3 W. R. 65; 156 E. R. 508.

1902. —.—]—If C. gives an indemnity to A. & B. covenants to assign his *spes successionis* to the benefit of that indemnity to D., when *spes successionis* is realised, B. immediately becomes a trustee for D., & C. cannot claim to set off a debt due to him from B. before satisfying the demands of D.—*Re POULTER, POULTER v. POULTER, EDWARDS v. POULTER* (1912), 56 Sol. Jo. 291.

*Set-off in contract for guarantee.*—*See* Part VI., Sect. 3, sub-sect. 2, *ante*.

### SUB-SECT. 2.—RIGHTS OF CONTRIBUTION FROM JOINT INDEMNIFIER.

*See, now*, R. S. C., Ord. 16, r. 1.

## SECT. 9.—RIGHTS OF PERSONS INDEMNIFIED INTER SE.

1903. *No right of contribution—When not liable to common demand.*—A lessee of land assigned part of the land to A. for the residue of the term, & other part to B. for the residue of the term, less ten days, at apportioned rents, covenanting in both cases to pay the rent due to the original lessor & to indemnify.

The lessee having become bankrupt, A., on the application of the lessor & on threat of distraint, paid the whole rent under the original lease:—*Held*: as A. & B. were not liable to a common

tribution as against B.—*JOHNSON v. WILD* (1890), 44 Ch. D. 146; 50 L. J. Ch. 322; 62 L. T. 537; 38 W. R. 500; 6 T. L. R. 259.

*Rights of co-sureties inter se.*—*See* Part VIII., *ante*.

## SECT. 10.—DISCHARGE OF INDEMNITY.

*Discharge of guarantee.*—*See* Part IX., *ante*.

1904. *Effluxion of time—Bastardy bond—Bastard becoming of full age.*—The obligation entered into in a bastardy bond conditioned to indemnify the parish against the costs, charges, etc., by reason of birth, maintenance, & education of a bastard child, is at an end when the bastard attains the age of twenty-one years, & maintains himself & does not cover charges incurred on the bastard subsequently becoming chargeable to the parish.—*WANDLEY v. SMITH* (1835), 2 Cr. M. & R. 716; 1 Gale, 356; Tyr. & Gr. 194; 5 L. J. M. C. 30; 150 E. R. 303.

1905. *Act of parties—Party indemnified—Debt taken upon himself.*—B. & C. were jointly bound as sureties for A.; D., the wife of A., charged her separate estate to indemnify B. from all losses, etc. The whole loss was borne by B. alone, who afterwards, without the concurrence of D., released C. his co-surety:—*Held*: D.'s separate estate was thereby released from the moiety of the losses.—*HODGSON v. HODGSON* (1837), 2 Keen, 704; 7 L. J. Ch. 5; 48 E. R. 800.

*Annotation*:—*Reid*. *Bolton v. Salmon*, [1891] 2 Ch. 48.

**1906.** — — — — —.]—A., as surety for his sons B. & C., mortgaged real estate to M., to secure to M. the payment of £2,500 due from B. & C. & B. & C. gave A. a bond to indemnify him in respect of the mtg. A., by will, devised the mtgd estate to B., & gave the residue of his estate to trustees, on trust to pay his funeral & testamentary expenses & all his debts, & in particular all sums which might be charged upon the property devised to B.:—*Held*: testator took the debt on himself, & the £2,500 was payable out of his estate so as to exonerate the principal debtors.—*MUSKET v. CLIFFE* (1848), 2 De G. & Sm. 213; 1 L. T. O. S. 372; 64 E. R. 109; *sub nom.* *MUSHET v. CLIFFE*, 17 L. J. Ch. 269; 12 Jur. 739.

**1907.** — — — — —.]—**Fraud—Secret agreement with creditors.**—Pltf. becoming insolvent compounded with his creditors, & entered into a deed by which it was agreed that bills should be given to the creditors for 5s. in the pound, which were guaranteed by T. M. The creditors covenanted not to sue while these bills were running, & agreed to discharge pltf. from all claim when the bills for 5s. in the pound were paid. There was also a covenant whereby the creditors covenanted to indemnify pltf. in respect of outstanding bills in their hands at the execution of the deed. H. P. & P. M. were, at the time of the execution of the composition-deed, holders of acceptances of pltf. these bills pltf. was afterwards sued upon, & compelled to pay, with costs. H. P. was sued on the covenant to indemnify pltf., & he pleaded that before the execution of the deed it had been agreed between pltf. & deft. & his partner, P. M. that in addition to the composition of 5s. in the pound pltf. should pay in full a portion of his debt to them, & should pay the composition of 5s. in the pound in cash instead of by bill, & that this agreement was unknown to the other creditors, & that J. P. & P. M. had executed the deed to induce the other creditors to believe that they had received a similar composition with the rest.—*Held*: the transaction was fraudulent, & pltf. could not recover upon the covenant to indemnify.—*HIGGINS v. PITT* (1849), 4 Exch. 312; 18 L. J. Ex. 488; 15 L. T. O. S. 139; 151 E. R. 1231.

*Annotations*:—*Reid*, *Mallalieu v. Hodgson* (1851), 16 Q. B. 639; *Haddon v. Ayres* (1858), 1 E. & E. 118. *Mentd.* *Bowes v. Foster* (1858), 6 W. R. 257; *Atkinson v. Denby* (1861), 6 H. & N. 778; *Daughlish v. Tennent* (1866), 8 B. & S. 1.

**1908.** — — — — —.]—**Adverse order suffered by consent—No effective defence available.**—In an action for the breach of a covenant of indemnity contained in an indenture of Nov. 1842, the declarations set forth an indenture of Jan. 1809, being a settlement made on the marriage of A. with B., by which provision was made for effecting a policy of assurance on the life of B., the proceeds of which were to be subject to the appointment of A. & B., or of the survivor, in favour of a child or children of the marriage; it then set out a settlement of Mar. 1840, made upon the marriage of C., a daughter of A. & B., with D., reciting the death of A. without having exercised the power of appointment, by which deed C., with the consent of D., her then intended husband, assigned all her interest in any fortune to which she might become entitled under the will of her mother to trustees, for the separate use of C., with a power of appointment by C. in favour of children of that marriage. Of these deeds no profit was made. The declaration then set out, with profert, the indenture of Nov. 1842, reciting the death of B., that she had made a will, dated in July, 1840, whereby she appointed the sum of £2,000 to be settled "upon the trusts

declared in the indenture of settlement of Mar. 1840, so far as the rules of law & equity would permit, & she had power so to direct & appoint, but if she had not such power, then she willed & appointed that the £2,000 should be paid to C., or as C. should by writing direct & appoint, for her separate use," & further reciting that by another indenture the pltf. became trustees under the indenture of Mar. 1840, that they had received the £2,000 which was property of a personal nature to which C. was beneficially entitled under the will of B., & that the same was in their hands subject to, & charged in equity with, the trusts of the indenture of Mar. 1840, that D. was desirous to obtain from pltf. a loan of the £2,000, & that it was considered that B. had not power to appoint the £2,000 to be settled upon the trusts of the indenture of Mar. 1810, & therefore that, under the alternative appointment made by her, C. had become entitled thereto absolutely for her separate use, but that a question had been made whether it was not subject to the assignment made by the indenture of Mar. 1810, wherefore the said C., with the approbation of D., her husband, had proposed & consented that the £2,000 should be paid to pltf. as trustees, to be held by them upon the trusts therein declared, they being indemnified by C. & D.

The declaration then averred that the £2,000 had been accordingly lent by pltf. to D.; that that sum remained unpaid; that, by an indenture of Sept. 1845, T. S. & others were appointed trustees of the indenture of Mar. 1840, in place of pltf.; that T. S., as such trustee, had commenced a suit in Chancery against pltf. & others to compel them to invest the £2,000 so lent to D.; that D. had notice of the proceedings, & was required to take upon himself the defence thereto, & to indemnify pltf.; that D. declining to take upon himself the defence, pltf. consented to an order whereby they became liable to transfer to the accountant-general a certain amount of stock, & were put to expense:—*Held*: pltf. were not precluded from recovering upon deft.'s contract of indemnity, by their having consented to a decree before hearing—it not being shown that the decision could be in any degree affected by the stage of the cause in which it was pronounced, or that pltf., by incurring the expense of prosecuting the suit to the hearing, could have made any effectual defence, or have diminished the damage consequent upon an adverse decision.—*NEWBOROUGH (LORD) v. SCHRODER* (1849), 7 C. B. 342; 18 L. J. C. P. 200; 13 L. T. O. S. 48; 13 Jur. 611; 137 E. R. 136. *Annotations*:—*Mentd.* *Gorsuch v. Cree* (1860), 8 C. B. N. S. 574; *Taylor v. Chichester & Mithurst Icy.* (1867), L. R. 2 Exch. 356.

**1909.** — — — — —.]—**Party giving indemnity—Revocation in course of legal proceedings.**—Deft. to an action for the infringement of a patent, not being willing to defend the action, agreed to allow the maker of the machine which was the subject of the action, to do so in his name on being indemnified against the costs. The indemnity as to the costs of the action was given, & deft. signed a retainer to the solr. of the maker of the machine to act as solr. in the action, & in any appeals. An appeal to the House of Lords having been presented by the maker, deft., on the ground that he had refused to give him a further indemnity, purported to withdraw his retainer to his solr., & instructed another solr. to take steps to withdraw the appeal. The costs of the proceedings up to the time of the appeal to the House of Lords had been paid & security lodged for the costs of that appeal:—*Held*: deft. being fully indemnified against the costs, had no

*Sect. 10.—Discharge of indemnity.]*

right to revoke the retainer, or otherwise interfere with the proceedings, & an injunction must be granted restraining him from doing so.

*Qu.* : whether deft. could have interfered even if the indemnity which he had accepted did not prove sufficient.—*MONTFORTS v. MARSDEN*, [1895] 1 Ch. 11; 64 L. J. Ch. 52; 71 L. T. 620; 12 R. 193, C. A.

1910. Mistake—By party giving indemnity—Mistake of law.]—B., under the mistaken notion that he was, as heir-at-law of his father, entitled to shares in a joint-stock co. as realty, executed a deed by which he joined in indemnifying the directors in respect of certain advances made by them. It turned out upon inquiry that the shares were personal estate, & B. filed his bill to be relieved from the deed, & the ct. made a decree in his favour, which decree was upon appeal affirmed.—*BROUGHTON v. HUTT* (1858), 3 De G. & J. 501; 28 L. J. Ch. 167; 32 L. T. O. S. 306; 5 Jur. N. S. 231; 7 W. R. 106; 44 E. R. 1361, L. JJ.

1911. Renewal of bill of exchange—Without knowledge of indemnifying party.]—A., at the request of B., & on his promise that he would share any loss or liability he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C. being unable to meet it, it was agreed between the holders & A. & C. without the knowledge of B. that another bill should be drawn for the amount, in substitution of the former acceptance. A. having been obliged to pay the second bill, sued B. on his indemnity :—*Held* : B.'s liability on his undertaking was not discharged by the renewal of the bill, the parties not standing in the position of creditor & principal & surety.—*WAY v. HEARN* (1862), 11 C. B. N. S. 774; 142 E. R. 1000.

1912. *S. P. WAY v. HEARN* (1862), 13 C. B. N. S. 292; 32 L. J. C. P. 34; 6 L. T. 751; 143 E. R. 117.

Bond for safe return of ship.]—*See ADMIRALTY*, Vol. I., p. 117, Nos. 228–229.

## GUARDIAN AND WARD.

*See FRAUDULENT AND VOIDABLE CONVEYANCES; INFANTS AND CHILDREN.*

## GUARDIANS OF THE POOR.

*See ELECTIONS; POOR LAW.*

## GUN LICENCES.

*See GAME; REVENUE.*

## GUNPOWDER.

*See PUBLIC HEALTH AND LOCAL ADMINISTRATION.*

## HABEAS CORPUS.

*See CROWN PRACTICE; PRISONS.*

## HABENDUM.

*See* DEEDS AND OTHER INSTRUMENTS.

## HABITUAL CRIMINAL.

*See* CRIMINAL LAW AND PROCEDURE.

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## HABITUAL DRUNKARD.

*See* CRIMINAL LAW AND PROCEDURE ; INTOXICATING LIQUORS.

## HACKNEY CARRIAGES.

*See* STREET AND AERIAL TRAFFIC.

## HALF-BLOOD.

*See* DESCENT AND DISTRIBUTION.

## HALF-TIMERS.

*See* EDUCATION ; FACTORIES AND SHOPS.

## HARBOURS.

*See* SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

## HARD LABOUR.

*See* CRIMINAL LAW AND PROCEDURE ; PRISONS

## HARES.

*See* GAME.



## HAWKERS AND PEDLARS.

*See* MARKETS AND FAIRS.

## HAY AND STRAW.

*See* AGRICULTURE ; WEIGHTS AND MEASURES.

## HEALTH.

*See* PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HEARSAY EVIDENCE.

*See* EVIDENCE.

## HEIRLOOMS.

*See* REAL PROPERTY AND CHATTELS REAL.

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## HEIRSHIP.

*See* DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

## HERALDS AND HERALDS' COLLEGE.

*See* PEERAGE AND DIGNITIES.

## HEREDITAMENTS.

*See* COPYHOLDS ; REAL PROPERTY AND CHATTELS REAL.

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## HERESY.

*See* ECCLESIASTICAL LAW.

## HERIOT.

*See* COPYHOLDS.

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## HIGH BAILIFF.

*See* COUNTY COURTS.

## HIGH COURT.

*See* COURTS ; PRACTICE AND PROCEDURE.

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## HIGH SEAS.

*See* FISHERIES ; PRIZE LAW AND JURISDICTION ; SHIPPING AND NAVIGATION.

## HIGH STEWARD.

*See* CONSTITUTIONAL LAW.

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## HIGH TREASON.

*See* CONSTITUTIONAL LAW ; CRIMINAL LAW AND PROCEDURE.

# HIGHWAYS, STREETS AND BRIDGES.

	PAGE
PART I. DEFINITIONS AND CHARACTERISTICS . . . . .	260
SECT. 1. HIGHWAY . . . . .	260
SUB-SECT. 1. IN GENERAL . . . . .	260
SUB-SECT. 2. KINDS OF HIGHWAY . . . . .	262
SUB-SECT. 3. WHETHER NECESSARILY A THOROUGHFARE . . . . .	263
SUB-SECT. 4. WHETHER PUBLIC RIGHT OF USER RESTRICTED . . . . .	264
SECT. 2. MAIN ROADS . . . . .	266
SECT. 3. HIGHWAYS REPAIRABLE BY INHABITANTS AT LARGE . . . . .	268
SECT. 4. TURNPIKE ROAD . . . . .	268
SECT. 5. STREETS . . . . .	268
SUB-SECT. 1. IN GENERAL . . . . .	268
SUB-SECT. 2. STATUTORY DEFINITIONS . . . . .	269
A. Under Public Health Acts . . . . .	269
B. In the Metropolis . . . . .	272
(a) Under Metropolis Management Acts . . . . .	272
(b) Under London Building Acts . . . . .	273
C. Under Other Statutes . . . . .	274
SECT. 6. NEW STREETS . . . . .	275
SUB-SECT. 1. IN GENERAL . . . . .	275
SUB-SECT. 2. HOW CREATED . . . . .	277
SECT. 7. CHURCHWAY . . . . .	279
SECT. 8. MARKETWAY . . . . .	279
PART II. HIGHWAY STATUTES, AREAS AND AUTHORITIES. . . . .	279
SECT. 1. HIGHWAY STATUTES . . . . .	279
SECT. 2. HIGHWAY AREAS AND AUTHORITIES. . . . .	279
SUB-SECT. 1. APART FROM SPECIAL AREAS . . . . .	279
A. For Ordinary Highways . . . . .	279
B. For Main Roads . . . . .	280
SUB-SECT. 2. IN SPECIAL AREAS . . . . .	280
A. Isle of Wight . . . . .	280
B. South Wales . . . . .	281
SUB-SECT. 3. OTHER CASES . . . . .	281
PART III. ORIGIN AND PROOF OF HIGHWAYS . . . . .	281
SECT. 1. HIGHWAYS BY PRESCRIPTION . . . . .	281
SECT. 2. HIGHWAYS BY DEDICATION AND ACCEPTANCE . . . . .	282
SUB-SECT. 1. IN GENERAL . . . . .	282
SUB-SECT. 2. INTENTION TO DEDICATE . . . . .	286
SUB-SECT. 3. CAPACITY TO DEDICATE . . . . .	288
A. In General . . . . .	288
B. The Crown . . . . .	288
C. Leaseholders . . . . .	289
D. Limited Owners . . . . .	289
E. Statutory Corporations and Public Trusts . . . . .	290
F. In respect of Copyholds . . . . .	293

	PAGE
SUB-SECT. 4. PROOF OF DEDICATION . . . . .	293
A. In General . . . . .	293
B. User . . . . .	294
(a) In General . . . . .	294
(b) Length of User . . . . .	296
(c) Nature of locus in quo . . . . .	297
(d) User must be Open and as of Right . . . . .	301
(e) Interruption of User . . . . .	302
C. Limited Dedication . . . . .	303
D. Admissibility of Evidence . . . . .	303
SUB-SECT. 5. DEDICATION OF ROADS ALREADY IN EXISTENCE . . . . .	305
SUB-SECT. 6. RESTRICTED OR CONDITIONAL DEDICATION . . . . .	306
A. Restrictions as to Mode of User . . . . .	306
B. Restrictions as to Time of User . . . . .	306
C. Restrictions as to Persons Using . . . . .	307
D. Dedication Subject to Rights of Owners . . . . .	307
E. Dedication Subject to Toll . . . . .	307
F. Dedication Subject to Market Rights . . . . .	307
G. Proof of Limited Dedication . . . . .	307
SUB-SECT. 7. REBUTTAL OF EVIDENCE OF DEDICATION . . . . .	308
SUB-SECT. 8. EXTENT OF DEDICATION . . . . .	308
SUB-SECT. 9. ACCEPTANCE . . . . .	308
A. Under Highway Act, 1835, s. 23 . . . . .	308
B. By Public User . . . . .	309
C. By Acts of Highway Authority . . . . .	309
SECT. 3. HIGHWAYS BY STATUTE . . . . .	311
 PART IV. WIDTH OF HIGHWAYS . . . . .	 312
SECT. 1. DUTY TO WIDEN HIGHWAYS . . . . .	312
SECT. 2. EXTENT OF SPACE SUBJECT TO PUBLIC RIGHT OF PASSAGE . . . . .	312
SUB-SECT. 1. IN GENERAL . . . . .	312
SUB-SECT. 2. WHERE FENCES EXIST . . . . .	313
SUB-SECT. 3. WHERE THERE IS A DITCH . . . . .	315
SUB-SECT. 4. HIGHWAYS SET OUT UNDER LOCAL STATUTES . . . . .	315
SECT. 3. STATUTORY PROVISIONS AS TO WIDTH OF VIA TRITA . . . . .	316
 PART V. RIGHTS IN CONNECTION WITH HIGHWAYS . . . . .	 316
SECT. 1. RIGHTS OF PUBLIC . . . . .	316
SUB-SECT. 1. IN GENERAL . . . . .	316
SUB-SECT. 2. RIGHT OF PASSAGE . . . . .	316
SUB-SECT. 3. RIGHT TO DEVIATE . . . . .	318
SECT. 2. RIGHTS OF OWNER OF SOIL . . . . .	319
SUB-SECT. 1. PRESUMPTION AS TO AND EVIDENCE OF OWNERSHIP OF SOIL OF HIGHWAYS . . . . .	319
A. General Presumption . . . . .	319
B. Presumption in case of Sale or Lease of Land . . . . .	321
C. Roadside Waste . . . . .	323
D. Roads set out under Turnpike Acts . . . . .	324
E. Roads set out under Inclosure Acts . . . . .	325
F. Towing Paths . . . . .	325
SUB-SECT. 2. OWNERS' RIGHTS NOT INCONSISTENT WITH PUBLIC RIGHTS . . . . .	325
A. In General . . . . .	325
B. Right to Interfere with Subsoil . . . . .	326
(a) By Owner . . . . .	326
(b) By Other than Owner . . . . .	326
C. Ownership of Trees and Herbage . . . . .	328
D. Ownership of Air . . . . .	328
E. Enforcement of Rights . . . . .	329
SUB-SECT. 3. STATUTORY VESTING OF HIGHWAYS IN LOCAL AUTHORITIES . . . . .	329

	PAGE
SECT. 3. RIGHT TO ACCESS BY OWNER OF ADJOINING PREMISES . . . . .	332
SUB-SECT. 1. IN GENERAL . . . . .	332
SUB-SECT. 2. NATURE OF RIGHT . . . . .	333
SECT. 4. REMEDIES FOR INTERFERENCE WITH RIGHTS OF ADJOINING OWNERS. . . . .	334
SECT. 5. TOLLS . . . . .	336
SUB-SECT. 1. IN GENERAL . . . . .	336
SUB-SECT. 2. ORIGIN . . . . .	337
SUB-SECT. 3. RECOVERY OF . . . . .	339
SUB-SECT. 4. OFFENCES BY TOLL-KEEPERS . . . . .	339
SUB-SECT. 5. PASSING AND REPASSING . . . . .	340
SUB-SECT. 6. SITUATION OF TOLL-GATES . . . . .	343
SUB-SECT. 7. LIABILITY TO AND EXEMPTION FROM TOLLS. . . . .	343
A. General Exemptions . . . . .	343
B. Under Particular and Local Acts . . . . .	344
(a) Particular Articles or Persons . . . . .	344
(b) Particular Vehicles . . . . .	346
SUB-SECT. 8. EVASION OF . . . . .	349
SUB-SECT. 9. EXTINGUISHMENT . . . . .	351
SUB-SECT. 10. LIABILITY OF BRIDGE TOLLS TO LAND TAX. <i>See</i> LAND TAX.	
SUB-SECT. 11. TOLLS AS APPENDANT TO A MANOR . . . . .	352
SUB-SECT. 12. TOLLS OF MARKETS AND FAIRS. <i>See</i> MARKETS.	
SUB-SECT. 13. HARBOUR TOLLS AND WHARF DUES. <i>See</i> SHIPPING; WATERS AND WATERCOURSES.	

PART VI. REPAIR OF HIGHWAYS . . . . .	352
SECT. 1. STANDARD OF REPAIR . . . . .	352
SECT. 2. MODE OF REPAIR . . . . .	353
SECT. 3. MATERIALS FOR REPAIR OF HIGHWAYS . . . . .	353
SUB-SECT. 1. FROM LAND ALLOTTED OR ACQUIRED FOR THE PURPOSE . . . . .	353
SUB-SECT. 2. FROM OTHER LAND . . . . .	354
A. Waste Land and Foreshore . . . . .	354
B. Inclosed Land . . . . .	356
SECT. 4. CONTRACTS FOR REPAIR OF HIGHWAYS . . . . .	357
SECT. 5. HIGHWAYS REPAIRABLE BY INHABITANTS AT LARGE. . . . .	357
SUB-SECT. 1. IN GENERAL . . . . .	357
SUB-SECT. 2. WHO ARE LIABLE . . . . .	358
SUB-SECT. 3. TO WHAT HIGHWAYS LIABILITY EXTENDS . . . . .	358
A. At Common Law . . . . .	358
B. Highways Constructed under Statute . . . . .	359
(a) Inclosure Acts . . . . .	359
(b) Turnpike Acts . . . . .	360
(c) Local Acts . . . . .	360
C. Under Highway Act, 1835, s. 23 . . . . .	361
SUB-SECT. 4. TO WHAT PLACES LIABILITY ATTACHES . . . . .	363
SUB-SECT. 5. AVOIDANCE OF LIABILITY . . . . .	364
A. By Agreement . . . . .	364
B. By Custom or Prescription . . . . .	365
C. By Statute. . . . .	366
D. Other Cases . . . . .	367
SECT. 6. HIGHWAYS REPAIRABLE BY INDIVIDUALS. . . . .	367
SUB-SECT. 1. IN GENERAL . . . . .	367
SUB-SECT. 2. LIABILITY UNDER STATUTE. . . . .	367
SUB-SECT. 3. PRESCRIPTIVE LIABILITY . . . . .	367

	PAGE
SUB-SECT. 4. LIABILITY RATIONE TENURÆ . . . . .	368
A. In General . . . . .	368
B. Who are Liable . . . . .	368
C. Proof of Liability . . . . .	369
D. Exemption from Highway Rates . . . . .	370
E. Discharge and Termination of Liability. . . . .	371
SUB-SECT. 5. LIABILITY RATIONE CLAUSURÆ . . . . .	372
SECT. 7. TRUSTS FOR REPAIR OF HIGHWAYS . . . . .	372
SECT. 8. EXTINCTION OF LIABILITY TO REPAIR . . . . .	372
SUB-SECT. 1. HIGHWAY STOPPED UP OR ALTERED . . . . .	372
SUB-SECT. 2. PHYSICAL DESTRUCTION OF HIGHWAY. . . . .	372
SUB-SECT. 3. HIGHWAY DECLARED UNNECESSARY . . . . .	373
SECT. 9. APPORTIONMENT OF DIVIDED LIABILITY TO REPAIR . . . . .	373
SECT. 10. TRANSFER OF LIABILITY FROM INDIVIDUALS TO INHABITANTS AT LARGE . . . . .	374
SUB-SECT. 1. UNDER HIGHWAY ACTS . . . . .	374
SUB-SECT. 2. UNDER PUBLIC HEALTH ACTS . . . . .	374
SECT. 11. LIABILITY FOR COLLATERAL REPAIRS . . . . .	374
SUB-SECT. 1. FENCES AND SUPPORTS . . . . .	374
SUB-SECT. 2. CELLARS, GRATINGS, ETC. . . . .	375
PART VII. ENFORCEMENT OF DUTY TO REPAIR . . . . .	375
SECT. 1. MANDAMUS . . . . .	375
SECT. 2. INDICTMENT . . . . .	376
SUB-SECT. 1. IN GENERAL . . . . .	376
SUB-SECT. 2. BY AND AGAINST WHOM PREFERRED . . . . .	376
SUB-SECT. 3. FACTS TO BE ALLEGED AND PROVED . . . . .	377
SUB-SECT. 4. APPEARANCE . . . . .	378
SUB-SECT. 5. EVIDENCE . . . . .	379
A. In General . . . . .	379
B. Record of Previous Proceedings . . . . .	379
C. Reputation. . . . .	380
SUB-SECT. 6. PLEAS OF DEFENDANTS . . . . .	380
SUB-SECT. 7. CERTIORARI . . . . .	381
SUB-SECT. 8. TRIAL AND APPEAL . . . . .	381
A. In General . . . . .	381
B. Judgment and Fine . . . . .	381
C. Appeal and New Trial . . . . .	382
D. Costs. . . . .	383
SECT. 3. STATUTORY REMEDIES . . . . .	383
SUB-SECT. 1. HIGHWAYS IN GENERAL; COMPLAINT TO JUSTICES . . . . .	383
SUB-SECT. 2. HIGHWAYS REPAIRABLE BY INHABITANTS AT LARGE . . . . .	385
A. Complaint by County Council . . . . .	385
B. Complaint by Parties or other Council . . . . .	385
SUB-SECT. 3. HIGHWAYS REPAIRABLE RATIONE TENURÆ . . . . .	385
PART VIII. POWERS, DUTIES AND LIABILITIES OF HIGHWAY AUTHORITIES . . . . .	386
SECT. 1. POWERS AND DUTIES . . . . .	386
SUB-SECT. 1. IN GENERAL . . . . .	386
SUB-SECT. 2. WIDENING AND IMPROVEMENT OF HIGHWAYS . . . . .	386
SUB-SECT. 3. AS TO DITCHES AND DRAINS . . . . .	387
SUB-SECT. 4. AS TO HEDGES AND TREES . . . . .	387
SUB-SECT. 5. REMOVAL OF SNOW AND OTHER OBSTRUCTIONS . . . . .	388
SUB-SECT. 6. CLEANSING OF HIGHWAYS . . . . .	389
SUB-SECT. 7. FENCING HIGHWAYS . . . . .	389
SUB-SECT. 8. RESTRICTION OF TRAFFIC . . . . .	390
SUB-SECT. 9. AS TO ROADSIDE WASTE AND MARGINS . . . . .	391

	PAGE
SUB-SECT. 10. PROTECTION OF PUBLIC RIGHTS OF WAY . . . . .	391
SUB-SECT. 11. LIGHTING HIGHWAYS AND STREETS . . . . .	392
A. In General . . . . .	392
B. In Urban Districts . . . . .	393
C. In Rural Districts . . . . .	393
D. Injury to Street Lamps . . . . .	394
SUB-SECT. 12. AS TO BUILDING LINES . . . . .	395
SECT. 2. EXPENSES . . . . .	395
SUB-SECT. 1. OF COUNTY COUNCILS . . . . .	395
SUB-SECT. 2. OF BOROUGH, URBAN OR OTHER COUNCILS . . . . .	390
SECT. 3. ACCOUNTS. <i>See</i> LOCAL GOVERNMENT.	
SECT. 4. ILLEGAL EXPENDITURE . . . . .	397
SECT. 5. LIABILITIES . . . . .	398
SUB-SECT. 1. LIABILITY AS HIGHWAY AUTHORITY . . . . .	398
A. For Non-Feasance . . . . .	398
B. For Misfeasance . . . . .	404
(a) In General . . . . .	404
(b) For Acts of Employees . . . . .	408
(c) For Acts of Contractors and Agents . . . . .	409
SUB-SECT. 2. LIABILITY AS SANITARY AUTHORITY . . . . .	410
SUB-SECT. 3. LIABILITY IN RESPECT OF STATUTORY UNDERTAKINGS . . . . .	413
SUB-SECT. 4. SUMMARY PROCEEDINGS . . . . .	413
PART IX. NUISANCES AND REMEDIES . . . . .	413
SECT. 1. NUISANCES . . . . .	413
SUB-SECT. 1. OBSTRUCTIONS . . . . .	413
A. In General . . . . .	413
B. "Wilful Obstruction". . . . .	415
C. Inappreciable Obstruction . . . . .	416
D. Obstruction in Footway . . . . .	416
E. Gates and Posts . . . . .	419
F. Rail Tracks . . . . .	419
G. Breaking Open or Failing to Reinstate Road . . . . .	420
H. Subsidence of Road . . . . .	421
I. Playing Games on Highway. . . . .	422
J. Swing Bridges . . . . .	422
K. Use of Road for Trade Purposes . . . . .	422
(a) In General . . . . .	422
(b) Markets and Fairs . . . . .	423
(c) Goods Exposed or Deposited in Street . . . . .	423
i. In General . . . . .	423
ii. Streets in Metropolitan Area . . . . .	423
L. Vehicles . . . . .	425
M. Refuse . . . . .	427
N. Trees . . . . .	427
O. Materials for Road Repairs . . . . .	427
P. Assembly of Crowds . . . . .	427
Q. Dedication Subject to Obstruction . . . . .	427
SUB-SECT. 2. NUISANCES ARISING FROM THEATRES, EXHIBITIONS, ETC. . . . .	427
SUB-SECT. 3. ANIMALS ON THE HIGHWAY . . . . .	429
SUB-SECT. 4. LOCOMOTIVES, ETC., ON HIGHWAY . . . . .	430
SUB-SECT. 5. DANGEROUS AND EXTRAORDINARY TRAFFIC . . . . .	432
SUB-SECT. 6. DANGERS ARISING FROM BUILDINGS . . . . .	433
SUB-SECT. 7. DANGEROUS WALLS AND FENCES . . . . .	434
SUB-SECT. 8. OMISSION TO FENCE DANGEROUS PLACES . . . . .	434
SUB-SECT. 9. EXPLOSIVE AND INFLAMMABLE SUBSTANCES . . . . .	434
SUB-SECT. 10. INFECTED PERSONS OR ANIMALS ON HIGHWAY . . . . .	434
SUB-SECT. 11. ENCROACHMENTS . . . . .	435

	PAGE
SUB-SECT. 12. FIRES NEAR HIGHWAY . . . . .	436
SUB-SECT. 13. ENGINES AND MACHINERY NEAR HIGHWAY . . . . .	436
SUB-SECT. 14. VEHICLES, ETC., LEFT ON ROADSIDE . . . . .	437
SUB-SECT. 15. OFFENCES IN CONNECTION WITH RIDING AND DRIVING . . . . .	437
SUB-SECT. 16. WATER OR SNOW ON HIGHWAY. . . . .	439
SUB-SECT. 17. UNDERMINING ROADS OR SUPPORTS . . . . .	439
SUB-SECT. 18. SANITARY CONVENIENCES . . . . .	440
SUB-SECT. 19. NUISANCES ARISING FROM EXERCISE OF STATUTORY POWERS . . . . .	440
SUB-SECT. 20. MALICIOUS INJURY . . . . .	440
SUB-SECT. 21. HOARDINGS . . . . .	440
SUB-SECT. 22. OTHER CASES . . . . .	440
SECT. 2. DEFENCES . . . . .	440
SUB-SECT. 1. ABATEMENT BEFORE TRIAL OF INDICTMENT . . . . .	440
SUB-SECT. 2. BENEFIT TO PUBLIC. . . . .	440
SUB-SECT. 3. CONSENT OF HIGHWAY AUTHORITIES . . . . .	440
SUB-SECT. 4. CUSTOM OR USAGE . . . . .	441
SUB-SECT. 5. PRESCRIPTION . . . . .	441
SUB-SECT. 6. DEDICATION SUBJECT TO OBSTRUCTION . . . . .	441
SUB-SECT. 7. EXERCISE OF STATUTORY POWERS . . . . .	444
SUB-SECT. 8. INAPPRECIABLE EXTENT OF NUISANCE . . . . .	446
SUB-SECT. 9. ACQUIESCENCE BY PLAINTIFF IN NUISANCE . . . . .	446
SUB-SECT. 10. CONTRIBUTORY NEGLIGENCE OF PLAINTIFF. . . . .	446
SUB-SECT. 11. REMOTENESS OF DAMAGE . . . . .	448
SECT. 3. REMEDIES . . . . .	448
SUB-SECT. 1. ABATEMENT OF NUISANCE . . . . .	448
A. By Private Person . . . . .	448
B. By Local and Highway Authorities . . . . .	449
SUB-SECT. 2. ACTION BY ATTORNEY-GENERAL—INJUNCTION . . . . .	450
SUB-SECT. 3. ACTION BY PRIVATE PERSON . . . . .	452
A. When Maintainable . . . . .	452
B. Sufficiency of Damage Sustained . . . . .	453
SUB-SECT. 4. STATUTORY COMPENSATION IN LIEU OF ACTION . . . . .	454
SUB-SECT. 5. PROCEEDINGS BY LOCAL AND HIGHWAY AUTHORITIES . . . . .	455
SUB-SECT. 6. INDICTMENT . . . . .	456
SUB-SECT. 7. SUMMARY PROCEEDINGS UNDER HIGHWAY ACTS . . . . .	457
A. Jurisdiction of Justices . . . . .	457
B. Who may Institute Proceedings . . . . .	459
C. Form of Order . . . . .	459
D. Removal of Obstruction . . . . .	459
E. Time for Commencement of Proceedings . . . . .	459
F. Appeals . . . . .	459
PART X. INTERFERENCE WITH HIGHWAYS UNDER STATUTORY POWERS . . . . .	460
PART XI. EXCESSIVE WEIGHT AND EXTRAORDINARY TRAFFIC . . . . .	460
SECT. 1. EXCESSIVE WEIGHT . . . . .	460
SECT. 2. EXTRAORDINARY TRAFFIC . . . . .	462
SUB-SECT. 1. IN GENERAL . . . . .	462
SUB-SECT. 2. HOW CHARACTER DETERMINED . . . . .	463
SUB-SECT. 3. RELATION TO NORMAL INCREASE OF TRAFFIC . . . . .	463
SUB-SECT. 4. TRAFFIC ARISING FROM LOCAL INDUSTRY . . . . .	464
A. In General . . . . .	464
B. Stone Quarrying . . . . .	464
C. Timber Haulage . . . . .	466
SECT. 3. WHO ARE LIABLE . . . . .	467
SUB-SECT. 1. BEFORE LOCOMOTIVES ACT, 1898 . . . . .	467
SUB-SECT. 2. SINCE LOCOMOTIVES ACT, 1898 . . . . .	468



	PAGE
SECT. 4. RECOVERY OF EXPENSES . . . . .	470
SUB-SECT. 1. IN GENERAL . . . . .	470
SUB-SECT. 2. CERTIFICATE OF SURVEYOR. . . . .	471
SUB-SECT. 3. PERIOD OF LIMITATION . . . . .	472
SUB-SECT. 4. IN WHAT COURT RECOVERABLE . . . . .	474
SUB-SECT. 5. MEASURE OF DAMAGES . . . . .	475
SECT. 5. INJUNCTION TO RESTRAIN . . . . .	475
PART XII. STOPPING-UP OR DIVERSION OF HIGHWAYS . . . . .	476
SECT. 1. AT COMMON LAW . . . . .	476
SUB-SECT. 1. IN GENERAL . . . . .	476
SUB-SECT. 2. FORMER PROCEDURE . . . . .	476
SECT. 2. STATUTORY PROVISIONS . . . . .	476
SUB-SECT. 1. IN GENERAL . . . . .	476
SUB-SECT. 2. UNDER HIGHWAY ACTS . . . . .	477
A. Conditions Requisite . . . . .	477
B. Jurisdiction of Justices . . . . .	479
C. Consent . . . . .	479
D. Notices . . . . .	480
E. Justices' Certificates . . . . .	481
(a) Form . . . . .	481
(b) Enrolment . . . . .	483
F. Appeals . . . . .	483
(a) In General . . . . .	483
(b) Who may Appeal. . . . .	484
(c) Notice of Appeal . . . . .	484
(d) Costs . . . . .	485
G. Effect of Order for Diversion . . . . .	485
H. Presumption of Lost Order . . . . .	486
SUB-SECT. 3. UNDER CHURCH BUILDING ACTS. . . . .	487
SUB-SECT. 4. UNDER INCLOSURE ACTS . . . . .	487
SUB-SECT. 5. UNDER RAILWAY ACTS. <i>See RAILWAYS.</i>	
PART XIII. STREETS . . . . .	487
SECT. 1. METROPOLITAN . . . . .	487
SUB-SECT. 1. STATUTES, AUTHORITIES AND AREAS . . . . .	487
A. Statutes and Authorities . . . . .	487
(a) In General . . . . .	487
(b) City of London, Precincts, etc. . . . .	487
B. Saving Clauses and Exceptions . . . . .	487
SUB-SECT. 2. VESTING, CONTROL, REPAIR AND IMPROVEMENT . . . . .	487
A. Vesting and Control . . . . .	487
B. Repair and Improvement . . . . .	488
SUB-SECT. 3. PAVING NEW STREET. . . . .	489
A. What is a New Street . . . . .	489
B. Width of Carriageway and Footway . . . . .	489
C. What amounts to Paving . . . . .	489
D. Liability of Owners of Adjoining Property . . . . .	489
(a) In General . . . . .	489
(b) Who are Owners . . . . .	490
(c) Exempted Premises . . . . .	493
(d) Land and Premises Forming, Fronting or Abutting . . . . .	493
(e) Successive Owners . . . . .	496
E. Apportionment of Expenses by Local Authority . . . . .	496
(a) In General . . . . .	496
(b) Mode of Apportionment . . . . .	497
(c) Conclusiveness of Apportionment . . . . .	498
(d) Recovery of Amount Apportioned . . . . .	499
(e) Recovery of Amount Wrongly Paid . . . . .	500
F. Liability as between Landlord and Tenant . . . . .	500

	PAGE
SUB-SECT. 4. TEMPORARY REPAIRS TO PRIVATE STREETS . . . . .	500
SUB-SECT. 5. FLAGGING AND PAVING OF FOOTWAYS, COURTS, ETC. . . . .	500
SUB-SECT. 6. CLOSING OF COURTS AND ALLEYS . . . . .	500
SUB-SECT. 7. BUILDING LINE . . . . .	501
A. In General . . . . .	501
B. Re-Erection of Buildings . . . . .	502
C. What is a Building or Structure . . . . .	502
D. Decision of Superintending Architect . . . . .	504
E. Works Authorised by Special Acts . . . . .	507
F. Proceedings for Infringement of Line . . . . .	508
SUB-SECT. 8. SPACE IN FRONT OF BUILDINGS . . . . .	509
SUB-SECT. 9. FORMATION, ADAPTATION AND ALTERATION OF STREETS . . . . .	510
SUB-SECT. 10. PROJECTIONS . . . . .	513
SUB-SECT. 11. DANGEROUS STRUCTURES . . . . .	514
SUB-SECT. 12. CONSTRUCTION OF ARCHES, ETC., BENEATH PUBLIC WAYS . . . . .	514
SUB-SECT. 13. BUILDINGS ERECTED IN NEW STREETS . . . . .	514
SUB-SECT. 14. BREAKING UP STREETS . . . . .	515
SUB-SECT. 15. LIGHTING STREETS . . . . .	515
SUB-SECT. 16. POSTS AND RAILS . . . . .	516
SUB-SECT. 17. SANITARY CONVENIENCES . . . . .	516
SUB-SECT. 18. HOARDINGS . . . . .	516
SUB-SECT. 19. VAULTS UNDER STREETS . . . . .	517
SUB-SECT. 20. SUBWAYS. . . . .	517
SUB-SECT. 21. NAMING OF STREETS AND ALTERATION OF NUMBERS . . . . .	517
SUB-SECT. 22. EXCAVATION . . . . .	517
SUB-SECT. 23. DEMOLITION OF BUILDINGS . . . . .	518
SUB-SECT. 24. RECOVERY OF EXPENSES BY LOCAL AUTHORITY. . . . .	518
SECT. 2. EXTRA METROPOLITAN . . . . .	518
SUB-SECT. 1. VESTING AND CONTROL OF STREETS . . . . .	518
SUB-SECT. 2. WIDENING AND IMPROVEMENT . . . . .	519
SUB-SECT. 3. MAKING UP AND REPAIR OF STREETS . . . . .	519
SUB-SECT. 4. MAKING UP AND PAVING PRIVATE STREETS. . . . .	520
A. Under Public Health Acts . . . . .	520
(a) Powers of Rural Authority . . . . .	520
(b) Street or Part of Street Repairable by Inhabitants at Large . . . . .	520
(c) Preparation of Plans and Estimates . . . . .	521
(d) Premises "Fronting, Adjoining or Abutting" . . . . .	522
(e) Exempted Premises . . . . .	522
i. Crown Property . . . . .	522
ii. Agreement with Local Authority, etc . . . . .	522
iii. Churches, Chapels and Schools . . . . .	522
iv. Other Cases . . . . .	523
(f) Paving Notice . . . . .	523
i. Service . . . . .	523
ii. Form and Contents . . . . .	525
iii Deviation from Notice . . . . .	527
(g) Width of Carriageway and Footway . . . . .	527
(h) Paving and Levelling . . . . .	527
(i) Sewering . . . . .	527
(j) Recurring Liability . . . . .	529
(k) Execution of Work by Local Authority on Default of Frontager . . . . .	529
(l) Apportionment of Expenses . . . . .	530
i. In General . . . . .	530
ii. Notice to Dispute Apportionment . . . . .	530
iii. Proceedings before Arbitrator . . . . .	530

	PAGE
(m) Recovery of Expenses . . . . .	532
i. Demand for Payment . . . . .	532
ii. " Owner in Default " . . . . .	533
iii. Summary Proceedings . . . . .	533
iv. Proceedings in County Court . . . . .	535
v. Limitation of Time . . . . .	535
(n) Private Improvement Expenses . . . . .	535
(o) Payment by Instalments . . . . .	536
(p) Statutory Charges on Premises . . . . .	536
(q) Appeal to Ministry of Health . . . . .	538
(r) Tenant for Life and Remainderman . . . . .	538
(s) Landlord and Tenant . . . . .	539
(t) Vendor and Purchaser . . . . .	539
B. Private Street Works Act, 1892 . . . . .	539
(a) Area of Operation of the Act. . . . .	539
(b) Application of Public Health Acts . . . . .	539
(c) Adoption of the Act . . . . .	539
(d) Street or Part of Street. . . . .	539
(e) Width of Carriageway and Footway . . . . .	540
(f) What Premises are Chargeable . . . . .	540
i. Premises " Fronting, Adjoining or Abutting " . . . . .	540
ii. " Access through Court, Passage or otherwise " . . . . .	541
iii. Exempted Premises . . . . .	542
(g) Plans and Estimates . . . . .	542
(h) Provisional Apportionment . . . . .	543
i. Approval by Local Authority . . . . .	543
ii. Notice of Objections . . . . .	543
iii. Grounds of Objections . . . . .	543
iv. Hearing of Objections . . . . .	544
v. Appeals . . . . .	545
(i) Final Apportionment . . . . .	545
i. Notice of Apportionment . . . . .	545
ii. Recovery of Expenses . . . . .	545
iii. Objections to Final Apportionment . . . . .	546
(j) Contribution to Expenses by Local Authority . . . . .	547
(k) Charge by Limited Owners . . . . .	547
(l) Expenses of Local Authority . . . . .	547
(m) Power to Borrow. . . . .	547
(n) Accounts and Application of Money . . . . .	547
C. Local Acts . . . . .	547
(a) Execution of Works . . . . .	547
i. In General . . . . .	547
ii. Notice to Frontagers . . . . .	548
iii. " Paving and Levelling " . . . . .	549
iv. " Streets " . . . . .	549
(b) Charges and Expenses . . . . .	550
i. Premises adjoining Street . . . . .	550
ii. Apportionment amongst Owners . . . . .	550
iii. Recovery of Expenses . . . . .	551
iv. Appeals . . . . .	552
SUB-SECT. 5. LIGHTING STREETS . . . . .	552
SUB-SECT. 6. CONSTRUCTION OF NEW STREETS . . . . .	552
A. In General . . . . .	552
B. Validity of Bye-Laws . . . . .	552
C. Deposit and Approval of Plans . . . . .	556
D. " Laying out " New Street . . . . .	556
E. Width of Street . . . . .	558
F. Enforcement of Bye-Laws . . . . .	558
SUB-SECT. 7. BUILDING LINE IN STREETS . . . . .	559
A. Under Public Health (Buildings in Streets) Act, 1888 . . . . .	559
(a) " Written Consent " to Erect or Bring Forward . . . . .	559
(b) " Erect or Bring Forward " . . . . .	560
(c) " House or Building " . . . . .	560

	PAGE
(d) "Street" . . . . .	580
(e) "Front Main Wall of the House on Either Side" . . . . .	580
(f) House or Building "on Either Side" . . . . .	581
(g) House or Building "in Same Street" . . . . .	581
(h) "Addition to House or Building" . . . . .	582
(j) Proceedings for Infringement of Statute . . . . .	582
B. Under Public Health Acts . . . . .	583
C. Under Towns Improvement Clauses Act, 1817 . . . . .	584
D. Under Local Acts . . . . .	584
SUB-SECT. 8. IMPROVEMENT LINE IN STREETS . . . . .	585
SUB-SECT. 9. BREAKING UP STREETS . . . . .	585
SUB-SECT. 10. PROJECTIONS IN STREETS . . . . .	585
SUB-SECT. 11. DOORS AND GATES OPENING OUTWARDS ON TO STREETS . . . . .	586
SUB-SECT. 12. WATER SPOUTS TO HOUSES . . . . .	586
SUB-SECT. 13. VAULTS, CELLARS AND ARCHES UNDER STREETS . . . . .	586
SUB-SECT. 14. FENCES, HOARDINGS AND REFUGES . . . . .	586
SUB-SECT. 15. NAMING OF STREETS . . . . .	587
SUB-SECT. 16. VALIDITY OF BYE-LAWS . . . . .	587
PART XIV. FOOTPATHS . . . . .	588
SECT. 1. IN GENERAL . . . . .	588
SECT. 2. GATES AND STILES . . . . .	589
SECT. 3. STEPPING-STONES AND FOOTBRIDGES . . . . .	589
SECT. 4. GUARD POSTS . . . . .	570
PART XV. BRIDGES AND APPROACHES THERETO . . . . .	571
SECT. 1. IN GENERAL . . . . .	571
SECT. 2. REPAIR OF BRIDGES . . . . .	571
SUB-SECT. 1. LIABILITY TO REPAIR . . . . .	571
A. County Council . . . . .	571
(a) In General . . . . .	571
(b) Bridges super flumen vel cursum aquæ . . . . .	572
(c) Bridges built or repairable by Turnpike Trustees . . . . .	573
(d) Bridges built by Private Individuals . . . . .	575
i. In Existing Highway . . . . .	575
ii. Not in Existing Highway . . . . .	575
iii. Bridges built before or after 1803 . . . . .	575
B. Borough Council . . . . .	576
C. Urban and Rural Highway Authorities . . . . .	576
D. Hundred, Township and Parish . . . . .	577
E. Individuals . . . . .	577
(a) In General . . . . .	577
(b) Liability ratione tenuræ . . . . .	579
(c) Bridges necessitated by Interference with Highway . . . . .	580
i. In General . . . . .	580
ii. Railway and Canal Bridges . . . . .	580
F. Statutory Companies . . . . .	582
G. Alteration of Boundaries of Local Authorities . . . . .	582
H. New and Improved Bridges . . . . .	583
I. Enforcement of Liability . . . . .	583
(a) In General . . . . .	583
(b) Indictment . . . . .	583
(c) Evidence . . . . .	584
SUB-SECT. 2. EXTENT OF REPAIR . . . . .	585
A. Reconstruction . . . . .	585
B. Approaches and Roadway . . . . .	585
(a) Public Authorities . . . . .	585
(b) Individuals . . . . .	586
(c) Statutory Companies . . . . .	586
SUB-SECT. 3. INJURY ARISING FROM NON-REPAIR . . . . .	587



a right can be acquired. . . . There is no such right as that known to the law. Therefore, there must be a definite terminus, & a more or less definite direction (WILLS, J.).

(3) Where the right of passage exists on the part of the public, & where the road over a common or an unenclosed space, or anything of that kind which would naturally be taken, is foundrou or is allowed to become foundrous, the public . . . have a right to deviate right or left in order to get along upon those parts that are less foundrou (WILLS, J.).

(4) Repair by the parish is always if it is made out, a strong indication of the public right. It is a burden accepted by the parish which would not be accepted unless there was a public way (WILLS, J.).—*EYRE v. NEW FOREST HIGHWAY BOARD* (1892), 56 J. P. 517; *on appeal*, 8 T. L. R. 648, C. A.

*Annotations:—As to (1) Consd.* Shearburn v. Chertsey R. D. C. (1914), 78 J. P. 289. *Reid.* A.-G. v. Antrobus, [1905] 2 Ch. 188; Paris v. Lymington R. D. C. (1911), 75 J. P. Jo 88. *As to (2) Consd.* Robinson v. Cowpen L. B. (1893) 62 L. J. Q. B. 619; Moser v. Ambleside U. D. C. (1925) 89 J. P. 118. *Reid.* Tyne Improvement Comrs. v. Imrie A.-G. v. Tyne Improvement Comrs. (1899), 81 L. T. 174. *As to (4) Reid.* Campbell Davys v. Lloyd, [1901] 2 Ch. 518; Leigh U. C. v. King, [1901] 1 K. B. 717; Brockman v. Folkestone Corp. (1911), 76 J. P. 99; Cababé v. Walton-upon-Thames District Council, [1912] 2 K. B. 432.

**Distinguished from easement.]—***See* Nos. 486, 487, *post*.

6. Over what highway may exist—Way leading to navigable river.]—*R. v. ST. ISSEY (INHABITANTS)* (1840), 14 L. T. O. S. 176; 13 J. P. Jo. 745.

— **Or ferry—Presumption of dedication.]—***See* No. 52, *post*.

7. — **Common — Whether jus spatiaudi included.]—***EYRE v. NEW FOREST HIGHWAY BOARD*, No. 5, *ante*.

8. — — — — —.]—*BLUNDELL v. CATTERALL*, No. 18, *post*.

*See, generally*, OPEN SPACES.

9. — **Artificial structure — Erected under statutory powers.]—***Ptfs.*, the Improvement Comrs. of the river T., acquired certain lands & constructed a pier under statutory powers, the work being done at intervals between the years 1854 & 1891. The public were in the habit of using the pier as a promenade & for various purposes of pleasure & recreation, & *ptfs.* alleged that they never desired nor intended to prevent the public from so using it as a matter of favour. Finding, however, that a claim as of right was being set up, *ptfs.*, on Dec. 21, 1897, placed barriers across the landward end of the pier, & ordered the pier to be closed for twenty-four hours. Thereupon the mayor & other officers of the adjoining borough of S., being refused admission broke down the barriers & also certain permanent gates across the pier. *Ptfs.* now sued them for the trespass. At the same time an action was brought against the comrs. in the name of the A.-G. alleging that the said pier & the several parts thereof had been from time to time dedicated to the use of & accepted by the public as a common & public highway:—*Held*: (1) a right of way could exist over a structure erected under statutory powers; (2) an owner might dedicate his land for purposes of recreation; (3) *ptfs.* must be presumed to have dedicated a

simple right of way within certain assigned limits. —*TYNE IMPROVEMENT COMRS. v. IMRIE, A.-G. v. TYNE IMPROVEMENT COMRS.* (1899), 81 L. T. 174, 10. Once a highway always a highway.]—*DAWES v. HAWKINS*, No. 270, *post*.

11. — — —.]—*LEE v. PATRICK* (1864), 28 J. P. Jo. 276.

12. — **Effect of disuse.]—***HARVEY v. TRURO RURAL COUNCIL*, No. 454, *post*.

13. — **River.]—***SIMPSON v. A.-G.*, No. 106, *post*.

14. — — —.]—A triangular piece of ground, on one side bordering a river & contiguous to a bridge, & on another formerly open to an ancient highway leading to the bridge, was fenced in 1871 by the then highway authority to prevent nuisance, the fence extending from the bridge to the wall of a house which formed the third side. The person who since 1890 had owned the house treated the ground as his own, & *ptfs.* as highway authority brought this action to establish their right to remove the fence at will:—*Held*: on evidence of user before the fencing, the ground was a public highway between the land & the river, & was also part of the highway to the bridge, & the erection of the fence did not prevent its being a highway.

The true view is that this was part of a very ancient highway, & once a highway always a highway (SWINFEN-EADY, J.).—*ST. IVES CORPN. v. WADSWORTH* (1908), 72 J. P. 73; 6 L. G. R. 306.

— **Effect of closing one end—Highway becoming a cul-de-sac.]—***See* Nos. 45, 46, *post*.

15. — **Effect of closing both ends.]—***BAILEY v. JAMIESON*, No. 4, *ante*.

**Closing & diversion of highways generally.]—***See* Part XII, *post*.

16. Carriage way—Includes footway.]—*DAVIES v. STEPHENS*, No. 219, *post*.

17. — — —.]—I apprehend that the free right of way with horses, carts, waggons, or carriages, gives also a right of way without horses, carts, waggons, or carriages. The greater right carries with it the lesser (AMPHLETT, L.J.).—*WELLS v. LONDON, TILBURY & SOUTHEND RY. CO.* (1877), 5 Ch. D. 126; 37 L. T. 302; 41 J. P. 452; 25 W. R. 325, C. A.

18. Foreshore—Not a highway.]—The public have no common law right of bathing in the sea; & as incident thereto, of crossing the sea shore on foot, or with bathing machines, for that purpose.

Many persons who reside in the vicinity of wastes & commons, walk or ride on horseback, in all directions, over them, for their health & recreation; & sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering places, this practice prevails to a very great degree; yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil (ABBOT, C.J.).—*BLUNDELL v. CATTERALL* (1821), 5 B. & Ald. 268; 106 E. R. 1190.

*Annotations:—Folld.* Llandudno U. C. v. Woods, [1899] 2 Ch. 705; Brinkman v. Matley, [1904] 2 Ch. 313. *Reid.* A.-G. v. Chambers (1851), 4 De G. M. & G. 206; Free Fishers & Druggers of Whitstable Co. v. Gaun (1863), 13 C. B. N. S. 853; Robinson v. Cowper L. B. (1893), 62 L. J. Q. B. 619; Behrens v. Richards, [1905] 2 Ch. 614; Fitzhardinge v. Purcell, [1908] 2 Ch. 139. *Montd.* Bonest

the road.—*HARRENDRO COOMAR CHOWDHRY v. PARAMONKE CHOWDHRAIN* (1879), 7 C. L. R. 272.—*IND.*

*e. Roads of joint stock companies.]—*Roads of joint stock cos. are not public roads or highways within 22 Vict. c. 54, s. 336.—*K. v. BROWN*

(1863), 13 C. P. 356.—*CAN.*

*d. Allowance for road—Lying between two counties.]—**Semble*: an allowance for road lying between two counties, but not opened, is a road within 22 Vict. c. 54, s. 326.—*RE WATERLOO COUNTY CORPN. & BRANT*

*COUNTY CORPN.* (1864), 23 U. C. R. 537.—*CAN.*

*e. Streets laid out by Crown surveyor—Not staked out—& never used.]—*Streets laid out under C. S. U. C. c. 54, s. 313, in the original plan of a town by

**Sect. 1.—Highway: Sub-sects. 1, 2 & 3.]**

v. Pipon (1829), 1 Knapp, 80; Tyson v. Smith (1839), 9 Ad. & El. 406; Beaufort v. Swansea Corp'n. (1849), 3 Exch. 413; A.-G. v. Hammer (1858), 27 L. J. Ch. 837; A.-G. v. Tomline (1879), 40 L. T. 775; Ilchester v. Raishleigh (1889), 61 L. T. 477; Parker v. Clegg (1903), 2 L. G. R. 608; Mercer v. Denne, [1904] 2 Ch. 534; Foster v. Warblington U. C., [1906] 1 K. B. 648; Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171.

19. ———.]—(1) The public have no right at common law to enter upon the foreshore except for the purpose of navigation or fishing. They are not entitled to cross the shore even for the purpose of bathing or amusement.

(2) The sands of the seashore are not in the full sense of the word a highway.

(3) A more extended right to use the foreshore may be gained by prescription or by custom either by individuals or by the temporary or permanent inhabitants of the place in which the foreshore is situate, but the existence of this more extensive right must be proved, & will not be presumed in the absence of proof.—*LLANDUDNO URBAN COUNCIL v. WOODS*, [1899] 2 Ch. 705; 68 L. J. Ch. 623; 81 L. T. 170; 63 J. P. 775; 48 W. R. 43; 43 Sol. Jo. 689.

*Annotations:—As to (1)* *Reid*, Brinkman v. Matley, [1904] 2 Ch. 313. *Generally, Reid*, Behrens v. Richards, [1905] 2 Ch. 614. *Mentid*, Yeatman v. Lombarger, [1912], 107 L. T. 742; A.-G. v. Sewell (1918), 68 L. J. K. B. 425.

20. ———.]—The public have no common law right to use the foreshore or to pass & repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner.—*BRINKMAN v. MATLEY*, [1904] 2 Ch. 313; 73 L. J. Ch. 642; 91 L. T. 429; 68 J. P. 534; 20 T. L. R. 671; 48 Sol. Jo. 639; 2 L. G. R. 1057, C. A.

*Annotations:—Reid*, Behrens v. Richards, [1905] 2 Ch. 614; Lushardinge v. Purcell, [1908] 2 Ch. 139.

*See, generally, WATERS & WATERCOURSES.*

21. **Wastes or commons.]**—*BLUNDELL v. CATTERALL*, No. 18, *ante*.

**SUB-SECT. 2.—KINDS OF HIGHWAY.**

22. **King's highway—Distinguished from footway.]**—*ANON.* (1546), Moore, K. B. 5; 72 E. R. 400.

23. ———.]—*R. v. SAINTIEFF*, No. 26, *post*.

24. ———.]—Same as “communis strata.”—An indictment for a nuisance “in communis strata sine alta via regia,” is good.—*R. v. HAMMOND* (1717), 10 Mod. Rep. 382; 1 Stra. 44; 88 E. R. 779.

*Annotation:—Reid*, R. v. Haddock (1737), Andr. 137.

25. ———.]—**Turnpike road under temporary Act—Temporary Act continued.]**—*R. v. LORDSMERE* (INHABITANTS), No. 863, *post*.

26. ———.]—**Distinguished from bridleway.]**—“Highway” is the *genus* of all public ways, as well cart, horse, & footways; & yet an indictment lies for any one of these ways, if they be common to all the Queen's subjects having occasion to pass there; that is, if it be a footway only common to them all, or a horseway & a prime-way; & these are not *altæ regie viæ*, for that is the great highway common to cart, horse & foot, that please to use it (*HOLT, O.J.*).—*R. v. SAINTIEFF* (1704), 6

Mod. Rep. 255; Holt, K. B. 129; 2 Ld. Raym. 1174; 1 Salk. 359; 87 E. R. 1002.

27. ———.]—**Distinguished from packway.]**—*R. v. SAINTIEFF*, No. 26, *ante*.

28. **Bridleway.]**—*R. v. SAINTIEFF*, No. 26, *ante*.

29. ———.]—*R. v. SALOP* (INHABITANTS), No. 32, *post*.

30. **Pack & prime-way.]**—*R. v. SAINTIEFF*, No. 26, *ante*.

31. **Footway.]**—*R. v. SAINTIEFF*, No. 26, *ante*.

32. ———.]—There is no doubt that a public footway or bridleway is a highway (*LORD ELLENBOROUGH, C.J.*).—*R. v. SALOP* (INHABITANTS) (1810), 13 East, 95; 104 E. R. 303.

*Annotation:—Mentid*, R. v. Sutton Coldfield Overseers (1874), L. R. 9 Q. B. 153.

33. **Ferry—In nature of highway.]**—A ferry is in nature of a highway (*PARKER, C.*).—*HILTON v. SCARBOROUGH* (LORD) (1714), 2 Eq. Cas. Abr. 171; 22 E. R. 147, L. C.

*See, generally, FERRIES*, Vol. XXIV., pp. 968 *et seq.* **Foreshore.]**—*See* Nos. 18–20, *ante*.

34. **Towing path.]**—The public are not entitled at common law to tow on the banks of ancient navigable rivers.—*BALL v. HERBERT* (1789), 3 Term Rep. 253; 100 E. R. 560.

*Annotations:—Connad*, Blundell v. Catterall (1821), 5 B. & Ald. 268. *Expld*, Winch v. Thames Conservators (1872), L. R. 7 C. P. 458. *Reid*, Colchester Corp'n. v. Brooke (1845), 7 Q. B. 339. *Mentid*, A.-G. v. Tomline (1879), 12 Ch. D. 214.

35. ———.]—Defts. were a corp'n. constituted for the purpose of the upper navigation of the river Thames by Thames Navigation Act, 1866 (c. 89) & under that Act & the previous statutes relating to such navigation, defts. acquired for the public by parol agreement with the owners of the land, the use of the towing paths along the river, & the right to take toll, which they accordingly took, for the use of such towing paths as well as for the use of the navigation generally:—*Held*: (1) defts. had power to maintain & repair the towing path, & having invited the public to use it, & taken toll as they were authorised to do for the use of it, they were bound to take reasonable care that it was in a reasonably fit condition to be used as a towing path; (2) the towing path was not confined to the mere beaten track made by single horses towing down the stream, but included also so much of the bank as was necessary & proper for the purpose of towing barges.

Although there is no public right at common law of towing on the banks of a navigable river, there may be a good dedication of the banks to the public for limited purpose of towing.—*WINCH v. THAMES CONSERVATORS* (1872), L. R. 7 C. P. 458; 41 L. J. C. P. 241; 27 L. T. 95; 36 J. P. 646; 20 W. R. 949; *affd.* (1874), L. R. 9 C. P. 378, Ex. Ch. *Annotations:—As to (1)* *Reid*, Forbes v. Lee Conservancy Board (1879), 4 Ex. D. 116; Gridley v. Thames Conservators (1886), 2 T. L. R. 469; Thames Conservators v. Kent, [1918] 2 K. B. 272. *As to (2)* *Reid*, Lee Conservancy Board v. Button (1879), 12 Ch. D. 383. *Generally, Mentid*, Thomas v. Quartermaine (1887), 18 Q. B. D. 665; Yarmouth v. France (1887), 19 Q. B. D. 647; Nesbitt v. Mablethorpe U. D. C., [1918] 2 K. B. 1.

*See, generally, RAILWAYS; WATERS & WATERCOURSES.*

36. **River.]**—A public right of navigation in a river or creek may be extinguished either by an Act of Parliament or writ of *ad quod damnum* &

the Crown surveyor are public highways, though not staked out upon the ground, & never opened or used.—*R. v. GREAT WESTERN RY. CO.* (1862), 21 U. C. R. 555.—*CAN.*

**PART I. SECT. 1, SUB-SECT. 2.**

34 i. **Towing path.]**—The trackway along a canal, vested in the Grand

Canal Company by 11 & 12 Geo. 3 (I. r.), c. 31, is a public highway.—*R. v. RATHMINES & RATHGAR IMPROVEMENT COMRS.* (1864), 11 L. T. 281.—*IR.*

1. **Statute labour road.]**—Statute labour had been performed on parts of a road, but only to a very limited extent:—*Held*: not sufficient to establish the road as a public highway under

22 Vict. c. 51.—*R. v. HALL* (1866), 17 C. P. 282.—*CAN.*

g. **Roads laid out by private persons—Not highways before dedication.]**—*VANNATTA v. UPLANDS, LTD.* (1913), 25 W. L. R. 86; 12 D. L. R. 669; 18 B. C. R. 197.—*CAN.*

h. **Common staircase—In nature of**

inquisition thereon, or under certain circumstances by comrs. of sewers, or by natural causes, as the recess of the sea or an accumulation of mud, etc., & where a public road obstructing a channel, once navigable, has existed for so long a time that the state of the channel at the time when the road was made cannot be proved; in favour of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, & the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that account necessarily a public navigable channel, although sufficiently large for that purpose.

A navigable river is in the nature of a highway (HOLROYD, J.).—*R. v. MONTAGUE* (1825), 4 B. & C. 598; 6 Dow. & Ry. K. B. 616; 3 Dow. & Ry. M. C. 292; 4 L. J. O. S. K. B. 21; 107 E. R. 1183.

*Annotations*.—*Consd.* *Sim E. Bak v. Ang Yong Huat*, [1923] A. C. 429. *Refd.* *Colchester Corp'n. v. Brooke* (1845), 7 Q. B. 339; *R. v. Hornsea* (1854), 18 J. P. 134; *Williams v. Eytton* (1858), 2 H. & N. 771; *Freeman v. Tottenham & Hampstead Junction Ry.* (1865), 11 L. T. 702. *Mentd.* *Ilchester v. Itashleigh* (1889), 61 L. T. 477.

37. —.]—*SIMPSON v. A.-G.*, No. 196, *post*.

*See, generally*, WATERS & WATERCOURSES.

38. Railways.—Whether public highways.]—*GREAT NORTHERN Ry. Co. v. EASTERN COUNTIES Ry. Co.* (1851), 9 Hare, 306; 7 Ry. & Can. Cas. 643; 21 L. J. Ch. 837; 68 E. R. 520.

*Annotations*.—*Mentd.* *East Anglian Ry. v. Eastern Counties Ry.* (1851), 11 C. B. 775; *Prince of Wales Assoc. v. Harding* (1858), E. B. & E. 183; L. B. & S. C. Ry. v. L. & S. W. Ry. (1859), 4 De G. & J. 362; *Richmond Waterworks Co. & Southwark & Vauxhall Waterworks Co. v. Richmond, Surrey Vestry* (1876), 3 Ch. D. 82; *R. v. Woking U. D. C. (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

*See, generally*, RAILWAYS.

39. Occupation roads.]—Occupation roads laid out through an estate for the use & convenience of the inhabitants are not thereby dedicated to the public.

An estate was purchased for the purpose of building houses; a part was laid out as private roads, & upon a partition, the owners taking the roads covenanted that the other freeholders & the occupiers of the houses should have the full use & enjoyment of the roads in as absolute a manner as if they were public roads.—*Held*: a request to be supplied with gas by a minority of the occupiers of houses was sufficient, without the consent of the freeholders, to justify the breaking up the roads by the gas co. to lay down their pipes to comply with such request. On appeal the decision was affirmed, as every occupier had the same right, for the purpose of his use & enjoyment, to call in all such aid as he might have done if the roads had been public roads.—*SELBY v. CRYSTAL PALACE GAS CO.* (1862), 4 De G. F. & J. 246; 31 L. J. Ch. 595; 6 L. T. 790; 26 J. P. 676; 8 Jur. N. S. 830; 10 W. R. 636; 45 E. R. 1178, L. JJ.

### SUB-SECT. 3.—WHETHER NECESSARILY A THOROUGHFARE.

40. General rule.]—If a passage leading from one part to another of a public street, though by a very circuitous route, made originally for private convenience, has been open to all the world for a great number of years, without any

bar or chain across it, & without any person passing through it meeting with interruption, it is to be considered as dedicated to the public, & it becomes a highway, to obstruct which is an indictable offence.

To say that this right [of way] cannot exist because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where there is no thoroughfare (LORD ELLENBOROUGH, C.J.).—*R. v. LLOYD* (1808), 1 Camp. 260, N. P.

*Annotations*.—*Consd.* *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449. *Refd.* *Woodyer v. Hadden* (1813), 5 Taunt. 125; *R. v. St. Benedict, Cambridge* (1821), 4 B. & Ald. 447; *Barracough v. Johnson* (1838), 8 Ad. & El. 99; *Grand Surrey Canal Co. v. Hall* (1840), 1 Man. & G. 392; *Elwood v. Bullock* (1844), 6 Q. B. 383; *Healey v. Batley Corp'n.* (1875), L. R. 19 Eq. 375; *A.-G. & London Property Investment Trust v. Richmond Corp'n. & Gosling* (1903), 89 L. T. 700; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

41. —.]—(1) Trespass for entering plff.'s close & pulling down a wall therein. Plea: that the close was a public pavement within Metropolitan Paving Act, 1817 (c. xxix); that plff. unlawfully & contrary to the Act, erected thereon the said wall; & because the wall incumbered the pavement, & plff. refused, on deflt.'s request, to remove the same, deflt. entered & pulled it down.—*Held*: on motion for judgment *non obstante veredicto*, the plea was bad for not showing that it was absolutely necessary for deflt., in order to exercise the alleged right of passage, to remove the wall.

(2) A public highway may, in law, exist over a place which is not a thoroughfare. Whether, in fact, it does exist or not, is a question for the jury.—*BATEMAN v. BLUCK* (1852), 18 Q. B. 870; 21 L. J. Q. B. 406; 17 J. P. 4; 17 Jur. 386; 118 E. R. 320.

*Annotations*.—*As to* (1) *Refd.* *Bagshaw v. Buxton L. B. of Health* (1875), 34 L. T. 112. *As to* (2) *Consd.* *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449; *A.-G. & London Property Investment Trust v. Richmond Corp'n. & Gosling* (1903), 89 L. T. 700. *Refd.* *Bailey v. Jamieson* (1876), 34 L. T. 62; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425. *Generally, Mentd.* *Sub-Marine Telegraph Co. v. Dickson* (1864), 15 C. B. N. S. 769.

*See, also*, No. 4, *ante*.

42. *Terminus ad quem not public.*]—In a proceeding against B. & C. to have it declared, that they had been trespassers on the lands of A. it was pleaded to the effect that B. & C. had a right of way over these lands as inhabitants of a neighbouring town & as two of the public. To this it was replied, that upon the true construction of a local Act of Parliament the right of way, if any such had existed which was denied, had been thereby extinguished.—*Held*: (1) such an Act of Parliament is not to be construed strictly as against the public, who were, in fact, no parties to the passing of the Act; & (2) the provisions of such Act & the works which had been constructed thereunder, were not inconsistent with the existence of a public footpath over these lands; (3) issues directed to try the fact of the existence of such right of way were properly directed, notwithstanding the confluence of two rivers, the *locus ad quem* might or might not be held to be a public place.

Consideration of what is a public place as the terminus of a public footway.

I believe applt. is quite right in saying generally that a public right of way means a right to the public of passing from one public place to another

highway.]—A common staircase is in the nature of a highway, so as to support an action for damages on account of any injury from not properly securing a dangerous opening, or nuisance, that may be there made

or placod.—*MILNE v. SMITH* (1814), 2 Dow. 390.—*SCOT*.

### PART I. SECT. 1, SUB-SECT. 3.

k. Roads used by Indians.—Not necessarily highways—50 Geo. 3, c. 1,

s. 12.]—*BYRNES v. BOWN* (1850), 8 U. C. R. 181.—*CAN.*

1. Road along canal bank.—Open to public.]—A roadway along a canal bank, at the canal harbour, though open to the public & a place of general



Sect. 1.—Highway: Sub-sects. 3 & 4.]

public place. It was suggested that by the law of Scotland there might be a public right of way from a given public place, but neither terminating in a public place nor leading to a public place. I doubt whether that can be the law of Scotland any more than it is the law of England (LORD CRANWORTH, C.).—*CAMPBELL v. LANG* (1853), 1 Eq. Rep. 98; 1 Macq. 451; 21 L. T. O. S. 119; 1 W. R. 538, H. L.

*Annotations:—As to (3) Consd. Bourke v. Davis* (1889), 44 Ch. D. 110. *Refd. R. v. Thomas* (1857), 3 Jur. N. S. 713; A.-G. v. Antrobus, [1905] 2 Ch. 158.

43. —.]—(1) Although a public way may pass through private property, it must have at each end a public terminus. The terminus of a public way may be sufficient, although it have not in the ordinary sense an exit. It may be a *cul de sac*. But a mere private place, not admitting of a passage through or beyond it, cannot form the terminus of a public way.

(2) Upon evidence satisfactory & uncontradicted showing a public right of way as far back as the memory of living witnesses can be expected to extend, the jury may presume a previous enjoyment corresponding with that evidence.

Non-user or obstruction of a public right of way may be evidence for the jury that the right does not exist, but *qu.*: whether it can be evidence to show that the right has been lost.

It was contended that the learned judge ought to have told the jury "that evidence of the interruption of the right of way for twenty-two years after 1827, acquiesced in by the public for that period, was sufficient in law to exclude such right of way on that part of the public." I can find no such provision as that in the law of Scotland any more than I can in the law of England. Whether a person excludes the public is a question of degree; & the acquiescence of the public is also a question of degree. Certainly the fact that a person has for twenty-two years prevented people from doing what they had done before for forty years, does not of itself destroy the right (LORD CRANWORTH, C.).—*YOUNG v. CUTHBERTSON* (1854), 1 Macq. 455, H. L.

*Annotations:—As to (1) Consd. Bourke v. Davis* (1889), 44 Ch. D. 110. *Refd. R. v. Thomas* (1857), 3 Jur. N. S. 713; A.-G. v. Antrobus, [1905] 2 Ch. 158. *As to (2) Consd. Mann v. Brodie* (1885), 10 App. Cas. 378. *Refd. Folkestone Corpn. v. Brockman*, [1914] A. C. 338; *Thornhill v. Weeks* (1914), 78 J. P. 154.

44. Effect of closing both ends.]—*BAILEY v. JAMIESON*, No. 4, *ante*.

45. *Cul de sac*—Caused by stopping up existing highway.]—An inclosure Act empowered comrs., with the concurrence of two justices, to stop up, divert or turn, & to direct to be discontinued any public road or footpath through any part or parts of the lands & grounds in the parish of T. which to the comrs. should appear useless; subject to an appeal to quarter sessions. The comrs. & two justices made an order stopping up a public footpath in the parish of T. which was continued as a footpath into the parish of S., whereby the part in the latter parish became useless as a public way:—*Held*: (1) the comrs. had power to stop up the part of the footpath in the parish of T., & if any injury was thereby done, the remedy was by appeal.

*Seemle*: (2) the part of the footway in the parish of T. still remained a public way, though a *cul de sac*.—*GWYN v. HARDWICKE* (1856), 1 H. & N.

resort, is not a thoroughfare.—*BALFOUR v. BAIRD & BROWN* (1857), 20 Dunl. (Ct. of Sess.) 238; 30 Sc. Jur. 124.—*SCOT*.

PART I. SECT. 1, SUB-SECT. 4.  
*m. Allowance for road—Within Canadian Railway Act.*—The allow-

49; 25 L. J. M. C. 97; 27 L. T. O. S. 72; 20 J. P. 359; 4 W. R. 486; 156 E. R. 1113.

*Annotations:—As to (1) Consd. R. v. Waller* (1875), 31 L. T. 777. *As to (2) Refd. Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309.

46. —.]—A public footpath was rendered a *cul de sac* by buildings authorised by Act of Parliament; deft. obstructed the path at a place between which & the end of the *cul de sac* there was no opening or thoroughfare. Upon an indictment for this obstruction, the jury found deft. guilty; but they also found that this part of the path, which deft.'s obstruction stopped, had ceased to be of any public utility:—*Held*: a public path was still a highway, although it had become a *cul de sac*; & that the measure of public inconvenience caused by the obstruction of such a highway could be considered only with regard to the punishment of the person causing it.—*R. v. BURNEY* (1875), 31 L. T. 828; 39 J. P. 599.

*Annotations:—Refd. Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309; *Josselson v. Weiler* (1911), 75 J. P. 513.

47. —.]—A.-G. v. ANTROBUS, No. 285, *post*.

48. —.]—*MOSER v. AMBLESIDE URBAN DISTRICT COUNCIL*, No. 256, *post*.

49. —In town.]—*BOURKE v. DAVIS*, No. 313, *post*.

50. —.]—A.-G. v. CHANDOS LAND & BUILDING SOCIETY, No. 289, *post*.

51. —.]—In 1878 there existed in the city of London a court behind No. 38, B., & a passage thereto from B. To the court the public had free access through the passage. It was proved that the boys of the neighbourhood went there to play; that on one occasion an organ grinder was found there; & that it was sometimes chosen as a suitable place for fights because it was quiet. It was policed by the City Police & scavenged & lit by the Comrs. of Sewers. In 1877 land which included this court was acquired by the Comrs. of Sewers under an Improvement Act. Acting under their powers the comrs. erected a hoarding which prevented the public reaching the site of the court through the passage. The passage was then used for private purposes. In 1890, the scheme having been abandoned, the comrs. commenced to sell the land in building lots, & in 1896 they sold a lot including the court to deft., together with such right of way over & along the passage as they had power to grant. In 1910 pltf., who occupied 38, B., sought to prevent defts. using the passage on the ground that it was not a public highway, & that there was no right of way:—*Held*: the court & passage, although a *cul de sac*, were a highway in 1878; & as the various acts of the comrs. did not include a closing order, the passage never lost its public character, & defts. were entitled to judgment.—*JOSSELSON v. WEILER* (1911), 75 J. P. 513; 9 L. G. R. 1132.

*See, also*, No. 1987, *post*; Part III., Sect. 2, sub-sect. 4, B. (c), *post*.

52. Road leading to river.]—*MEDMENHAM CASE* (undated), cited in 81 L. T. at p. 179.

*Annotation:—Refd. Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174.

#### SUB-SECT. 4.—WHETHER PUBLIC RIGHT OF USER RESTRICTED.

53. General rule.]—Comrs. of inclosure were empowered to set out & appoint "public highways

ance for a road made by a Crown surveyor, is a highway, within Municipal Act, s. 599, & although not an open public road, used & travelled

& roads" of a given width which "after the setting out & completing thereof" were to be repaired & kept in repair in such manner as the other public highways within the township. By their award they directed that a certain raised path of the given width, which was already staked out, & had theretofore been used as a bridle road, should be "a public road" called the L. road. In describing abutments in their award, the comrs. treated the L. road as a known boundary, & in setting out bridle & other roads they used express & apt words. Nothing was done from the date of the award in 1760 to 1853, to make the road more a carriage road than it had been before; the actual repairs were consistent with a bridle road & with a carriage road; but there was no evidence of uses except as a bridle road. The inhabitants were indicted for non-repair of the road as a public highway, & evidence being given to show that it was in disrepair if it was a road for all purposes, a verdict was taken for defts., subject to be set aside & entered for the Crown if the award was conclusive that the road was one for all purposes:—*Held*: though the phrase "public highway" *prima facie* imported a road for carriages as well as for other purposes, yet it might mean public brideway only; & that being so, the user for eighty-nine years as a brideway was decisive that the road was a brideway only.—*R. v. ALDBOROUGH* (1853), 17 J. P. 648.

54. Cart, horse & footways.]—*R. v. SAINTIFF*, No. 26, *ante*.

55. Common highway.]—In an indictment for not repairing a highway, it need not be described as a highway to be used in any particular manner.

I do not remember any authority that holds it is necessary to say, it is highway for this or that particular carriage, for if it is a common highway, it is a highway for all manner of things (LORD HARDWICKE, C.J.).—*R. v. HATFIELD (INHABITANTS)* (1736), *1 Lec temp. Hard.* 315; 95 E. R. 204.

56. Footway.]—Footways through Richmond gate & through East Sheen across Richmond Park established, but not for carriages or horse people.—*R. v. BURGESS* (1760), 2 Burr. 908; 97 E. R. 627.

57. —.]—(1) A footway can be used only by foot passengers, & not by others, yet it is certainly a public highway (HOLROYD, J.).

(2) A towing path is to be used only by horses employed in towing vessels, yet it is a common highway for that purpose (BAXLEY, J.).—*R. v. SEVERN & WYE RY. CO.* (1819), 2 B. & Ald. 646; 106 E. R. 501.

*Annotations*:—*As to* (2) *Refd.* *Winch v. Thames Conservators* (1872), L. R. 7 C. P. 458. *Generally, Refd.* *Lee Conservancy Board v. Button* (1879), 12 Ch. D. 383. *Mentd.* *R. v. Pagham Sewers Comrs.* (1828), 2 Man. & Ry. K. B. 468; *R. v. Jeyes* (1835), 3 Ad. & El. 416; *R. v. Gamble* (1839), 11 Ad. & El. 69; *Ex p. Robins* (1839), 1 Will. Woll. & H. 578; *R. v. Victoria Park Co.* (1841), 1 Q. B. 288; *R. v. Birmingham & Gloucester Ry.* (1842), 2 Gal. & Dav. 236; *R. v. Clark* (1844), 8 Jur. 489; *Johnson v. Mid. Ry.* (1849), 4 Exch. 367; *R. v. Kidwelly & Llanelly Canal & Tramroad Co.* (1850), 15 L. T. O. S. 223; *R. v. L. & Y. Ry.* (1852), 22 L. J. Q. B. 57; *R. v. York & North Midland Ry.* (1852), 1 E. & B. 178; *York & North Midland Ry. v. It.* (1853), 17 Jur. 690; *It. v. G. W. Ry.* (1893), 62 L. J. Q. B. 572; *Darlington L. B. v. L. & N. W. Ry.*, [1894] 2 Q. B. 694; *R. v. Poplar B. C.* (No. 1), [1922] 1 K. B. 72.

58. Carriage way—Right of drift excluded.]—Public way restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way referred to.—*BALLARD v. DYSON* (1808), 1 Taunt. 279; 127 E. R. 841.

*Annotations*:—*Mentd.* *Manifold v. Pennington* (1825), 4 B. & C. 161; *Cowling v. Higginson* (1838), 4 M. & W. 245;

*Allan v. Gomme* (1840), 11 Ad. & El. 759; *Newcomen v. Coulson* (1877), 5 Ch. D. 133; *Serff v. Acton L. B.* (1886), 31 Ch. D. 679.

59. —Way not passable for all carriages.]—(1) A right of way for all the King's subjects to pass & repass with their carts & carriages, is not restrained because all carriages cannot pass & repass.

(2) Where a way has been recognised as public in an Act of Parliament for making streets, squares, etc., it is not necessary that it should be adopted by the parish to make it a public way.—*R. v. LYON* (1825), 5 Dow. & Ry. K. B. 407; 2 Dow. & Ry. M. C. 513; *Ry. & M.* 151; 3 L. J. O. S. K. B. 92; *sub nom. It. v. LYNN & DEBNEY*, 1 O. & P. 527.

*Annotation*:—*As to* (2) *Refd.* *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704.

60. —Includes footway.]—*DAVIES v. STEPHENS*, No. 219, *post*.

61. —.]—*WELLS v. LONDON, TILBURY & SOUTHERN RY. CO.*, No. 17, *ante*.

62. Towing path.]—*R. v. SEVERN & WYE RY. CO.*, No. 57, *ante*.

63. Bridleway.]—*R. v. ALDBOROUGH*, No. 53, *ante*.

64. Whether confined to necessary traffic—User for purposes of pleasure.]—*MILDRED v. WEAVER*, No. 293, *post*.

65. —.]—(1) A local authority under an obligation to keep up a road is chargeable with the cost of works necessary for the preservation of the road, even though they may not actually form part of it, such as a sea wall & groynes necessary to prevent a road running along the sea shore from being periodically injured by the inroads of the sea. The fact that a footpath along the top of such sea wall is besides being part of the highway, used as a promenade or esplanade for the purposes of pleasure, does not effect the liability to repair.

(2) The use of the esplanade for any *jus spatiandi* or purposes of amusement is no way inconsistent with its being a part of the road (LORD WATSON).—*SANDGATE URBAN DISTRICT COUNCIL v. KENT COUNTY COUNCIL* (1898), 70 L. T. 425; 15 T. L. R. 59, H. L.

*Annotation*:—*As to* (1) *Consd.* *A.-G. v. Staffordshire County Council*, [1905] 1 Ch. 336.

66. Limited dedication.]—(1) Where an erection or excavation exists upon land, & the land on which it exists, or to which it is contiguous, is dedicated to the public as a highway, the dedication must be taken to be made to the public & accepted by them, subject to the inconvenience or risk arising from the existing state of things.

(2) Deft. occupied a house adjoining to a public street, with a cellar belonging to it, which cellar had existed before deft. had anything in the house. The mouth of this cellar opened into the footway of the street by a trap door. During the day this trap door was open, but at night it was closed by a flap, which slightly projected above the footway, & it had so projected as long as living memory went back. *Pltf.*, coming along the footway at night, stumbled over this flap, fell, & sustained injury, for which he brought an action:—*Held*: the jury ought to draw the conclusion that the cellar flap had existed as long as the street, & the dedication of the way to the public was with the cellar flap in it, & subject to its being continued there; & therefore, deft. was not liable, as the maintenance of such an ancient cellar flap was not unlawful.

(3) Declaration for negligently & improperly

upon by the public, it is a highway | *GLOUCESTER TOWNSHIP v. CANADA* | 284; 4 O. L. R. 262; 1 O. W. R. 485.  
within Railway Act of Canada.—*ATLANTIC RY. CO.* (1902), 22 C. L. T. —*CAN.*

Sect. 1.—Highway: Sub-sect. 4. Sect. 2.]

placing in a public street certain steps, so that the same were an obstruction to persons using the street; & dangerous to persons passing along it at night; & averring that *pltf.* passing along the street, fell over them & was injured. Plea, that the street was subject to the right of the occupiers of a house adjoining it to have steps standing in the highway & leading up to the outer door of the house, all persons passing along the highway being entitled to pass on foot over the steps as a part of the highway, which steps were part of the house; that, the street being lowered under Metropolis Management Act, 1855 (c. 120), the old steps were necessarily removed, & the present steps placed in their room; that the new steps were placed on the same part of the highway on which the old steps had stood, & caused no greater obstruction or danger than did the old steps.—*Held*: the plea was good, as the former highway was subject to the right on the part of the occupiers of *deft.'s* house to keep these steps there, & the lowered highway was subject to a similar right.

(4) It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions & subject to certain reservations, & the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice & hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage & loss, & to make further concessions to the public altogether beyond the scope of his original intention (*per Cur.*).—*FISHER v. PROWSE, COOPER v. WALKER* (1862), 2 B. & S. 770; 31 L. J. Q. B. 212; 6 L. T. 711; 26 J. P. 613; 8 Jur. N. S. 1208; 121 E. R. 1258.

*Innotations*:—*As to* (1) *Consd.* *Hamilton v. St. George, Hanover Square* (1873), 11 R. 9 Q. B. 42. *Reid, Spice v. Peacock* (1875), 30 J. P. 581. *Moore v. Lambeth Waterworks Co.* (1856), 17 Q. B. D. 462; *Warner v. Wandsworth District Board of Works* (1839), 53 J. P. 471; *G. O. Ry. v. Howlett*, [1916] 2 A. C. 511. *As to* (4) *Fold. Hobbins v. Jones* (1863), 15 C. B. N. S. 221. *Apld.* *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26; *Arnold v. Holbrook* (1873), 28 L. T. 23; *Brackley v. Mid. Ry.* (1916), 83 L. J. K. B. 1596. *Reid, Cubitt v. Maxse* (1873), L. R. 8 C. P. 704. *Generally, Mendt, Owen v. De Winton* (1894), 58 J. P. 833; *Folkestone Corp. v. Brockman* (1914), 83 L. J. K. B. 745; *Selby v. Whitbread*, [1917] 1 K. B. 730.

67. Occupation road—Public right limited to right of footway.]—*Pltf.*, the owner, & three other persons, his tenants, sought to restrain *defts.* from further trespassing on their land, & for damages for trespass already committed. *Defts.* claimed that the land was part of a public highway, & that what they had done was in the execution of their duty. The three lanes concerned ran through the estate, & were known as B. G., & P. respectively. There was an admitted footway down the latter. From the evidence it appeared that these ways were occupation roads merely, which were rendered necessary before all the property came into one estate to enable the local farmers to get to outlying fields. In 1909, B. came to be a nuisance, & the owner destroyed the fences & built a wall down the middle. In 1912 the clerk of the council wrote claiming that this lane was a public highway, & requesting the removal of the wall. After a long correspondence

the council, in Feb. 1913, pulled down the wall & cut a quantity of undergrowth, the property of *pltf.* In May the writ was issued in this action. The judge said that the evidence consisted of documents, etc., & evidence of user. As to the latter, he thought it had been proved that these were mere occupation roads. There was nothing apparently in the documents, maps, tithe maps, award under Inclosure Acts, & so forth, which had been put in, which seemed contrary to the conclusion:—*Held*: subject to the public footway in P., none of these ways was a highway.—*FULLER v. CHIPPENHAM RURAL DISTRICT COUNCIL* (1914), 79 J. P. 4.

*See, further*, Part III., Sect. 2, sub-sect. 6, *post*.

## SECT. 2.—MAIN ROADS.

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), ss. 13, 15, 16.

68. Conversion of turnpike roads into main roads—Under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13.—Effect of enlargement of area of borough.]—The above sect. enacts that any road which has "between Dec. 31, 1870, & the date of this Act ceased to be a turnpike road . . . shall be deemed to be a main road, & one-half of the expenses incurred from & after Sept. 29, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate." The *corp.* of the town & borough of R. was the highway authority of the R. highway area. Under Towns Improvement Clauses Act, 1847 (c. 34), ss. 47–50, such portions of the turnpike roads entering R. as came within the area of the town were taken out of the turnpike trusts, & the obligation to repair the same was imposed upon the *corp.* By a local Act in 1872, the boundaries of the borough were enlarged & all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads, thus for the first time brought within the area of the borough, were taken out of the turnpike trusts by the operation of Towns Improvement Clauses Act, 1847, & ceased to be turnpike roads:—*Held*: these further portions, being only parts of turnpike roads, had not ceased to be "turnpike roads," & were not to be deemed to be "main roads" within the close sect.: & the county authority were not liable to pay half the expenses of their maintenance.—*LANCASHIRE J.J. v. ROCHEDALE CORPN.* (1883), 8 App. Cas. 494; 53 L. J. M. C. 5; 49 L. T. 368; 48 J. P. 20; 32 W. R. 65, H. L.; *reversg.* S. C. *sub nom.* *ROCHEDALE CORPN. v. LANCASHIRE J.J.* (1881), 8 Q. B. D. 12, C. A.

*Innotations*:—*Consd.* *Middlesbrough Overseers v. North Riding of Yorkshire J.J.* (1883), 11 Q. B. D. 490; *West Riding J.J. v. R.* (1883), 8 App. Cas. 781. *Expld.* *Lancaster County J.J. v. Newton-in-Makerfield Improvement Comrs.* (1886), 11 App. Cas. 416; *Over Darwen Corp. v. Lancaster J.J.* (1884), 13 Q. B. D. 497.

69. — Road absorbed by growth of town.]—A private Act authorised the construction of a turnpike road from W. to S. & the collection of tolls, & provided that "no part of the money arising or to be received by virtue of this Act shall be laid out in repairing, maintaining, or

improving any street, highway, or place in any part of the towns of B., S., & W." By the growth of the town of S. a portion of the turnpike road had in fact become a street in the town before Dec. 31, 1870. The turnpike trust created by the private Act expired in 1876:—*Held*: (1) the effect of the above provision was not to cause the portion of the road in question to "cease to be a turnpike road" before Dec. 31, 1870 [under the above sect.]; (2) an agreement made under Local Government Act, 1858 (c. 98), s. 41, before Dec. 31, 1870, for the removal of turnpikes on a portion of a road, & its repair by the corp'n. of S., did not make it cease to be a turnpike road.—*WEST RIDING JJ. v. R.* (1883), 8 App. Cas. 781; 53 L. J. M. C. 41; 49 L. T. 786; 48 J. P. 228; 32 W. R. 253, H. L.

*Annotations*.—As to (1) *Consd. Lancaster County JJ. v. Newton in Makerfield Improvement Comrs.* (1886), 11 App. Cas. 416; Derby County Council v. Matlock Bath & Scarthin Nick Urban District, [1896] A. C. 315. *Generally, Mentd.* Over Darwen Corp'n. v. Lancaster JJ. (1884), 13 Q. B. D. 497.

70. ——— From what date operative—*Expiry of turnpike trust.*—In 1855 a portion of a turnpike road was included in an improvement district under a local Act incorporating Towns Improvement Clauses Act, 1847 (c. 34). Thereupon by virtue of sects. 47–51 of the latter Act the maintenance of this portion of the road became vested in the improvement comrs. & the turnpike trustees ceased to have power to collect tolls or lay out money upon it. In 1877 the turnpike trust expired. The comrs. were the "highway authority" for the district, & the district was a "highway area" within Highways & Locomotives (Amendment) Act, 1878, s. 13:—*Held*: notwithstanding the operation of sects. 47–51 of Towns Improvement Clauses Act, 1847, the road only "ceased to be a turnpike road" & became a "main road," within sect. 13 of Highways & Locomotives (Amendment) Act, 1878, upon the expiration of the turnpike trust; & since that event happened after 1870 the county authority was liable to pay to the comrs. one-half the expenses incurred by them in the maintenance of the portion of the road within their district, as provided by sect. 13.—*LANCASTER COUNTY JJ. OF THE PEACE v. NEWTON IN MAKERFIELD IMPROVEMENT COMRS.* (1886), 11 App. Cas. 416; 50 L. J. M. C. 17; 55 L. T. 615; 51 J. P. 68; 35 W. R. 185, H. L.; *affg.* S. C. *sub nom.* *NEWTON IN MAKERFIELD IMPROVEMENT COMRS. v. LANCASHIRE JJ.* (1884), 15 Q. B. D. 25, C. A.

*Annotation*.—*Consd.* Derby County Council v. Matlock Bath & Scarthin Nick Urban District, [1896] A. C. 315.

71. ——— What are turnpike roads.—The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road," but subject to the payment of tolls by the persons using it:—*Held*: this was not a dedication of the road to the public, & the road was not a highway repairable by the inhabitants at large under Public Health Act, 1875 (c. 55), s. 150. *Semble*, an individual cannot, without legislative authority, dedicate a road to the public if he reserves the right to charge tolls for the user; & the mere fact that a number of persons form themselves into a co. for making & maintaining a road, & erect gates & bars & charge tolls, does not make the road a "turnpike road" in the sense of a turnpike road made such by Act of Parliament, & so dedicated to the public.—*AUSTERBERRY v.* (1885), 29 Ch. D. 750; 55 L. J. Ch.

633; 53 L. T. 543; 49 J. P. 532; 33 W. R. 807; 1 T. L. R. 473, C. A.

*Annotations*.—*Refd.* *Mid. Ry. v. Watton* (1886), 17 Q. B. D. 30; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Mentd.* *Hall v. Ewin* (1887), 57 L. T. 831; *Rogers v. Hosegood*, [1900] 2 Ch. 888; *Nathan v. Rouse* (1904), 2 L. G. R. 1304; *Hubbard v. Weldon* (1909), 25 T. L. R. 356; *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 437; *Chelsham & Woldingham Assoon. v. Hayward* (1911), 76 J. P. 52; *L. C. C. v. Allen*, [1914] 3 K. B. 643; *Palliser v. Dover Corp'n.* & *Dover Harbour Board* (1914), 58 Sol. Jo. 379; *Smith v. Colbourne*, [1914] 2 Ch. 533; *Re Woking U. D. C. (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

72. ——— Under sect. 150 of Public Health Act, 1875 (c. 55), an urban authority may require owners of premises fronting, adjoining, or abutting on streets to sewer, level, & pave such streets as may require to be sewered, levelled, or paved. By sect. 4 "street" includes any highway (not being a turnpike road) . . . & any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not. App'ts. were the owners of land & premises fronting, adjoining, or abutting on a private road leading through a populous part of the district in W. II. The proprietors of the road had erected gates or bars at several places along the road, at which they demanded & had taken tolls for some thirty years from persons using the carriage-way for vehicles, horses, & cattle, out of which tolls they had executed whatever repairs had been done to the road. The tolls were not taken by virtue of any Act of Parliament, & there was no evidence of any authority to erect the gates or to take the moneys, or of there being any obligation on the part of the association to repair:—*Held*: (1) the road in question, even if it were a private road, was a "street" within sect. 4 of the Act; (2) the road in question was not a turnpike road.

It was also suggested that the road was really a turnpike road; but that is met by the case of *Austerbury v. Oldham Corp'n.*, No. 71, *ante*, where it was expressly held that a road like this is not a turnpike road (*LOPES, L.J.*).—*MIDLAND RY. CO. v. WATTON* (1886), 17 Q. B. D. 30; 55 L. J. M. C. 99; 54 L. T. 482; 50 J. P. 405; 34 W. R. 524, C. A.

*Annotations*.—As to (1) *Apld.* *West Hartlepool Corp'n. v. Robinson* (1897), 75 L. T. 677. *Refd.* *Essex v. Wlral Rural S. A.* (1886), 17 Q. B. D. 107; *Baird v. Tunbridge Wells Corp'n.*, [1891] 2 Q. B. 867; *Hill v. Wallasey L. B.* (1894) 1 Ch. 133; *White v. Fulham Vestry* (1896), 71 L. T. 425. *Generally, Mentd.* *West Ham Corp'n. v. Grant* (1888), 40 Ch. D. 331; *Evans v. Newport Urban S. A.* (1889), 61 L. T. 684; *Sandgate L. E. v. Koeke* (1891), 8 T. L. R. 27; *Derby Corp'n. v. Grudgings*, [1891] 2 Q. B. 496.

*See, also*, No. 1223, *post*.

73. Jurisdiction to declare highway a main road under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 15—Application for order.—To whom made—County authority.—The recorder of a borough to which liberties belong fulfils the description of county authority under the above Act, & may be applied to for a declaration of main roads.—*R. v. DOVER RECORDER* (1884), 49 J. P. 86; 32 W. R. 876, D. C.; *revg.* S. C. *sub nom.* *Ex p. ISLE OF THANET RURAL SANITARY AUTHORITY*, 48 J. P. 249.

74. ——— Highway area—Not within s. 14.—The comrs. of a district in the fens of Norfolk, appointed & incorporated under various local Acts for draining & enclosing lands & providing roads, applied to the county council, as the county authority, for an order, under sect. 15 of the above Act, declaring a certain road in their district to be a main road:—*Held*: the Act was so framed as to include only the three highway areas mentioned in sect. 14 & the highway authority within those

**Sect. 2.—Main roads. Sects. 3, 4 & 5: Sub-sects. 1 & 2, A.]**

areas, & did not extend to include an exceptional area & an exceptional authority. Both the comrs. & their district fell within this category, & the county authority was not bound to make the order sought.—*R. v. NORFOLK COUNTY COUNCIL* (1891), 60 L. J. Q. B. 379; 65 L. T. 222; 56 J. P. 7, D. C. *Annotation*:—*Expld. Re Marshland Smeth & Fen District Comrs. & Marshland R. D. C.* (1895), 65 L. J. Q. B. 185.

**75. Jurisdiction to declare main road an ordinary highway under Highways & Locomotives (Amendment) Act, 1878 (c. 77) s. 16—Application for provisional order.]**—The above sect. provides as follows: "If it appears to a county authority that any road within their county which, within the period between Dec. 31, 1870, & the date of the passing of this Act, ceased to be a turnpike road, ought not to become a main road in pursuance of this Act, such authority shall, before Feb. 1, 1879, made an application to the Local Government Board for a provisional order declaring that such road ought not to become a main road." The sect. further provides that, "Subject as aforesaid, where it appears to a county authority that any road within their county, which has become a main road in pursuance of this Act, ought to cease to be a main road & become an ordinary highway, such authority may apply to the Local Government Board for a provisional order declaring that such road has ceased to be a main road & become an ordinary highway:—*Held*: a road which had ceased to be a turnpike road within the period specified by the first of the above-mentioned provisions, & had become a main road, there being no application for a provisional order before Feb. 1, 1879, was not excluded from the operation of the second of the above mentioned provisions, & the Local Government Board had, therefore, jurisdiction to make a provisional order declaring such road an ordinary highway upon an application made subsequently to Feb. 1, 1879.—*R. v. LOCAL GOVERNMENT BOARD* (1885), 15 Q. B. D. 70; 54 L. J. M. C. 104; 53 L. T. 194; 49 J. P. 580, C. A.

County council as authority, *see* Part II., Sect. 2, sub-sect. 1, B., *post*.

**SECT. 3.—HIGHWAYS REPAIRABLE BY INHABITANTS AT LARGE.**

*See* Part VI., Sect. 5, *post*.

**SECT. 4.—TURNPIKE ROADS.**

**NOTE.**—*Turnpike roads no longer exist as such. See Annual Turnpike Acts Continuance Act, 1882 (c. 52), s. 8.*

**76. Meaning.]**—The legal meaning of the word "turnpike road," is a road on which parties have, by law, a right to erect gates & bars for the purpose of taking toll, & of refusing the permission to pass to all persons who refuse to pay it.—*NORTHAM BRIDGE & ROADS CO. v. LONDON & SOUTHAMPTON RY. CO.* (1840), 6 M. & W. 428; 1 Ry. & Can. Cas. 665; 9 L. J. Ex. 165; 4 Jur. 892; 151 E. R. 479; *previous proceedings* (1840), 1 Ry. & Can. Cas. 653; *subsequent proceedings* (1840), 11 Sim. 42.

*Annotations*:—*Expld. Ex p. Potter* (1867), 16 L. T. 350; *R. v. French* (1879), 4 Q. B. D. 507. *Consd. West Riding J. v. R.* (1883), 8 App. Cas. 781. *Reid. R. v. West Hoe Highways Trustees* (1846), 10 J. P. 405; *Northam Bridge Co. v. R.* (1886), 55 L. T. 759.

**77. — Within Railways Clauses Consolidation Act, 1845 (c. 20), s. 50—Road repairable by tolls.]**—The words "turnpike road" in the above sect. mean a road which is repaired by tolls payable by passengers for the use of the road.—*R. v. EAST & WEST INDIA DOCKS, ETC., RY. CO.* (1853), 2 E. & B. 466; 1 C. L. R. 496; 22 L. J. Q. B. 380; 21 L. T. O. S. 180; 17 J. P. 807; 17 Jur. 1181; 1 W. R. 409; 118 E. R. 841.

*Annotations*:—*Mentd. Fenwick v. East London Ry.* (1875), L. R. 20 Eq. 544; *A.-G. v. Met. Ry.*, [1894] 1 Q. B. 384; *St. James & Pall Mall Electric Light Co. v. R.* (1904), 73 L. J. K. B. 518.

**78. — Within 4 & 5 Vict. c. 59, s. 1.]**—An Act of Parliament authorised trustees to establish a ferry & make certain highways in connection therewith. The trustees were also empowered to take tolls, out of the proceeds of which the ferry & roads were to be maintained. No limit of time was specified by the Act for the expiration of the trust. The Act also provided that, in case the works thereby authorised should not be executed within the space of ten years, all the powers & authorities thereby given should cease & determine, save only as to so much of the work as should have been completed within that time. The trustees established the ferry & made all the roads specified in the Act but one. The funds arising from the tolls becoming insufficient for the repair & maintenance of the roads so made, an application was made by the trustees to justices for an order for contribution to the repair of one of the roads so made, out of the highway rate under the above sect.:—*Held*: (1) the trust created by the Act was a turnpike trust within the above sect.; (2) inasmuch as the Act merely authorised & did not compel the making of the roads thereby specified & contemplated that all the works might not be executed, the construction of the whole system of roads authorised to be made was not a condition precedent to the roads that were made becoming highways, & consequently an order of contribution to the repair of the road in question might be made under the above sect.

I think that a road is a turnpike road within 4 & 5 Vict. c. 59, when it is made under the authority of an Act of Parliament with that intention, & in contemplation that it should be repaired by tolls to be taken at a turnpike (*BRAMWELL, L.J.*).—*R. v. FRENCH* (1879), 4 Q. B. D. 507; 48 L. J. M. C. 175; 41 L. T. 63; 43 J. P. 699; 28 W. R. 118, C. A.

*Annotation*:—*As to* (2) *Consd. Swansea Improvements & Tram. Co. v. Swansea & Mumbles Ry.* (1880), 3 Ry. & Can. Tr. Cas. 339.

**Conversion of turnpike road into main road.]**—*See* Nos. 68-70, *ante*.

**SECT. 5.—STREETS.**

**SUB-SECT. 1.—IN GENERAL.**

**79. What constitutes a street—Houses on both sides.]**—The word "street" means a thoroughfare with houses on both sides, not merely a road or footway.—*GALLOWAY v. LONDON CORPN.* (1866), L. R. 1 H. L. 34; *sub nom. GALLOWAY v. LONDON CORPN. & METROPOLITAN RY. CO., LONDON CORPN. v. GALLOWAY*, 35 L. J. Ch. 477; 14 L. T. 865; 30 J. P. 580; 12 Jur. N. S. 747, H. L.

*Annotations*:—*Distd. L. C. & D. Ry. v. London Corpn.* (1868), 19 L. T. 250. *Consd. L. B. & S. C. Ry. v. St. Giles, Camberwell, Vestry* (1879), 4 Ex. D. 239; *Robinson v. Barton-Eccles L. B.* (1883), 8 App. Cas. 798. *Reid. Baker v. Portsmouth Corpn.* (1877), 3 Ex. D. 157. *Mentd. Carington v. Wycombe Ry.* (1868), 3 Ch. App. 377; *Kent Coast Ry. v. L. C. & D. Ry.* (1868), 3 Ch. App. 656; *Quinton v. Bristol Corpn.* (1874), 43 L. J. Ch. 783; *Gard*

*v. City of London Sewers Comrs.* (1885), 28 Ch. D. 486; *Bristol Grdns. v. Bristol Corpn.* (1887), 18 Q. B. D. 549; *James v. Lovel* (1887), 56 L. T. 739; *Lewis v. Weston-super-Mare L. B.* (1888), 40 Ch. D. 55; *Donaldson v. South Shields Corpn.* (1899), 68 L. J. Ch. 162; *Goldberg v. Liverpool Corpn.* (1900), 82 L. T. 362; *East Fremantle Corpn. v. Annols*, [1902] A. C. 213; *Roberts v. Charing Cross, Euston, & Hampstead Ry.* (1903), 87 L. T. 732; *L. & N. W. Ry. v. Westminster Corpn.*, [1904] 1 Ch. 759; *Conron v. L. C. C.*, [1922] 2 Ch. 283.

80. ———.]—*ALLEN v. FULHAM VESTRY*, No. 155, *post*.

81. ——— *Houses on one side.*]—*HOLDEN v. ST. MARY, ISLINGTON, VESTRY* (1887), 3 T. L. R. 326, C. A.

82. ———.]—*ROBINSON v. BARTON-ECCLES LOCAL BOARD*, No. 86, *post*.

83. ———.]—*SIMMONDS BROTHERS, LTD. v. FULHAM VESTRY*, No. 163, *post*.

84. ———.]—*A.-G. v. LAIRD*, No. 112, *post*.

85. ——— *Houses at one end.*]—*A.-G. v. SIDDALL* (1898), *Times*, June 24, C. A.

*Annotation*:—*Reid. A.-G. v. Laird*, [1925] Ch. 318.

86. ——— *Roadway with buildings.*]—Public Health Act, 1875 (c. 55), s. 157, enables an urban authority to make bye-laws with respect (*inter alia*) to the level, width & construction of new streets:—*Held*: the words "new streets" in that sect. are not confined to streets constructed for the first time, but apply also to an old highway formerly a country lane, which has long been a street within the interpretation clause (sect. 4) of that Act, & which, by the building of houses on each side of it had recently become a street in the popular sense of the term.

In the natural & popular sense of the word "street" or the words "new street," I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must, or may be continuous or discontinuous); & by "new street," a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it (*LORD SELBORNE, C.*).—*ROBINSON v. BARTON-ECCLES LOCAL BOARD* (1883), 8 App. Cas. 798; 53 L. J. Ch. 226; 50 L. T. 57; 48 J. P. 276; 32 W. R. 249, H. L.

*Annotations*:—*Consd. Williams v. Powning* (1883), 48 L. T. 672; *Jowett v. Idle L. B.* (1887), 36 W. R. 138; *Fenwick v. Croydon Union R. S. A.*, [1891] 2 Q. B. 216; *St. Giles, Camberwell, Vestry v. Crystal Palace Co.*, [1892] 2 Q. B. 33; *A.-G. v. Rufford*, [1899] 1 Ch. 537. *Expld.* *A.-G. v. Gibb*, [1909] 2 Ch. 265; *A.-G. v. Laird*, [1925] Ch. 318. *Reid. Metropolitan Board of Works v. Nathan* (1885), 54 L. T. 423; *Mid. Ry. v. Watton* (1886), 17 Q. B. D. 30; *Woodhill v. Sunderland Corpn.* (1887), 57 L. T. 303; *Davis v. Greenwich District Board of Works*, [1895] 2 Q. B. 219; *Allen v. Fulham Vestry*, [1899] 1 Q. B. 681; *A.-G. v. Ashbourne Recreation Ground Co.* (1902), 1 L. G. R. 146; *Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182; *A.-G. v. Dorin*, [1912] 1 Ch. 369. *Mentd.* *Portsmouth Corpn. v. Smith* (1885), 10 App. Cas. 364; *Williams v. Wallace L. B.* (1886), 16 Q. B. D. 718.

87. ——— *Roadway with detached houses.*]—*R. v. FULLFORD*, No. 130, *post*.

88. *Whether houses included.*]—Though the word "street" may include the houses abutting or fronting upon a public thoroughfare, as well as the actual roadway or footways, yet the strict & *primâ facie* meaning of the word "street" is confined to the roadway & footways.

Accordingly, in the construction of a local Act, which gave the corpn. of London powers to construct a viaduct over H., & to make certain new streets & to acquire lands for the purposes of the Act; & which enacted that in any case in which the corpn. might require to take any lands already purchased by the L. C. & D. Ry. Co., & that the co. were unwilling to dispose of the same, or required the same for the purposes of their railway, it should be referred to arbitration in manner thereinbefore provided; Provided always that this

provision should not be construed to prevent the corpn. taking all such lands of the railway co. as might be required for the construction of the viaduct or raised way of the line of the new streets authorised by the Act:—*Held*: the latter provision did not apply to a case where the corpn. required to take a piece of land already purchased by the railway co., but did not require the same for the construction of the actual roadway or footways of the viaduct or new streets. The corpn. were accordingly restrained from taking the piece of land till the matter had been determined by arbitration as provided by the Act.—*LONDON, CHATHAM & DOVER RY. CO. v. LONDON CORPN.* (1868), 19 L. T. 250, L. JJ.

89. *Private road*—Subject to toll.]—*TAYLOR v. OLDHAM CORPN.*, No. 96, *post*.

90. *Unenclosed square in private ownership*—*Traversable by public.*]—The urban sanitary authority of E. made a bye-law that every driver of a hackney carriage when plying for hire shall station his carriage on one of the appointed stands. In the city of E. there was a square in front of a hotel which was not enclosed, & where the public could pass freely except when the hotel keeper's carriages stood there, as the square was let with the hotel, & used for the hotel cabs standing when plying for hire:—*Held*: the driver when plying for hire there incurred the penalty imposed by the bye-law, as this place was part of the street.—*MARKS v. FORD* (1880), 45 J. P. 157, D. C.

91. *Bridge.*]—Declaration, that pltf. was possessed of certain land forming part of the bed of a canal, & that defts. erected a bridge across the canal, & caused it & the walls adjoining to be so constructed that the parts of the same extended & projected over parts of the canal. Plea, that the several acts, matters & things complained of were lawfully done by defts. under & by virtue of powers given to them by an Act, made, etc.:—*Held*: the plea in these general terms was good.

A bridge may be so situate as to be a "street" within the meaning of a statute.—*BEAVER v. MANCHESTER CORPN.* (1857), 8 E. & B. 44; 26 L. J. Q. B. 311; 20 L. T. O. S. 226; 4 Jur. N. S. 23; 120 E. R. 17.

## SUB-SECT. 2.—STATUTORY DEFINITIONS.

### A. Under Public Health Acts.

92. *Within 1848 Act, sect. 69—Private road.*]—Within the ordinary meaning of the word the magistrate was justified in holding that this road was a street. It was long, & there were portions of it where there were no houses. But there was, on one side, a continuous line of houses, & on the other side there were houses & shops. It was contrary to sense to say that it was not a street, & whether it was private or public property it made no difference (*LORD ESHER, M.R.*).—*MIDLAND RY. CO. v. WEST HAM LOCAL BOARD* (1880), 2 T. L. R. 589, C. A.

*Annotation*:—*Reid. R.* (on the prosecution of Cleckheaton L. B. of Health) *v. Burnup* (1886), 50 J. P. 598.

*See, now*, 1875 Act, s. 150.

93. *Within 1875 Act, sect. 4—Whether co-extensive with streets under sect. 150—Question of fact.*]—By sect. 4 of the above Act, "in this Act, if not inconsistent with the context, the following words & expressions have the meaning hereinafter respectively assigned to them," & amongst other definitions, "street includes any road," etc. By sect. 150, where any street within any urban district, not being a highway repairable by the inhabitants at large, is not sewered, paved,



**Sect. 5.—Streets: Sub-sect. 2. A.]**

& channelled to the satisfaction of the urban authority they may give notice to the owners of the adjoining premises to sewer, etc., the street & in failure to comply with the notice the urban authority may execute the works themselves, & recover the expense of so doing from the adjoining owners in a summary manner. Summary proceedings having been taken by an urban authority to recover, under sect. 150, the expense of sewerage, etc., a road within the district which was not a highway repairable by the inhabitants at large:—**Held:** it was a question of fact for the justices to determine whether or not the road was a street within sect. 150, & they were not bound to find as matter of law that it was a street by the terms of the definition in sect. 4.—**MAUDE v. BAILDON LOCAL BOARD** (1883), 10 Q. B. D. 394; 48 L. T. 874; 47 J. P. 644, D. O.

**Annotations:—***Dttd.* Portsmouth Corpn. v. Smith (1883), 13 Q. B. D. 184. *Consd.* R. (on the prosecution of Cleckheaton L. B. of Health) v. Burnup (1886), 50 J. P. 598; Ellis v. L. C. C. (1892), 67 L. T. 558. *Refd.* R. v. Sheil (1884), 50 L. T. 590; Jowett v. Idle L. B. (1887), 57 L. T. 928; Richards v. Kessick (1888), 57 L. J. M. C. 48; Fenwick v. Croydon Union L. S. A., [1891] 2 Q. B. 216.

94. ————]—Sect. 150 of the above Act applies only to streets which are streets in the ordinary & popular sense of the word, & the word "street," in sect. 150, does not necessarily include every meaning given to it by sect. 4 of the Act. In summary proceedings to recover expenses under sect. 150, it is for the justices, having regard to the surrounding circumstances, & to whether there is any intention of building along a road so as to convert it into a street, to find as a fact whether the road in question is a street in the ordinary & popular sense of the word; & it makes no difference that the sect. has been applied or may apply to a portion of the road other than that in question. Where the justices find a road, or a portion of a road, is not a street in the ordinary & popular sense, they will be right in holding that the sect. is not applicable to the road or portion.—**R. (ON THE PROSECUTION OF CLECKHEATON LOCAL BOARD OF HEALTH) v. BURNUP** (1886), 50 J. P. 598, D. C.

**Annotations:—***N.F.* Jowett v. Idle L. B. (1887), 57 L. T. 928; Fenwick v. Croydon R. S. A., [1891] 2 Q. B. 216. *Refd.* Richards v. Kessick (1888), 52 J. P. 758.

95. ————]—**Ways communicating with the backs of houses.]—**Passages at the back of houses intended to afford access to the ashpits & privies of such houses as are within the definition of "street," as defined by the above sect. & are therefore subject to the bye-laws made by a local board in pursuance of the powers contained in sect. 157 (1) of the same Act.—**R. v. GOOLE LOCAL BOARD**, [1891] 2 Q. B. 212; 60 L. J. Q. B. 617; 64 L. T. 595; 55 J. P. 535; 39 W. R. 608, D. C.

**Annotations:—***Refd.* Walthamstow U. D. C. v. Sandell (1904), 68 J. P. 509; Oakley v. Merthyr Tydfil Corpn., [1905] 1 K. B. 409.

*See, also*, No. 107, *post*.

96. Within 1875 Act, sect. 16—Private road—Subject to toll.]—By a local Act the O. corp. were generally empowered to lay sewers in streets & courts not being highways, with certain special provisions as to sewerage S. road, which it was admitted had not been complied with. The same Act repealed all the other general Acts on the subject, so far as they applied to the borough, but made no mention of Sewage Utilisation Act, 1865 (c. 75), which was passed a few days before the local Act, & which gave the corp. general powers to lay sewers. The above Act repeals Sewage Utilisation Act, & itself empowers sewer

authorities to lay sewers in any "road or street or place laid out as or intended for a street." After the passing of the above Act, the corp. proceeded to sewer S. road, which was a private way, with houses on each side, for the passage along which a toll was taken by ptfs., in whom it was vested.

A motion by ptfs. for an injunction to restrain the corp. was refused:—**Held:** (1) the corp. had power to sewer S. road, independently of the local Act, under the above sect., as continuing the power given by Sewage Utilisation Act, which it only repealed for the purpose of consolidation & re-enactment; (2) S. road was a street within the Acts.

The term "street" both in its general meaning & by the local [O. Borough Improvement] Act includes a private road, for passage over which a toll is charged, & on which the public have no right of way.—**TAYLOR v. OLDHAM CORPN.** (1876), 4 Ch. D. 395; 46 L. J. Ch. 105; 35 L. T. 696; 25 W. R. 178.

**Annotations:—***As to* (1) *Refd.* *Re* New Callao (1882), 47 L. T. 175; Northam Bridge Co. v. R. (1886), 55 L. T. 759; Escott v. Newport Corp., [1904] 2 K. B. 369; Thurrock, Grays & Tilbury Joint Sewerage Board v. Thames Land Co. (1925), 23 L. G. R. 648. *As to* (2) *Fold.* Mid. Ry. v. Watton (1886), 17 Q. B. D. 30; R. v. Goole L. B., [1891] 2 Q. B. 212. *Refd.* Richards v. Kessick (1888), 57 L. J. M. C. 48; Baird v. Tunbridge Wells Corp., [1894] 2 Q. B. 867; Hill v. Wallasey L. B., [1894] 1 Ch. 133; West Hartlepool Corp. v. Robinson (1897), 75 L. T. 677. *Generally, Mentd.* *Re* Boulton's Trusts (1882), 51 L. J. Ch. 493; Re Brewer & Hankin's Contract (1899), 80 L. T. 127; Ystradgynodwg & Pontypridd Main Sewerage Board v. Bensted Surveyor of Taxes, [1906] 1 K. B. 204; Pennel & Wilson v. Tucker, [1907] 2 Ch. 191.

97. ————]—Ptff. was the owner of a private road in the W. district. Defts. were the urban sanitary authority of the district, & had the control of the streets generally in that district, & also the power of supplying the inhabitants with water. Defts. commenced, without ptff.'s consent, to break up his private road for the purpose of laying down water mains. Ptff. brought an action for an injunction:—**Held:** the words "where the local authority have not the control of the streets," in sect. 57 of the above Act, which forbids the laying down of pipes in any private road without the consent of the owner, are descriptive of a local authority who have not the control generally of the streets in their district, & had no application to defts.: & defts. had power under sects. 16 & 54 of the Act to lay down pipes in ptff.'s private road without his consent, making him proper compensation under sect. 308 of the same Act.

A private road is a "street" within sects. 16 & 54 of the above Act.—**HILL v. WALLASEY LOCAL BOARD**, [1894] 1 Ch. 133; 63 L. J. Ch. 1; 69 L. T. 641; 42 W. R. 81; 10 T. L. R. 73; 38 Sol. Jo. 56; 7 R. 51, C. A.

**Annotations:—***Refd.* Baird v. Tunbridge Wells Corp., [1894] 2 Q. B. 867. *Mentd.* Jones v. Conway & Colwyn Bay Joint Water Supply Board (1893), 69 L. T. 265.

98. Within 1875 Act, s. 150—Not co-extensive with definition in sect. 4—Question of fact.]—**MAUDE v. BAILDON LOCAL BOARD**, No. 93, *ante*.

99. ————]—**R. (ON THE PROSECUTION OF CLECKHEATON LOCAL BOARD OF HEALTH) v. BURNUP**, No. 94, *ante*.

100. ————]—Private road.]—**MIDLAND RY. CO. v. WATTON**, No. 72, *ante*.

101. ————]—Streets under sect. 4 included.]—The word "street" in sect. 150 of the above Act includes places which are defined as streets by sect. 4.—**JOWETT v. IDLE LOCAL BOARD** (1888), 36 W. R. 530; 4 T. L. R. 442, C. A.  
**Annotations:—***Fold.* Fenwick v. Croydon Union R. S. A.,

[1891] 2 Q. B. 318. *Reid, Richards v. Kessick* (1888), 87 L. J. M. C. 48; *Walthamstow U. D. C. v. Sandell* (1904), 68 J. P. 509.

102. — **Strip of land lying between houses & highway repairable by public.**—Owners of land adjoining a highway repairable by the inhabitants at large erected houses on their land, & threw open to the highway a strip of land in front of them:—*Held*: the houses with the strip of land in front together formed a "street" within the above sect. which the urban sanitary authority within whose district it was situate could compel the frontagers to pave, channel, & kerb under that sect.—*RICHARDS v. KESSICK* (1888), 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756, D. C.

*Annotations*:—*Consd. White v. Fulham, Vestry* (1896), 74 L. T. 425. *Apprvd. Property Exchange v. Wandsworth Board of Works*, [1902] 2 K. B. 61. *Reid, Evans v. Newport Urban S. A.* (1889), 61 L. T. 684; *St. James & St. John Clerkenwell Vestry v. Edmondson* (1902), 66 J. P. 324.

103. — **Public highway though not formally dedicated.**—Applt. was summoned under the above sect. for non payment of expenses incurred by the rural authority in sewerage, paving, etc., a road on which his premises abutted. An order of the Local Govt. Board, under sect. 276 of the Act, had declared the above sect. to be in force as to the road in question, which the order also declared to be a street. The road ran from a turnpike road to a bridge, where it passed into another parish, & was from that point repaired by the local board of that parish as a highway. It was about 900 feet long. It had on the south side several houses, including applt.'s house, abutting on it; on the north there was none for 785 feet from the turnpike road. For the rest of its course it was bounded on that side by a sewage farm belonging to the rural authority, on which were two buildings. It was a public highway. There was no evidence of formal dedication of the road, but there was evidence of its use as a public highway since 1835, & some evidence before 1835, but none inconsistent with its having been then an occupation road or footpath.

The justices held the order of the Local Govt. Board conclusive, that the road was a street, & further held, that, although in their opinion it was not a street in the popular acceptance of the word, it was a street within sect. 4 of the Act. On a case stated:—*Held*: the justices were wrong in holding that the order of the Local Govt. Board was conclusive that the road was a street, but that by the definition in sect. 4 it was a "street" within sect. 150, & applt. was liable.—*FENWICK v. CROYDON RURAL SANITARY AUTHORITY*, [1891] 2 Q. B. 216; 60 L. J. M. C. 161; 65 L. T. 645; 55 J. P. 470; 40 W. R. 124; 7 T. L. R. 594, D. C.

*Annotations*:—*Reid, Hill v. Wallasey T. B.*, [1894] 1 Ch. 133; *Cababé v. Walton-on-Thames District Council*, [1913] 1 K. B. 481.

104. — **Approach to railway station.**—*STRET-FORD URBAN DISTRICT COUNCIL v. MANCHESTER SOUTH JUNCTION & ALTRINCHAM RY. CO.* (1903), 68 J. P. 59; 19 T. L. R. 546; 1 L. G. R. 683, C. A.

105. — **Cul de sac—Adjoining premises without means of access.**—A passage forming a *cul de sac* may be a "street" within the above sect. & the owner of premises abutting thereon is liable to pay his apportioned share of the costs incurred by the local authority in making it up, notwithstanding the fact that he has no means of access into the passage from his premises.

I have no doubt I have to see what sort of a passage this is, whether it is a private approach to a man's house—his avenue leading up to his house from the street—or whether it is something

which can properly be dealt with by this Act as a passage-way rightly open to any member of the public who is going along an adjacent highway, & as to which *DAY, J.*, said in *It. v. Goole Local Board*, No. 95, *ante*, "there is nothing to show that the public cannot pass along it." I am clear that this is such a passage as is a "street" within sect. 150 (*BUCKLEY, J.*)—*WALTHAMSTOW URBAN DISTRICT COUNCIL v. SANDELL* (1904), 68 J. P. 509; 2 L. G. R. 835.

106. — **Additions to ancient highway.**—By an agreement, dated in 1883, the owners of an estate in an urban district through which ran an ancient highway about thirty feet wide, repairable by the inhabitants at large, agreed with the borough council that as & when the estate should be laid out for building, the owners would straighten & lay out the road so as to make it forty feet wide throughout. The agreement recited that it was entered into for the purpose of settling a question which had arisen as to the extent of the public rights over the road. When the whole of the road had been laid out in accordance with the agreement, the council made it up under the powers of the above sect., & sought to recover the expenses from the owners of premises abutting on the road:—*Held*: the whole of the road was repairable by the inhabitants at large, & consequently, the frontagers were not liable for the improvement expenses.—*PORTSMOUTH CORPN. v. HALL* (1907), 98 L. T. 513; 71 J. P. 564; 31 T. L. R. 76; 6 L. G. R. 16, C. A.

*Annotation*:—*Mentl. Andrews v. Abertillery U. C.* (1911), 80 L. J. Ch. 721.

107. **Within 1875 Act, s. 156—Turnpike road subject to toll.**—T. had a house abutting on a pavement alongside a turnpike road, on which road tolls were taken, & which was repaired by the county roads board, but it was within the jurisdiction of an urban sanitary authority in South Wales. T. was proceeded against under the above sect. for bringing forward his house beyond the line of street without the consent of the urban authority:—*Held*: this was a street within the meaning of that sect., though it was also a turnpike road, & notwithstanding the definition of street in sect. 4 of the Act.—*THOMAS v. ROBERTS* (1878), 43 J. P. 574, D. C.

*See, also*, No. 111, *post*.

108. **Within 1875 Act, s. 157—Footway forming principal access to houses.**—In making bye-laws, & insisting on their observance, a local authority is entitled to consider what may happen in the future, when present conditions have been altered & the neighbourhood has developed, even although the present necessity for the bye-laws may not be obvious.

The power to make bye-laws, as regards new streets, given by the above sect. is not confined to streets in the popular sense of the term, namely, roadways, with houses on both sides of them, but applies to streets, as defined by sect. 4 of the Act, which are proposed to be laid out & constructed for the first time.

The bye-laws of an urban sanitary authority required every new street over 100 feet long to be so laid out that its width should be 36 feet at the least & that it should be constructed for use as a carriage drive. W., who was employed, as a builder, by G. the owner of land, to erect some cottages on the land of G., sent to the urban authority plans showing an intended footpath, 202 feet long & 5 feet wide, affording the principal access to the cottages. The proposed footpath being objected to as not complying with the bye-laws, W., without any authority from G., undertook



**Sect. 5.—Streets: Sub-sect. 2, A. & B. (a) & (b).]**

that a roadway, 36 feet wide, should be made as soon as possession of sufficient land on the side further from the cottages to enable a road of the required width to be made could be obtained from a tenant whose tenancy could not be determined for some months. The plans, varied so as to show a roadway 36 feet wide, were approved on the conditions of the undertaking. The cottages were then erected, & the footpath was levelled & surfaced with rubble & sand. It was 5 feet wide & bounded on the further side from the cottages by an ancient hedge, & on the nearer side by a fence in which were openings giving access to the cottages:—*Held*: defts. had laid out & constructed a street within the meaning of the bye-laws; the bye-laws were *intra vires* & reasonable; &, although W., by reason of his having no control over the land, was not a proper party to the action, an injunction to enforce the obligations under the bye-laws must be granted against G.—*A.-G. v. GIBB*, [1909] 2 Ch. 265; 78 L. J. (Ch. 521; 101 L. T. 16; 73 J. P. 343; 7 L. G. R. 754.

**109. Order of Local Government Board under 1875 Act, s. 276—Whether conclusive.]—FENWICK v. (ROYDON RURAL SANITARY AUTHORITY, No. 103, *ante*.**

**110. Within 1888 Act, sect. 3—Question of fact—& degree.]—A.-G. v. SIDDALL (1898), *Times*, June 24, C. A.**

*Annotation*:—*Reid. A.-G. v. Laird*, [1925] Ch. 318.

**Houses scattered.]—R. v. MIDDLESBROUGH CORPN. (1890), *Times*, July, 7, D. C.**

**112. ———.]—On Apr. 7, 1924,** deposited with the B. Corpn. plans for the erection of a house & shop on a plot of land of which they were the owners fronting on H. Road, a main road 60 feet wide. The plot of land was situate at the corner of H. Road & C. Street, both within the borough of B. On the eastern side of the plot & at a distance therefrom of 700 feet was a steam laundry erected in & fronting on H. Road, the front main wall of which was set back from the road a distance of 12 feet. The land between the site of defts.' proposed building & the laundry was unbuilt upon. According to the deposited plans it was proposed to set back the building from H. Road a distance of 2 feet only. On Apr. 10, 1924, the corpn. disapproved of the plans on the ground that the building was not set back 12 feet from H. Road & that the same was proposed to be erected beyond the front main wall of the laundry. Notwithstanding this disapproval defts. proceeded to erect their building. Thereupon an action was commenced by the A.-G. at the relation of the corpn. for an injunction & for a mandatory order. Defts. contended that the laundry was not in the same street as their building or a building on either side of such building within Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3:—*Held*: (1) in order to be a "street" within the sect. there must be a succession of houses & buildings at least on one side of it, with some degree of continuity & proximity, such as would enable the et., as a question of fact, to hold that what was originally a mere highway had become a street; tried by that test the part of H. Road between C. Street on the west & the laundry on the east had not become a street; &, therefore, defts.' building & the laundry were not in the same street; (2) the expression "house . . . on either side thereof" in the sect. meant a house within some near distance, within some degree of proximity & not one standing a considerable

distance away, &, therefore, even assuming that the part of H. Road in question had become a street, the laundry, being situate at a distance of 700 feet from defts.' building, could not properly be described as a "house or building on either side" of it within the sect.—*A.-G. v. LAIRD*, [1925] 1 Ch. 318; 94 L. J. Ch. 243; 132 L. T. 777; 89 J. P. 95; 60 Sol. Jo. 379; 23 L. G. R. 273, C. A.

**113. — Houses at one end only—Continuation a country road.]—A.-G. v. SIDDALL (1898), *Times*, June 24, C. A.**

*Annotation*:—*Reid. A.-G. v. Laird*, [1925] Ch. 318.

### **B. In the Metropolis.**

#### **(a) Under Metropolis Management Acts.**

**114. "Street"—Under 1862 Act, s. 53—Whether "new street" within 1862 Act, s. 112, included.]—Sect. 52 of the above Act enacts that where any sewer shall be constructed by any vestry, in & for the drainage of any new street, or of any house or houses erected since Jan. 1, 1856, the expenses of constructing such sewer should be borne & defrayed by the owners of such street or houses, & of the land bounding or abutting on such street. Sect. 53 enacts that where any sewer shall be constructed by any vestry in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer should be borne & defrayed only in part by the owners of the houses situate in, & of the land bounding & abutting on, such street respectively & the residue by the vestry, out of the sewers rates levied in their parish:—*Held*: sect. 53 applied to all streets, both old & new; &, therefore, when a sewer was constructed in a new street, but sewers rates had been levied in the street previously to the construction of the sewer, the owners of property in the street could not be charged with the whole expense of constructing the sewer.—*STR. GILES, CAMBERWELL VESTRY v. WELLER* (1869), L. R. 6 Q. B. 168, n.; 20 L. T. 756; 17 W. R. 973.**

*Annotations*:—*N.F. Sawyer v. Paddington Vestry* (1870), L. R. 6 Q. B. 164; *St. John, Hampstead, Vestry v. Cotton* (1885), 55 L. J. Q. B. 213.

**115. ———.]—Applt., about the year 1866, built some houses abutting on the H. Road, & about the same time the vestry of the parish constructed a sewer along the H. Road. Sewer rates had been levied in respect of the land upon which the houses were built for more than five years prior to Jan. 1, 1856. Before 1866 no sewer existed in the H. Road, which was & continued to be a turnpike road until July 1, 1861, on which day the vestry took charge of it for the first time:—*Held*: the H. Road was a new street within sect. 112 of above Act; sect. 53 did not apply to new streets as defined by sect. 112; & applt. was therefore liable to be rated under sect. 52.—*SAWYER v. PADDINGTON VESTRY* (1870), L. R. 6 Q. B. 164; 40 L. J. M. C. 8; 23 L. T. 662; 35 J. P. 213; 19 W. R. 96.**

*Annotations*:—*N.F. Hampstead Vestry v. Cotton* (1885), 16 Q. B. D. 475. *Reid. Robinson v. Barton L. B.* (1882), 21 Ch. D. 621.

—.]—Applt. was the owner of a piece of land within resps. district, upon which streets had been laid out since Aug. 7, 1862; certain building land not belonging to him bounded & abutted upon the ends of all the streets except one, which terminated at a cemetery. Resps. laid down sewers in the streets & apportioned the whole of the cost between applt., his tenants, & the owners of the cemetery. Sewer rates had for

many years been levied in respect of the houses upon applt.'s land, although no sewer had previously existed in the streets thereon:—*Held*: the word "street" in sect. 53 included "new streets" as defined by sect. 112, as well as old streets, that sect. 52 did not apply, & therefore, the apportionment was invalid, as it did not provide that a portion of the cost of the sewers should be defrayed by resp. out of the sewers rate levied in their district:—*Semble*: even if sect. 52 had been applicable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding & abutting upon the ends of the streets.—*SHEFFIELD v. FULHAM BOARD OF WORKS* (1876), 1 Ex. D. 395, C. A.

*Annotation*:—*Folld. Hampstead Vestry v. Cotton* (1885), 16 Q. B. D. 475.

117. ——— Former turnpike road become common highway.]—The words "a street" in sect. 53 of the above Act, include "new streets" as defined by sect. 112, as well as old streets. In 1872 a road in the metropolis which had up to that time been a turnpike road ceased to be a turnpike road & became a common highway. In 1883 the vestry of the parish in which the road was constructed a sewer & apportioned part of the expense of construction to the owner of lands abutting on the road. Previously to 1883 there had been no sewer in this part of the road. Sewers rates had been levied for five years prior to Jan. 1, 1856, in respect of these lands:—*Held*: (1) the case fell under sect. 53 & not under sect. 52 of the above Act; (2) the road was a "street" within the meaning of sect. 53 as defined by sect. 112 of that Act, & the lands were under the proviso in sect. 53 exempt from apportionment.—*ST. JOHN, HAMPTSTEAD, VESTRY v. COTTON* (1886), 12 App. Cas. 1; 56 L. J. Q. B. 225; 56 L. T. 1; 51 J. P. 310; 35 W. R. 505; 3 T. L. R. 161, H. L.; *affy. S. C. sub nom. HAMPTSTEAD VESTRY v. COTTON* (1885), 16 Q. B. D. 475, C. A.

118. ——— Under 1855 Act, s. 250 -Whether "new street" within 1862 Act, s. 112, included—*Builder's road*.]—A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made & coated with gravel & ballasted. The footpaths were made with gravel & kerbed with granite. The houses on either side of the road were not completed & inhabited, but the road was open for carriages & foot passengers. It was lighted by the parish but had not been taken to as a public road. The Vestry made branches from the drains into a sewer which belonged to them & ran along the centre of the road, & for that purpose they opened the road & footway. The builder declined to repay to the vestry the expenses incurred thereby:—*Held*: the road was not the less a street within the definitions in sect. 250 of the 1855 Act, & sect. 112 of the 1862 Act, because it came within the definition of a new street in the last mentioned sect.—*ST. JOHN'S, HAMPTSTEAD VESTRY v. HOOPEL* (1845), 15 Q. B. D. 652; 54 L. J. M. C. 147; 54 L. J. Q. B. 602; 49 J. P. 741; 33 W. R. 903; 1 T. L. R. 581.

119. ——— One side only built upon.]—*SIMMONDS BROTHERS, LTD. v. FULHAM VESTRY*, No. 163, *post*.

120. ——— Within 1878 Act, s. 6—Country road without houses.]—The proviso in the above sect., saving the application of the sect. under certain circumstances, applies only where the street in which buildings are being constructed was actually

existing for the purposes of building before or at the date of the passing of the Act. Where at that date the street was merely a country road, & not formed or laid out for building, the proviso has no application; & its protection cannot be invoked upon the ground that it was then a highway, & therefore a "street" by the definition in sect. 250 of 1855 Act.—*LONDON COUNTY COUNCIL v. MITCHELL* (1894), 63 L. J. M. C. 104; 10 R. 308, D. C.

121. "Street for foot traffic only"—Under 1882 Act, s. 8—*Courtyard to dwellings*.]—Artisans' dwellings, comprising twenty-six tenements, accommodating about 250 persons, were built, opening on an approach 100 feet long & 10 feet wide entered from a public street through a gateway 10 feet wide over which one of the buildings was carried. A roadway had previously existed on the site with warehouses abutting thereon, the gateway included the site of a former gateway, which had been pulled down & altered to a greater width. The approach did not afford communication with any other public street, & was for the sole use & convenience of the tenants of the dwellings, to the exclusion of the public, no right of way over the same having ever been dedicated to or used by the public at large:—*Held*: the approach had not been laid out as "a street for foot traffic only" within the above sect., so as to require the sanction of the Metropolitan Board of Works to the laying out thereof.—*METROPOLITAN BOARD OF WORKS v. NATHAN* (1885), 51 L. T. 423; 50 J. P. 502; 34 W. R. 161; 2 T. L. R. 112.

*Annotation*:—*Consd. L. C. C. v. Davis* (1895), 43 W. R. 574.

122. ———]—A magistrate is justified in holding that a passage or way two hundred feet long & twenty feet wide, leading through a gateway to two blocks of buildings intended for artisans' dwellings on either side of it, with a central door in each block opening on to the said passage, & not intended for the use of the public, but only for the purpose of access to the tenements in the said blocks, & having no other exit, is not "a street for foot traffic only" within the above sect., & the consent of the London County Council to the forming or laying out of such a passage or way is not, therefore, necessary.—*LONDON COUNTY COUNCIL v. DAVIS* (1895), 61 L. J. M. C. 212; 59 J. P. 583; 43 W. R. 571; 11 T. L. R. 456; 39 Sol. Jo. 585; 15 R. 509, D. C.

*Annotation*.—*Consd. Wood v. L. C. C.* (1895), 61 L. J. M. C. 276.

#### (b) Under London Building Acts.

See London Building Act, 1894 (c. cxxiii).

123. *Quadrangle surrounded by flats—Single entrance from highway—No public right of entry.*]

—By London Building Act, 1894 (c. cxxiii), s. 7, "No person shall commence to form or lay out any street for carriage traffic or for foot traffic" without having obtained the sanction of the London County Council. Prior to the passing of the Act, applt. erected in accordance with the statutes then applicable thereto a building comprising shops on the ground floor with flats above & an archway through the middle of the ground floor. The building fronted or abutted on to a street called V. Street, & the south-west wall of such building was left unfinished, with toothing, fire-places, etc., with a view to the subsequent extension of the building. After the passing of the Act applt. decided to extend the building by erecting additional buildings round the other

**Sect. 5.—Streets: Sub-sect. 2, B. (b), & C. Sect. 6: Sub-sect. 1.]**

three sides of the quadrangle. Such buildings were to contain about forty-two flats, & would have two entrances & staircases leading from the quadrangle to the flats. There would also be a one storied building used as an estate office with a separate entrance from the quadrangle. The drains of the building were to be connected with respns. sewer in V. Street. There would be no entrance or exit to or from the quadrangle, except by the said archway in V. Street, which was closed by lofty iron gates, & this archway & the quadrangle were intended for the use of the tenants of the flats in the proposed new buildings, & the tradesmen & others visiting them on business or pleasure, with or without carriages, & the public at large were to be entirely excluded therefrom:—*Held*: (1) applt. had not commenced to form or lay out a "street" for carriage traffic within sect. 7 of the Act; (2) the question whether the place was a "street" within the sect. was one of law.—*WOOD v. LONDON COUNTY COUNCIL* (1895), 64 L. J. M. C. 276; 73 L. T. 313; 59 J. P. 615; 44 W. R. 144; 11 T. L. R. 578; 39 Sol. Jo. 742; 15 R. 569, D. C.  
*Annotation*:—As to (1) *N.E. Armstrong v. L. C. C.*, [1900] 1 Q. B. 416.

**124. Road not intended for public carriage traffic.]**—In order that a road or carriage way may be a street within London Building Act, 1894 (c. cxxiii), s. 7, it is not necessary that it should be intended or used for public carriage traffic.

The owner of a building estate, of about four acres in extent, commenced to lay out a road which communicated at one end with a public carriage way the other end of the road ran into a square, about which it was intended to build a continuous line of houses or flats; houses or blocks of flats were also to be built along each side of the road itself, the total length of the road being about 600 feet. It was further intended to erect gates at the point where the road ran out of the public carriage way, & to keep a porter to open & shut the gates. The road was not intended for public use, but solely for the use of the occupiers of the houses in the road & square, & of their visitors & tradespeople. The owner had not obtained the consent of the London County Council before commencing the work:—*Held*: the road was a street within sect. 7 of the Act, & the owner was properly convicted under that sect. of having commenced to form or lay out a street for carriage traffic without having first obtained the sanction of the London County Council.—*ARMSTRONG v. LONDON COUNTY COUNCIL*, [1900] 1 Q. B. 416; 69 L. J. Q. B. 267; 81 L. T. 638; 64 J. P. 197; 48 W. R. 367; 16 T. L. R. 128; 44 Sol. Jo. 158, D. C.

*Annotations*:—*Fold, L. C. C. v. Davis* (1904), 91 L. T. 555. *Distd. L. C. C. v. Heathman* (1905), 69 J. P. 222. *Reid, Simmonds v. Fulham Vestry* (1900), 82 L. T. 497.

**125. Passage way leading to shops—Restricted user.]**—A passage way, thoroughfare, or courtyard leading to shops, even although some part of the user may be restricted to certain times, which is intended & used as a market or bazaar, may be a "street" within the meaning of the London Building Act, 1894 (c. cxxviii), & the person responsible therefore may be convicted under sect. 7 of that Act for commencing to form & lay out a street.—*LONDON COUNTY COUNCIL v. DAVIS*

(1904), 91 L. T. 555; 68 J. P. 520; 2 L. G. R. 1065, D. C.

*Annotation*:—*Consd. L. C. C. v. Heathman* (1905), 3 L. G. R. 1016.

"Commence to lay out a new street."—*See Part XIII., Sect. 1, sub-sect. 9; sect. 2, sub-sect. 6, D., post.*

*C. Under Other Statutes.*

**126. Town Police Clauses Act, 1847 (c. 89), s. 3—Land adjoining railway—No public right of passage.]**—In a district to which Local Govt. Act, 1858 (c. 98), applied, a piece of ground adjoining a railway station, & belonging to the co., metalled & separated from the highway only by a gutter, was used as an approach to the railway station. Private carriages were allowed to stand there, but no hackney or public carriages, except those of applt.; applt., by agreement with the co., having the sole right of standing carriages there for the purpose of plying for hire. Applt. having been convicted in a penalty for allowing his carriages to ply there for hire without a licence:—*Held*: the place was not a "street" within the above sect., for the places included by that sect. in the word "street" were places over which the public had a right of passage; & the conviction was therefore wrong.—(*URTIS v. EMBERY* (1872), L. R. 7 Exch. 369; 42 L. J. M. C. 39; 41 L. J. Ex. 241; 21 W. R. 143.

*Annotation*:—*Fold, Jones v. Short* (1900), 69 L. J. Q. B. 473.

**127. ——— Subject to public right of footway.]**—A railway co. provided a cab stand upon a piece of ground which was their private property subject to a public right of footway along it, & which was metalled & paved like an ordinary street & formed the side approach to one of their stations:—*Held*: the piece of ground was not a "street" within the above sect.—*JONES v. SHORT* (1900), 69 L. J. Q. B. 473; 82 L. T. 197; 64 J. P. 247; 48 W. R. 251; 44 Sol. Jo. 211; 19 Cox, C. C. 472, D. C.

**128. Towns Improvement Clauses Act, 1847 (c. 84), s. 53—Whether confined to street in popular sense.]**—By sect. 3 of the above Act, "the word 'street' shall extend to & include any road, square, court, alley, & thoroughfare, within the limits of the special Act." By sect. 53, "If any street, although a public highway at the passing of the special Act, have not theretofore been well & sufficiently paved & flagged, or otherwise made good," the occupiers of lands abutting on the street are liable for the expenses of paving, etc., & therefore the street is to be repaired out of the rates. A special Act incorporated sect. 53, but provided that "owners" should be substituted for "occupiers."

Pltfs., the local authority, made an agreement with defts. the owners of land abutting on a road, & under this agreement pltfs. purchased land & widened & improved the road. Afterwards pltfs. paved & flagged the footpath beside the road, & sued defts. for the expenses. The jury found that at the time of the paving the road was not a street in the popular acceptance of the term, & that it had been "otherwise made good" by the work which pltfs. had done under the agreement:—*Held*: (1) the road was a "street" within sect. 53; (2) as it had been "otherwise made good" defts. were not liable.—*PORTSMOUTH CORPN. v. SMITH* (1883), 13 Q. B. D. 184; 53 L. J. Q. B. 92; 50

**PART I. SECT. 5, SUB-SECT. 2.—C.**

*n. Burgh Police Scotland Act, 1892—Strip of ground not forming part of railway.]—GLASGOW & SOUTH-WESTERN RY. CO. v. AYR MAGISTRATES, [1912] S. C. (H. L.) 87.—SCOT.*

L. T. 308; 48 J. P. 404, C. A.; *affd. as to* (2) (1885), 10 App. Cas. 364, H. L.

*Annotations*.—*As to* (1) *Apld.* Jowett v. Idle L. B. (1888), 36 W. R. 530; Fenwick v. Croydon R. S. A., [1891] 2 Q. B. 216. *Refd.* R. (on the Prosecution of) Clockerton L. B. of Health v. Burnup (1886), 50 J. P. 598; Richards v. Kessick (1888), 57 L. J. M. C. 48. *As to* (2) *Refd.* Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496; Barry & Cadotson L. B. v. Parry, [1895] 2 Q. B. 110.

**129. Towns Improvement Clauses Act, 1847 (c. 34), s. 66—Whether road without buildings.]**—By the above sect., the comrs. may allow, upon such terms as they may think fit, any building within the limits of the special Act, to be set forward for improving the line of the street in which such building is situated:—*Held*: the term “street” as used in the above sect. did not include a road without a line of buildings, & the comrs. had no power under that sect. to divert any portion of a highway by widening it & obliterate a portion of the old highway which had thereby become unnecessary.—*R. v. PLATTS* (1880), 49 L. J. Q. B. 818; 43 L. T. 159; 11 J. P. 765; 28 W. R. 915.

**130. Local Government Act, 1858 (Amendment) Act, 1861 (c. 61)—Question of fact—For jury.]**—On the trial of an indictment framed on sect. 28 of the above Act, for bringing forward a house in a street beyond the front wall of the houses on either side, without the consent of the local board of health, it was proved that a house surrounded by a garden alongside a highway had been so brought forward by deft.; that alongside the same highway there were other houses in gardens separated from each other by their respective gardens, & standing irregularly, & at different distances from the highway:—*Held*: it was a question of fact for the jury whether the houses formed a street.

(2) In order to constitute a street there must be a row of houses sufficiently continuous & sufficiently proximate to one another; (3) *semble*: a set of detached houses not being in a continuous line, but some facing one way & some another, & having no appearance of uniformity, is not a street within the above Act.—*R. v. FULLFORD* (1861), 1c. & Ca. 103; 33 L. J. M. C. 122; 10 L. T. 316; 28 J. P. 357; 10 Jur. N. S. 522; 12 W. R. 715; 9 Cox. C. C. 453, C. C. R.

*Annotations*.—*As to* (1) *Apld.* A.-G. v. Laird, [1925] Ch 318. *Refd.* R. v. Shell (1884), 50 L. T. 590. *As to* (2) *Fold.* A.-G. v. Laird, [1925] Ch 318. *Refd.* Taylor v. Metropolitan Board of Works (1867), L. R. 2 Q. B. 213; Dryden v. Putney Churchwardens & Overseers (1876), 34 L. T. 69; Baker v. Portsmouth Corpn. (1877), 37 L. T. 381; Robinson v. Barton L. B. (1882), 21 Ch. D. 621; Richards v. Kessick (1888), 57 L. J. M. C. 48; Armstrong v. L. C. C., [1900] 1 Q. B. 416.

**131. — Row of houses—Sufficiently continuous & proximate.]**—*R. v. FULLFORD*, No. 130, *ante*.

**132. — Set of detached houses—Neither continuous nor uniform.]**—*R. v. FULLFORD*, No. 130, *ante*.

**133. Local Act—New roads on building estate.]**—By a local Act comrs. were created having duties with regard to streets & buildings within a certain area. In 1878 it was proposed to lay out an estate within such area for building, & plans were submitted to & approved by the comrs. By an agreement between them & deft., deft. was on completion of the roads in question, to throw eighteen feet of his land into the said roads, which was done, but not to make the roads. In 1887 the powers of the comrs. passed to the council on incorporation. In 1892 the council by an order required deft. to sewer, drain, level, flag, & metal the said roads so far as his premises fronted, adjoined or abutted thereon. The order not having been complied with, the council did the

work themselves, & on making request for payment, deft.'s agent disputed that the property was liable. On a summons taken out by the council to have the sums expended declared a charge on the property:—*Held*: (1) the roads were streets as to which the council had power to make the order; (2) they were public streets as well as streets within the ordinary meaning of the term.—*WEST HARTLEPOOL CORPN. v. ROBINSON* (1897), 77 L. T. 387; 62 J. P. 35; 46 W. R. 218; 14 T. L. R. 18, C. A.

*Annotation*.—*Generally, Mentd.* *Re* Stoker & Morpeth Corpn. (1911), 84 L. J. K. B. 1169.

## SECT. 6.—NEW STREETS.

### SUB-SECT. 1.—IN GENERAL.

*See* Metropolis Management Amendment Act, 1862 (c. 102), s. 112.

**134. Question of fact, not of law — Under Metropolis Management Acts.]**—A police magistrate, on a summons for an order, under Metropolis Management Act, 1855 (c. 120), ss. 105, 226, upon the proprietor of houses in D., alleged to be a “new street” within the Metropolis, for his share of the expenses of paving it, after hearing the parties & their evidence, dismissed the summons on the ground that D. was not a “new street” within the Act, because it was an old highway. A rule, under Justices Protection Act, 1848 (c. 11), s. 5, calling on him to hear & adjudicate on the complaint, was obtained, with a view of obtaining the decision of this ct., that D. might be a “new street” within Metropolis Management Act, 1855 (c. 120), s. 105, though it was an old highway:—*Held*: this ct. could not inquire whether the magistrate came to a right conclusion or not, but only whether he had adjudicated; & the ct. being of opinion that he had done so, the rule was discharged without any expression of opinion as to whether he was right or wrong in his construction of the Act.—*R. v. DAYMAN* (1857), 7 E. & B. 672; 26 L. J. M. C. 128; 20 L. T. O. S. 125; 22 J. P. 39; 3 Jur. N. S. 711; 5 W. R. 578; 119 E. R. 1305.

*Annotations*.—*Consd.* Maude v. Balldon L. B. (1883), 10 Q. B. D. 394; Portsmouth Corpn. v. Smith (1883), 13 Q. B. D. 181. *Fold.* R. v. Shell (1884), 50 L. T. 590.

*Refd.* R. v. Brown (1857), 7 E. & B. 757; Luton L. B. of Health v. Davis (1860), 6 Jur. N. S. 580; Pease v. Chaytor (1863), 3 B. & S. 620; R. v. Llandillo, Brocknockshiro, JJ. (1868), 15 L. T. 277; *Ex p.* Vaughan (1866), L. R. 2 Q. B. 111; St. Mary, Islington v. Barrett (1874), 30 L. T. 11; Dryden v. Putney Overseers (1876), 1 Ex. D. 223; Richards v. Kessick (1888), 59 L. T. 318. *Mentd.* R. v. Nunneley (1858), E. B. & E. 852; R. v. Allen (1866), 7 B. & S. 902; Buccleuch v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221.

**135. —**—*J.*—*BOWLER v. ST. MARY, ISLINGTON, VESTRY* (1875), 39 J. P. Jo. 757.

**136. —**—*J.*—The G. road was a lane 340 feet long; there were no buildings on either side of it, except four houses at one part of it, & the land was bounded on the north & south by back gardens & the backs & sides of houses. In proceedings taken by the P. Board of Works for the paving of the lane as a “new street” within Metropolis Management Acts, the magistrate held that the lane was not a “street” within the Acts, & refused to state a case under Summary Jurisdiction Act, 1857 (c. 43), as he considered the question one of fact:—*Held*: the question whether the lane was a “street” or not was a question of fact & not of law, & the magistrate could not be compelled to state a case.—*R. v. SHELL* (1884), 50 L. T. 590; 49 J. P. 68, D. C.

**137. —**—*J.*—A street, in order to be a

Sect. 6.—New streets: Sub-sects. 1 & 2.]

new street within Metropolis Management Acts, 1855 (c. 120), s. 105, & 1862 (c. 102), s. 77, must be a street formed by houses, some of which have been newly built, or by such houses with land.

A road which had been laid out since the passing of the Act of 1862, & was therefore a new street within the definition in sect. 112 of that Act, had upon one side a house & no other building, & upon the other side a house at one end & a chapel & hall at the other; no new buildings had been erected upon either side of the road for more than twenty years, nor was there any probability of the vacant plots of land on either side being built upon for some years:—*Held*: a magistrate was justified in finding that the road was not a new street for the purposes of sect. 105 of the Act of 1855 or sect. 77 of the Act of 1862, & the local authority could not recover from the frontagers the expenses of paving the road.

The question is whether it is a new street for the purposes of sect. 105 of the Act of 1855 or sect. 77 of the Act of 1862. I cannot feel any doubt upon the language of the sects., although the question is a very important one—important because, as has been pointed out, this particular road is only a section in the middle of a long road, & it may be most inconvenient that a portion of a long road should be imperfectly paved while the rest is properly done; we cannot, however, help that. When sect. 105 is carefully looked at, it is obvious that it not merely begins by treating houses as the essence of what is a street for the purposes of the sect., but later on it goes on to use this expression: “& the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses.” Clearly when that sect. was passed the Legislature was thinking of a street composed wholly or partially of houses; & I should say that the question whether there was a sufficient number of houses to make a road a street for the purposes of that Act would be a question of fact for the magistrate (WRIGHT, J.). *ST. MARY, BATTERSEA, VESTRY v. PALMER*, [1897] 1 Q. B. 220; 66 L. J. Q. B. 77; 75 L. T. 362; 60 J. P. 774; 45 W. R. 110; 13 T. L. R. 20; 41 Sol. Jo. 40, D. C.

*Innotations*:—*Apprvd.* Allen v. Fulham Vestry, [1899] 1 Q. B. 681. *Refd.* Property Exchange (No. 1) v. Wandsworth Board of Works (1902), 71 L. J. K. B. 515.

**138. What may be a new street.—Under Metropolis Management Acts Railway bridge connecting streets.]**—Applts., a railway co., constructed over their railway a bridge 50 feet wide, on which the railway station was built & which connected two streets in the Metropolis. The three lamps on the bridge were erected & lighted by the railway co., & by a deed of agreement, between the railway co. & the New River Waterworks Co., the latter co. had a perpetual easement for the conveyance of its water over the bridge by means of pipes & mains laid under its surface. The bridge had been used by the public uninterruptedly for eighteen months, & a public cab stand, appointed by the Comrs. of Police, was established on a part of the bridge:—*Held*: the bridge was a new street within Metropolis Management Act, 1855 (c. 120), & applts. were liable to contribute in respect of it to the paving of the road.—*NORTH LONDON RY. CO. v. ST. MARY, ISLINGTON, VESTRY* (1872), 27 L. T. 672; 37 J. P. 311; 21 W. R. 226.

**139. — — — Not confined to streets dedicated to public.]**—In Metropolis Management Act, 1862

(c. 102), s. 112, the expression “new street” is not confined to streets dedicated to the public.

*Resp.* was the owner of houses on both sides of a road, the footpaths of which on each side had been paved by applts., the vestry of the parish, & were used by the public. The carriageway had never been dedicated to the public; applts. paved the carriageway, & sought to recover the expense from *resp.* under Metropolis Management Act, 1855 (c. 120), s. 105, on the ground that the carriageway was a new street:—*Held*: although the carriageway had not been dedicated to the public, it was a new street within Metropolis Management Act, 1862 (c. 102), s. 112; & *resp.* was liable to pay the expense of paving it under Metropolis Management Act, 1855 (c. 120), s. 105.—*ST. MARY, ISLINGTON, VESTRY v. BARRETT* (1874), L. R. 9 Q. B. 278; 43 L. J. M. C. 85; 30 L. T. 11; 38 J. P. 198; 22 W. R. 402.

*Innotations*:—*Consd.* Poplar Board of Works v. North Metropolitan Tram. Co. (1879), 43 J. P. 590. *Refd.* L. C. C. v. Davis (1895), 61 L. J. M. C. 212.

**140. — — — New houses built along old highway.]**—*HEATLEY v. FOAKES* (1889), 53 J. P. 772, D. C.

**141. — — — Existing roadway & footpath—Newly made up.]**—A vestry sought to charge the owner of houses in a road with the expenses of paving the road, including the footway, which was on Jan. 1, 1856, when Metropolis Management Act, 1855 (c. 120), came into operation, an ancient footway repairable by the inhabitants at large, & had been from time to time repaired by the vestry at the expense of the ratepayers. The roadway as distinguished from the footway had never been repaired by the vestry & the maintenance of the road had not, previously to Jan. 1, 1856, been taken into charge or assumed by the authorities having control of the pavement or highways. The footway had been tar paved by the vestry at the cost of the ratepayers, but there was no record of it having been kerbed by the vestry, & such tar paving & other work as had been done from time to time was in the nature of repairs of a temporary character:—*Held*: the road, including the footpath, was a “new street” within Metropolis Management Amendment Act, 1862 (c. 102), s. 112, & the owner of the houses was liable to contribute to the paving expenses.—*WILSON v. ST. GILES, CAMBERWELL, VESTRY*, [1892] 1 Q. B. 1; 61 L. J. M. C. 3; 65 L. T. 790; 58 J. P. 167; 40 W. R. 41; 8 T. L. R. 20; 36 Sol. Jo. 30, D. C.

*Innotations*:—*Consd.* Davis v. Greenwich Board of Works, [1895] 2 Q. B. 219. *Distd.* White v. Fulham Vestry (1896), 74 L. T. 425.

**142. — — — Strip of land added to widen old street.]**—In 1888, the owner of land on the south side of a road called S. Road, which had been paved in 1870 at the sole cost of the owners of houses on the north side, under Metropolis Management Act, 1855 (c. 120), s. 105, agreed with the vestry to set back his boundary & dedicate a strip 13 feet wide to the public, so as to increase the width of the road. 6 feet in width of this added strip was thrown by the vestry into the carriageway of S. Road, & was metalled & ever since maintained & repaired out of the general rates. The remaining 7 feet was left to serve as a footpath, but was never paved, maintained, or repaired by the vestry. In 1894 the vestry resolved that the footpath, being a new street, should be paved at the cost of the owners of the houses or land abutting upon the street:—*Held*: no part of the cost of paving the footpath could be apportioned on the owners of the houses on the north side of S. Road, upon whom the whole cost of paving that road

as it was in 1870 had then been apportioned.—**WHITE v. FULHAM VESTRY** (1896), 74 L. T. 425; 60 J. P. 327; 12 T. L. R. 328; 40 Sol. Jo. 439, D. C.

*Annotations*.—**Folld.** Property Exchange v. Wandsworth Board of Works, [1902] 2 K. B. 61. **Refd.** St. James & St. John, Clerkenwell, Vestry v. Edmondson (1902), 66 J. P. 324.

**143.** — — — — —.]—Where an old street repairable by the inhabitants at large, & having houses upon one side of it, is widened by the addition of a longitudinal strip of land of a substantial width upon the opposite side, the strip so added becomes itself a new street, & the expenses of paving the added strip, whether under Metropolis Management Acts, 1855 (c. 120), & 1862 (c. 102), or Public Health Act, 1875 (c. 55), must be apportioned solely among the owners of property abutting upon that strip, & not upon the owners of property abutting upon the old street.—**PROPERTY EXCHANGE, LTD. v. WANDSWORTH BOARD OF WORKS**, [1902] 2 K. B. 61; 71 L. J. K. B. 515; 86 L. T. 481; 66 J. P. 135; 18 T. L. R. 464; 46 Sol. Jo. 378, C. A.

*Annotations*.—**Consd.** Andrews v. Abstrillery U. C. (1911), 80 L. J. Ch. 721. **Refd.** St. James & St. John, Clerkenwell, Vestry v. Edmondson (1902), 66 J. P. 324.

**144.** — — — — —.]—A public road, which before 1907 had been widened, with the sanction of the London County Council, to a width of 20 feet, was in 1907 further widened to a total width of 10 feet & was laid out as a street without the sanction but with the knowledge of the London County Council, & houses were erected on each side. Appls., within whose district the street lay, thereupon decided to pave the street as a new street under Metropolis Management Act, 1855 (c. 120), s. 105, & apportioned the estimated expenses among the frontagers. Resp't., who was one of the frontagers, contended that, as the street had been formed & laid out without the consent of the London County Council, it had been illegally formed & laid out, & that therefore the sect. did not apply so as to entitle appls. to apportion the expenses: **Held**: as the street was in fact a new street appls. had power under the sect. to pave it & to apportion the estimated expenses among the frontagers.—**CAMBERWELL CORPN. v. DIXON**, [1910] 1 K. B. 424; 79 L. J. K. B. 318; 102 L. T. 33; 74 J. P. 77; 8 L. G. R. 238, D. C.

**145.** — — — — — **Houses few & not continuous — No new houses erected for many years.**—**ST. MARY, BATTERSEA, VESTRY v. PALMER**, No. 137, *ante*.

**146.** — — — — — **Maintenance of highway by local authority.**—The mere fact that the maintenance of the paving & roadway of a road within the Metropolis had not previously to 1862 been taken into charge by the highway authority of the parish is not enough to constitute the road a "new street" within Metropolis Management Acts, 1855 (c. 120), s. 105, & 1862 (c. 102), s. 77.

No doubt if a piece of land were newly laid out for the purpose of being used as a street, & were not repairable by the public at large, it would be a new street although there were no houses along it. Or again, if an old road has houses built along its sides with access to it, & thereby is converted into what is popularly understood by the term "street," it would be a new street within the [1862] Act (**CAVE, J.**).—**ARTER v. HAMMER-SMITH VESTRY**, [1897] 1 Q. B. 616; 66 L. J. Q. B. 460;

76 L. T. 390; 61 J. P. 279; 45 W. R. 308; 41 Sol. Jo. 351, D. C.

*Annotation*.—**Refd.** Allen v. Fulham Vestry (1898), 79 L. T. 190.

**147.** — — — — — **Under Public Health Acts - Former old highway.**—**ROBINSON v. BARTON-ECCLES LOCAL BOARD**, No. 80, *ante*.

**148.** — — — — — **Strip of land added to widen old street.**—**RICHARDS v. KESSICK**, No. 102, *ante*.

**149.** — — — — — — —.]—**PROPERTY EXCHANGE, LTD. v. WANDSWORTH BOARD OF WORKS**, No. 113, *ante*.

**Street "formed or laid out since 1862" — Under London Building Act, 1894 (c. cxxiii), s. 49.] — See No. 2093, *post*.**

#### SUB-SECT. 2. — HOW CREATED.

**150. Recent change of character essential.] —** (1) The fact that the local authority have, under Metropolis Management Act, 1855 (c. 120), s. 98, permanently paved & channelled the footway before a number of houses fronting a country road will not estop them afterwards when that country road has, by having houses built continuously, & nearly continuously on both sides of it, become a new street, from exercising the powers given by sect. 105 of that Act by directing the footways on both sides to be permanently paved & channelled, & apportioning the estimated cost among the frontagers, including among these owners of the houses before which the footpath was previously paved & channelled under sect. 98.

(2) "New street" within Metropolis Management Act, 1862 (c. 102), s. 112, explained.

When you get the word street qualified with the epithet "new" it at once throws you back upon the popular meaning of the word street, & it means a place which by change of circumstances has within some indefinable period, you cannot say how long, but recently, acquired by building a new character & part of the old (**WILLIS, J.**).—**CROSSE v. WANDSWORTH BOARD OF WORKS** (1898), 79 L. T. 351; 62 J. P. 807, D. C.

**151. By erection of houses.] — SAWYER v. PADDINGTON VESTRY**, No. 115, *ante*.

**152.** — — — — — (1) The words "new street," as used in the Metropolis Management Acts, include a new street in the ordinary & popular sense of the term; & therefore, a country lane, which was bounded by hedges & fields, & was repaired by the parish time out of mind, becomes a new street within the meaning of that statute when houses are built along the sides of the lane. Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, provides that, where any vestry or district board shall have paved any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expense of paving the same:—**Held**: the words "land bounding or abutting on such street" include the soil of private roads leading out of a new street. (2) Prior to the passing of Metropolis Management Act, 1855 (c. 120), an ancient highway, which was a country lane, & had been repaired by the parish from time out of mind, existed in a district within the Act; after the passing of that statute, & before the passing of Metropolis Management (Amendment) Act, 1862 (c. 102),

#### PART I. SECT. 6, SUB-SECT. 2.

**c. By authorisation.—Of Provincial Legislature.]—**In virtue of its power

over property & civil rights in the Province, the Provincial Legislature has power to authorise a municipality to acquire & make a street, & to

provide how & upon what terms it may be acquired & made.—**GRAND TRUNK RY. CO. v. CITY OF TORONTO** (1900), 32 O. R. 120.—**CAN.**

**Sect. 6.—New streets: Sub-sect. 2. Sects. 7 & 8.**  
**Part II. Sects. 1 & 2: Sub-sect. 1, A.]**

twenty-one houses were built along the sides of the lane, several of which belonged to P.; afterwards ninety houses were built along the sides of the lane. N. was the owner of the soil & freehold of five new private roads leading out of the lane: but he had no exclusive occupation or possession of them:—*Held*: the lane, after the erection of the houses, became a “new street” within the Acts; (3) P. & N. were the owners of land bounding or abutting thereon, & they were liable to contribute to the expense of paving the same.—*Pound v. PLUMSTEAD BOARD OF WORKS, NORTHBROOK (LORD) v. PLUMSTEAD BOARD OF WORKS (1871), 1 L. R. 7 Q. B. 183; 41 L. J. M. C. 51; 25 L. T. 461; 36 J. P. 468; 20 W. R. 177.*

*Annotations*:—*As to (1) Refd.* *St. Mary, Islington Vestry v. Barrett (1874), 1 L. R. 9 Q. B. 278. As to (2) Follid.* *Dryden v. Putney Overseers (1876), 1 Ex. D. 223; Robinson v. Barton-Eccles L. B. (1883), 8 App. Cas. 798. Apld.* *St. Giles Camberwell Vestry v. Crystal Palace Co., [1892] 2 Q. B. 33. Refd.* *L. B. & S. C. Ry. v. St. Giles Camberwell (1879), 4 Ex. D. 239; Allen v. Fulham Vestry (1898), 79 L. T. 190; Clerkenwell Vestry v. Edmondson, [1901] 1 K. B. 264. As to (3) Consd.* *Plumstead Board of Works v. British Land Co. (1875), 1 L. R. 10 Q. B. 203; G. E. Ry. v. Hackney District Works Board (1883), 8 App. Cas. 687; Hornsey District Council v. Smith, [1897] 1 Ch. 843.*

**153.** — — — By Metropolis Management Act, 1855 (c. 120), s. 105, in case the owners of the greater part of “any new street laid out or made, or hereafter to be laid out or made,” which is not paved to the satisfaction of the vestry or district board, be desirous of having the same paved, or if such vestry or board deem it necessary or expedient that the same should be so paved, then such vestry or board may pave the same, & the expenses are to be charged on the owners of the houses forming such street. By s. 250 the word “street” shall apply to & include any highway:—*Held*: Metropolis Management Amendment Act, 1862 (c. 102), s. 112, does not restrict the meaning of the expression “new street,” & therefore that expression, as used in Metropolis Management Act, 1855 (c. 120), s. 105, includes a new street in the ordinary & popular sense of the term. An ancient country highway which became a “new street” in that sense, by the erection of buildings fronting it, shortly before, or after the passing of the Metropolis Management Act, 1855 (c. 120), is within the terms of s. 105 of that Act, & the expense of paving it may be charged upon the owners under that sect.—*ST. GILES, CAMBERWELL, VESTRY v. CRYSTAL PALACE CO., [1892] 2 Q. B. 33; 61 L. J. Q. B. 802; 66 L. T. 810; 57 J. P. 5; 40 W. R. 648, C. A.*

*Annotations*:—*Consd.* *Davis v. Greenwich Board of Works, [1895] 2 Q. B. 219. Refd.* *White v. Fulham Vestry (1896), 74 L. T. 425; Property Exchange (No. 1) v. Wandsworth Board of Works (1902), 71 L. J. K. B. 515.*

**154.** — — — *On both sides.*—When within the metropolis, as defined by Metropolis Management Act, 1855 (c. 120), s. 250, a new street is paved for the first time, the vestry or district board executing the work cannot at their discretion charge the costs thereof upon the general rate under sects. 96, 98 of that Act; they are bound to charge the expense of laying the pavement upon the owners of the adjoining houses & land, under sect. 105 of that statute, as varied by Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77. In 1855 a road in P., within the metropolis, as defined by the 1855 Act, s. 250, ran between an irregular line of houses & market gardens upon the south side & market gardens upon the north. Between that year & 1874, a continuous line of

houses was built along the north side & several houses along the south. The district board, within whose jurisdiction the road lay in 1874, paved a footpath by the side of the road & paid for the cost of the work under the 1855 Act, ss. 96, 98, out of the general rate levied upon the inhabitants of P.:—*Held*: (1) between 1855 & 1874 the road had become a “new street” within the 1855 Act, s. 105; (2) the district board had no power to charge the cost of paving the footpath upon the general rate, but it was compulsory upon them to obtain payment thereof from the owners of the adjoining houses & land, under that sect. as varied by the 1862 Act, s. 77.—*DRYDEN v. PUTNEY OVERSEERS (1876), 1 Ex. D. 223; 34 L. T. 69; 40 J. P. 263.*

*Annotations*:—*As to (1) Refd.* *Robinson v. Barton, Eccles, Winton, & Monton L. B. (1882), 46 L. T. 193; Property Exchange (No. 1) v. Wandsworth Board of Works (1902), 71 L. J. K. B. 515. As to (2) Follid.* *A.-G. v. Wandsworth District Board of Works (1877), 6 Ch. D. 539.*

**155.** — — — Under Metropolis Management Amendment Act, 1862 (c. 102), it is a question of fact for the magistrate whether a road has become at any given time a “new street” within the Act, & the ct. will not interfere with his decision unless it is clearly wrong upon the evidence. A road constructed as a highway by Act of Parliament through agricultural land may become a new street as soon as houses have been constructed on both sides of it.—*ALLEN v. FULHAM VESTRY, [1899] 1 Q. B. 681; 68 L. J. Q. B. 450; 80 L. T. 253; 63 J. P. 212; 47 W. R. 428; 15 T. L. R. 241; 43 Sol. Jo. 313, C. A.*

*Annotation*:—*Refd.* *Property Exchange (No. 1) v. Wandsworth Board of Works (1902), 71 L. J. K. B. 515.*

**156.** — — — *On one side.*—*HOLDEN v. ST. MARY, ISLINGTON, VESTRY (1887), 3 T. L. R. 326, C. A.*

**157.** — — — *Newly built.*—*ST. MARY, BATTERSEA, VESTRY v. PALMER, No. 137, ante.*

**158.** — — — *Conversion of old highway into new street.*—Metropolis Management Act, 1862 (c. 102), s. 112, does not restrict the meaning of the expression “new street,” & therefore that expression as used in the Metropolis Management Acts includes a new street in the ordinary & popular sense of the term.

A road, which was a turnpike road down to 1805 & previously to 1869 of a rural character, subsequently became a new street in the ordinary sense of the term by the erection of buildings alongside it:—*Held*: (1) it was within Metropolis Management Act, 1855 (c. 120), s. 105, & therefore the district board might pave it under that sect. & charge the expenses upon the frontagers; (2) the fact that slight temporary repairs had been previously done by the district board to the footway of the road by tar painting it did not prevent them from exercising the powers given by the sect.

The principle on which the expenses of paving a new street have been apportioned by a district board amongst the owners liable in respect thereof cannot be questioned in any ct.—*DAVIS v. GREENWICH BOARD OF WORKS, [1895] 2 Q. B. 219; 64 L. J. M. C. 257; 72 L. T. 674; 59 J. P. 517; 14 R. 552, C. A.*

*Annotation*:—*As to (1) Refd.* *St. Mary, Battersea, Vestry v. Palmer & Winder (1896), 60 J. P. 774.*

**159.** — — — — — *Arter v. HAMMERSMITH VESTRY, No. 146, ante.*

**160.** — — — *Limiting & defining breadth of road.*—Wherever buildings are erected on opposite sides of a highway so as to limit & define the breadth of the roadway, the highway so far as it lies between those buildings is a “new street.”—*A.-G. v. RUFFORD & Co., Ltd., [1899] 1 Ch.*



537; 68 L. J. Ch. 179; 80 L. T. 17; 63 J. P. 232; 47 W. R. 405; 15 T. L. R. 152.

*Annotations*—*Consd.* A.-G. v. Dorin, [1912] 1 Ch. 369. *Reid.* A.-G. v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101.

161. — **New building on one side only—Opposite sides of street in different highway areas.**—The boundary between two parishes, one of which was in the county of London & the other in Middlesex, ran along the middle of an old highway 2993 feet in length. At the time when Metropolis Management Act, 1855 (c. 120), came into operation, buildings had been erected on the Middlesex side of the highway, along nearly the whole of its length, but on the London side there were only seven or eight buildings situated at various points. A number of buildings having recently been erected along the London side of the highway, the vestry of the parish to which that portion of the highway belonged laid down a sewer under it for the purpose of draining those buildings, & apportioned the expenses of making the sewer among the frontagers upon that side of the highway on the ground that it was a new street. One of the frontagers having refused to pay the amount apportioned upon him, application was made to justices by the vestry for an order for payment by him of that amount. The justices found as a fact that, at the time when the Act came into operation, the highway, as a whole, had already become a street; & that being so, they decided that they could not deal with the London side of the highway by itself for the purpose of determining whether it was a new street, & therefore they dismissed the application:—*Held*: their decision was right. (*CLERKENWELL VESTRY v. EDMONDSON & SONS*, [1902] 1 K. B. 336; 71 L. J. K. B. 198; 86 L. T. 137; 18 T. L. R. 218, C. A.)

162. **Whether houses essential—Land newly laid out as street.**—*ARTER v. HAMMERSMITH VESTRY*, No. 146, *ante*.

163. — **One side building land unbuilt upon.**—(1) In 1883 a highway, the greater part of which was then paved, became a "new street" within Metropolis Management Act, 1855 (c. 120), s. 105, which enables a metropolitan vestry or district board to pave any "new street" not paved to their satisfaction, & to charge the expense on the

owners of the houses forming the street. From 1883 to 1899 the district board, & the vestry who succeeded them, repaired the footways & carriage-way of the street as surveyors of highways. In 1899 the vestry resolved to exercise their powers under sect. 105, & required the owners to pay the apportioned expenses of paving the street:—*Held*: as neither the board nor the vestry had exercised their powers under sect. 105 before 1899, the vestry were then entitled to exercise them, notwithstanding the time which had elapsed since the road became a new street.

A road may become a "new street" within sect. 105 of the Act, although all the land on one side of it is building land upon which no building has been erected.

(2) A highway of which one side is covered with houses along its entire length, & the other consists of building land vacant except for the existence thereon of a temporary iron school is a "street" within Metropolis Management Act, 1855 (c. 120), s. 250, & Metropolis Management (Amendment) Act, 1862 (c. 102).—*SIMMONDS BROTHERS, LTD. v. FULHAM VESTRY*, [1900] 2 Q. B. 188; 60 L. J. Q. B. 580; 82 L. T. 197; 61 J. P. 548; 18 W. R. 571, D. C.

#### SECT. 7.—CHURCHWAY.

**Over churchyard.**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 307, Nos. 1051, 1055.

164. **Over private land.**—A prescription for the inhabitants of a town to have a way over the land of another to their church is good as being in the nature of an easement.—*BOND'S CASE* (1639), March, 16, pl. 38; 82 B. R. 391.

*Annotation*—*Reid.* Constable v. Nicholson (1863), 13 C. B. N. S.

—*See, generally*, CUSTOM & USAGES, Vol. XVII., pp. 5, 9, 16, 17, Nos. 17, 49, 155–159.

#### SECT. 8.—MARKETWAY.

*See* CUSTOMS & USAGES, Vol. XVII., pp. 16, 17, Nos. 155–157.

## Part II.—Highway Statutes, Areas and Authorities.

### SECT. 1.—HIGHWAY STATUTES.

165. **Effect of public general Acts—On highways governed by local Acts.**—*Mandamus* to a justice to issue his distress warrant against the occupiers of P. bridge for a highway rate assessed on them, under Highway Act, 1835 (c. 50), in respect of their occupation of the bridge & toll house & the land on which the same was erected. Return that P. bridge was paved, repaired & cleansed under a local Act of Parliament:—*Held*: the return was no answer, as sect. 113 of Highway Act, 1835 (c. 50), did not exempt the property from liability to the rate imposed under sect. 37.

The intention of the legislature does not seem to be to exempt any property from the rate imposed by sect. 27, but to exempt ways, bridges, etc., managed under the provisions of local Acts from the regulations of the general highway Act, so as to preserve the powers conferred by the local Acts (*LORD DENMAN, C.J.*).—*R. v. PAYNTER*

(1849), 13 Q. B. 399; 3 New Mag. Cas. 105; 3 New Sess. Cas. 405; 18 L. J. M. C. 109; 12 L. T. O. S. 450; 13 J. P. 120; 13 Jur. 281; 110 E. R. 1315.

*Annotations*—*Distd.* R. v. Maidstone JJ. (1852), 16 J. P. Jo. 390; *Wright v. Frant Overseers* (1863), 4 B. & S. 118.

166. — — — — — *R. v. MAIDSTONE JJ.* (1852), 16 J. P. Jo. 390.

*See, generally*, STATUTES.

### SECT. 2.—HIGHWAY AREAS AND AUTHORITIES.

#### SUB-SECT. 1.—APART FROM SPECIAL AREAS.

##### A. For Ordinary Highways.

167. **Under Local Government Act, 1894 (c. 73)—Whether confined to authorities under Highways & Locomotives (Amendment) Act, 1878 (c. 77).**—The expression "highway authority" in Local



**Sect. 2.—Highway areas and authorities: Sub-sect. 1, A. & B.; sub-sect. 2, A. & B.; sub-sect. 3. Part III. Sect. 1.]**

Govt. Act, 1894 (c. 73), is general, & has not the limited meaning given to the same expression in Highways & Locomotives (Amendment) Act, 1878 (c. 77); & highway expenses raised by an acre rate are not defrayed out of any property or funds other than rates within sect. 29 of Local Govt. Act, 1894.

Comrs. of M. had under certain local & private Acts powers of inclosure & drainage, & jurisdiction over the roads in M., a district made up of parts of certain parishes, some of which were in rural & others in urban sanitary districts. Under these Acts the expenses of repairing the roads in M. were raised by an acre rate levied equally on the lands in M., & the lands in M. were exempted from all other highway expenses:—*Held*: (1) the comrs. were a highway authority within Local Govt. Act, 1891; (2) their authority as to the roads in the rural district was by sect. 25 of that Act transferred to the rural district council, their authority as to the roads in the urban district to the urban district council; (3) the highway expenses of M., after the transfer, were not to be raised by an acre tax, but treated as general expenses under sect. 29 of the Act, & the lands in M. were no longer exempted from general highway rates.—*Re MARSHLAND SMEETH & FEN DISTRICT COMRS. & MARSHLAND RURAL DISTRICT COUNCIL* (1895), 65 L. J. Q. B. 185; 59 J. P. 821; *sub nom.* MARSHLAND SMEETH & FEN DISTRICT COMRS. v. MARSHLAND DISTRICT COUNCIL, 73 L. T. 563, D. C.

*Annotation*:—*As to* (3) *Reid*. *Lonsdale v. Lowther Overseers* (1896), 60 J. P. 297.

**168. — Commissioners under local inclosure drainage Act.]—***Re MARSHLAND SMEETH & FEN DISTRICT COMRS. & MARSHLAND RURAL DISTRICT COUNCIL*, No. 167, *ante*.

**Transfer of powers of former highway authorities.]—**See Local Government Act, 1894 (c. 73), s. 25.

**Powers of former highway authorities.]—**See Part VIII., *post*.

*B. For Main Roads.*

**169. County council—Effect of agreement for repair by district council.]** Pltfs. entered into an agreement with defts., whereby, in consideration of a certain sum to be paid by defts. to pltfs., pltfs. agreed to maintain & repair the main roads within their district for a period of one year:—*Held*: notwithstanding the agreement, defts. continued to be the road authority in respect of the main roads in question, & they were therefore entitled to the surplus material excavated in the course of the construction of a line of tramway along one of such roads.—*STOCKPORT & HYDE HIGHWAY BOARD v. CHESTER COUNTY COUNCIL* (1891), 61 L. J. Q. B. 22; 65 L. T. 85; 55 J. P. 808; 39 W. R. 606.

**170. Whether district a geographical area.]—**By a series of statutes passed to regulate the management of ancient trust funds for repairing certain roads, the roads were divided among the road authorities, who received their due proportion of the funds, so that, in places, one side of the road was local situate in one urban district, & the other side in another district. For purposes of repair, however, the roads were divided across, so that each district council repaired a certain length of road, partly within its own district & partly without. Under the trusts on which the

funds were held the councils had the duty of lighting, watching, & watering the roads. The urban district councils claimed to retain the roads as main roads:—*Held*: (1) the district councils, notwithstanding their additional duties with regard to the roads, might retain, as being main roads within their district, so much, & so much only, of the roads as they repaired, though parts of the road might be locally situate outside the area of the district, on the ground that in this connection "district" means an administrative rather than a geographical area; (2) the existence of the trust funds ought not to be excluded from consideration in settling the amount to be contributed from the county; (3) the amount of the funds usually applicable to lighting, watching, & watering should not be treated as money to be taken into account in assessing the payment to be made by the county towards maintenance, repair, & improvement.—*MIDDLESEX COUNTY COUNCIL v. WILLENDEN & HENDON URBAN DISTRICT COUNCILS* (1896), 60 J. P. 630; 12 T. L. R. 437, D.

**171. Roads in two districts—Retention by district council—County contribution.]—***MIDDLESEX COUNTY COUNCIL v. WILLENDEN & HENDON URBAN DISTRICT COUNCILS*, No. 170, *ante*.

**SUB-SECT. 2.—IN SPECIAL AREAS.**

*A. Isle of Wight.*

**172. Highway authority—Effect of Local Government Act, 1894 (c. 73), s. 25.]—**By Isle of Wight Highway Acts, 1813 (c. xcii), & 1883 (c. cccxxvi), s. 5, comrs. were appointed for the purpose of maintaining & repairing the highways in the island. From 1883 until Local Government Act, 1888 (c. 41), the highways were repaired & maintained by such comrs. By sect. 12 of the Local Government Act, 1888, turnpike roads were abolished in the Isle, & Highways & Locomotives (Amendment) Act, 1878 (c. 77), was made to apply to it. In 1889 the Isle was made an administrative county of itself. Since 1890 the highway comrs. maintained & kept in repair as main roads the highways in the Isle. By sect. 25 of Local Government Act, 1894 (c. 73), it was provided that there should be transferred to the district council of every rural district all the powers, duties, & liabilities of any highway authority in the district, & that all highway boards should cease to exist, & that rural district councils should be the successors of the highway authority. Sect. 100 of Local Government Act, 1888, provides that the expression "highway authority" shall mean, as respects a highway district, the highway board or authority having the powers of a highway board:—*Held*: the powers, duties, & liabilities of the Isle of Wight highway comrs. had been transferred to the district council of the rural districts of the island, & the Isle of Wight highway comrs. had ceased to exist by sect. 25 of Local Government Act, 1894, & although the district council had become the actual highway authority, the expenses would still have to be defrayed by the county council.—*Re ISLE OF WIGHT HIGHWAY COMRS.* (1895), 72 L. T. 569; 59 J. P. 438, D. C.

*Annotation*:—*Reid*. *Re Marshland Smeeth & Fen District Comrs. & Marshland R. D. C.* (1895), 65 L. J. Q. B. 185.

**173. Liability for repairs.]—***Re ISLE OF WIGHT HIGHWAY COMRS.*, No. 172, *ante*.

**174. — Road formerly repaired by commissioners—How ascertained.]—**The words "arbitration under this Act" in sect. 12 (2) of

Local Govt. Act, 1888 (c. 41), mean arbitration in accordance with the provisions of sect. 62, & do not refer back to sect. 11 (4) of the Act.—*RE ISLE OF WIGHT RURAL DISTRICT COUNCIL & ISLE OF WIGHT COUNTY COUNCIL* (1900), 65 J. P. 87, D. C.

### B. South Wales.

See South Wales Highways Act, 1860 (c. 68); South Wales Highway Act, Amendment Act, 1878 (c. 34).

**175. Obligation to repair—How enforced.]—**Under 14 & 15 Vict. c. 16, districts were formed & highway boards constituted for the management of highways in South Wales, & district surveyors were appointed. By South Wales Highways Act, 1860 (c. 68), s. 6, the district surveyor is to have "all duties, powers, & responsibilities as regards the parishes in such district, of a surveyor elected under" Highway Act, 1835 (c. 50); "& all acts & provisions not hereby repealed, applicable to such last mentioned surveyor, shall, save as herein otherwise provided, apply in like manner to a surveyor of highways of a district appointed under this Act;" & by sect. 43, except as otherwise provided, all the provisions of Highway Act, 1835 (c. 50), were to remain in force & be applicable to the highways to be managed under the later Act, & the two Acts were to be construed together as one Act. Sect. 40 re-enacted sect. 90 of Highway Act, 1835 (c. 50), substituting a summons on the district surveyor for a summons on the parish surveyor; but sect. 95 of the earlier Act was not expressly re-enacted:—*Held*: that sect. remained in force; & therefore where, on the hearing of a summons against the district surveyor for the non-repair of a highway in South Wales,

he denies, on behalf of the inhabitants of the parish, the obligation to repair, the justices may direct an indictment to be preferred against the parish.—*R. v. JAMES* (1863), 3 B. & S. 901; 32 L. J. M. C. 211; 27 J. P. 676; 9 Jur. N. S. 1126; 122 E. R. 337.

### SUB-SECT. 3. —OTHER CASES.

**176. "Town" —Construction of local Act.]—**Sect. 23, of a local Act for better paving, etc., the town of M., required the comrs. appointed by the Act to repair, etc., all or any of the streets, etc., then paved or thereafter to be paved, cleansed, & lighted under the Act; sect. 35 empowered the comrs. to light streets "within the town," although they were not public. The limits of the Act were not defined. In pursuance of Highway Act, 1862 (c. 61), s. 7, the county of K. was divided into highway districts, one of which included that part of the parish of M. "not within the town of M." Since 1862, certain highways in the parish of M. had been lighted by the comrs.; before they were so lighted they were not within the town. Upon complaint before justices against the highway district board for not repairing them:—*Held*: (1) the word "town" in the local Act meant the town of M. not as it existed at the time of the passing of the Act, but as it extended from time to time; (2) a highway was within the town of M. if there was a continuous series of houses in it so contiguous as to form a congregation of human habitations; (3) the fact of lighting the highways was not conclusive as to their being in the town of M.—*MILTON COMRS. v. FAVERSHAM DISTRICT HIGHWAY BOARD* (1867), 10 B. & S. 518; 32 J. P. 37.

## Part III.—Origin and Proof of Highways.

### SECT. 1.—HIGHWAYS BY PRESCRIPTION.

**177. Whether possible.]—**(1) In both countries [England & Scotland] a right of public way may be acquired by prescription (*LORD BLACKBURN*).

(2) Where there has been evidence of a user by the public so long & in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, & has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore, in England, never practically necessary to rely on prescription to establish a public way

(*LORD BLACKBURN*). *MANN v. BRODIE* (1885), 10 App. Cas. 378, H. L.

*Annotations*.—As to (2) *Consol. Folkestone Corp'n. v. Brockman*, [1914] A. C. 338. *Reid*. *Macpherson v. Scottish Rights of Way & Recreation Soc.* (1888), 13 App. Cas. 741.

**178. —.]—**(1) Where there is a public footway, & adjacent land along the same line as the footway, but increasing the width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to public use as a footway all the space that he has devoted to traffic in fact.

(2) In all these cases of right of way it is necessary to remember that the thing to be established is

### PART II. SECT. 2, SUB-SECT. 3.

**176 l. "Town" — Construction of local Act.]—***WILLIAMS v. CITY OF PORTLAND* (1891), 19 S. C. R. 159.—*CAN.*

### PART III. SECT. 1.

**177 l. Whether possible.]—**A right of way had been enjoyed by the public for a period of upwards of forty years:—*Held*: it was thereby proved a public way.—*COMEAU v. LEBLANC* (1869), 8 N. S. R. 13.—*CAN.*

**177 ll. —.]—**Where a road was laid out over land by the owners, & was so used by the public, without interruption, for 30 or 40 years:—*Held*: it had become a public highway.—*MOORE v. ESQUERRE TOWNSHIP* (1871), 21 C. P. 277.—*CAN.*

**177 ill. —.]—***SINCLAIR v. PETERIS* (1912), 23 O. W. R. 441; 3 O. W. N. 1045; 4 O. W. N. 338; 8 D. L. R. 575.—*CAN.*

**177 iv. —.]—***HARVEY v. ROGERS* (1828), 3 Bll. N. S. 410.—*SCOT.*

**177 v. —.]—***FORBES v. FORBES* (1829), 7 Sh. (Ct. of Sess.) 441.—*SCOT.*

**177 vi. —.]—***MACKENZIE v. BANKES* (1868), 6 Macph. (Ct. of Sess.) 936; 40 Sc. Jur. 535.—*SCOT.*

**177 vii. —.]—**A public road can be acquired by immemorial user.—*DU TOIT v. ABERDEEN DIVISIONAL COUNCIL* (1910), C. P. D. 477.—*S. AF.*

**p. — Substituted road.]—***HOZIER v. HAWTHORNE, ETC.* (1884), 11 R. (Ct. of Sess.) 766; 21 Sc. L. R. 631.—*SCOT.*

**q. —.]—**If it can be inferred from evidence that a new road was taken as of right as a substitute for an old road, the years of use of both roads can be added together to make the prescriptive period.—*YOUNG v. KINLOCK*, [1910] A. C. 169; [1911] S. C. (H. L.) 1.—*SCOT.*

**r. — Evidence.]—***EDINBURGH MAGISTRATES v. N. B. RLY CO.* (1904), 6 F. (Ct. of Sess.) 620; 41 Sc. L. R. 492; 12 S. L. T. 20.—*SCOT.*

**s. Extinction of prescriptive right — Whether possible — Possession by private person.]—**The public cannot release their rights; & where an original allowance for road had been taken possession of & occupied by plff., for a period of forty years & upwards:—*Held*: such possession

**Sect. 1.—Highways by prescription. Sect. 2: Sub-sect. 1.]**

dedication, not user. A highway is not acquired by user. You cannot acquire a right of public way under the Prescription Acts. If you want to acquire a right by prescription you must go back to the time of Richard I., to a time before legal memory. In most of these cases dedication, it is true, is proved by user. But user is but the evidence to prove dedication; it is not user, but dedication which constitutes the highway (BUCKLEY, J.).—*A.-G. v. ESHER LINOLEUM Co., Ltd.*, [1901] 2 Ch. 647; 70 L. J. Ch. 808; 85 L. T. 414; 66 J. P. 71; 50 W. R. 22.  
*Annotation* :—*As to (2) Reidd. A.-G. v. Hemingway* (1916), 81 J. P. 112.

Prescription, *see, generally*, EASEMENTS, Vol. XIX., pp. 53 *et seq.*

**SECT. 2.—HIGHWAYS BY DEDICATION AND ACCEPTANCE.**

**SUB-SECT. 1.—IN GENERAL.**

*See Highway Act, 1835 (c. 50), s. 23.*

**179. Dedication alone insufficient—Necessity for acceptance by public.]—R. v. MELLOR, No. 865, *ost.***

**180. — — — — —.]—FISHER v. PROWSE, COOPER v. WALKER, No. 66, *ante*.**

**181. — — — — —.]—(1)** An Act passed in 1802 for inclosing a portion of Effingham Common. In 1808, the comr. appointed to carry the Act into execution made an award whereby & by the map deposited therewith a public road forty feet wide was directed to be made from A. to B. This road was accordingly set out, & was duly fenced by the allottees of the land adjoining it; but it was never formed & completed so as to satisfy the requirements of Inclosure Act, 1801 (c. 109), ss. 8 & 9, & to become a highway repairable by the parish; & there was no evidence that it had ever been used except by the owners or tenants of the allotments on the side of it, & in two or three instances by other persons shortly after it was so set out. About the year 1822, S., who was the lord of the manor of Effingham East Court, & who had purchased some allotments abutting on a portion of the road, planted along the whole length of it, about nine or ten feet from the fence separating it from Rammore Common, a row of fir trees; & the rest of the forty feet was overgrown with briars, brambles, & furze. Pltf. in 1852 became the owner of an estate abutting on the other portion of the road, & had for more than twenty years exercised repeated acts of ownership over the whole of the 40-foot space, such as, shooting over it, cutting down some of the fir-trees when they wanted thinning, & repairing the fences; though these it appeared had occasionally been repaired by other persons, to prevent sheep & cattle from straying on to their lands from the adjoining common. Deft., in 1869, purchased the estate which had formerly belonged to S.; & in 1870 she cut down & converted several of the trees

growing upon the 40-foot space opposite pltf.'s land; & to an action against her for this alleged trespass she pleaded, amongst other pleas, that the *locus in quo* was a common & public highway for all the Queen's subjects, & justified the cutting down & removing the trees in the exercise of such right of way. Neither in the conveyance to pltf., nor in that to deft., nor in the respective plans thereto annexed, was any mention made of the 40-foot road. The jury found that deft. did the acts complained of in assertion of a claim of property, & not of a right of way; that the 40-foot road was never taken to as a public highway by the public; & that pltf. had had twenty years' uninterrupted possession of the *locus in quo* :—*Held* : the evidence did not support the plea.

(2) Acceptance by the public is ordinarily proved by user by the public; & user by the public is also evidence of dedication by the owner. Both dedication by the owner & user by the public must concur to create a road otherwise than by statute (BRETT, J.).

(3) It is not compulsory on the public to accept the use of a way when offered to them (BRETT, J.).—(*CUBITT v. MAXSE (LADY CAROLINE)* (1873), L. R. 8 C. P. 704; 42 L. J. C. P. 278; 29 L. T. 244; 21 W. R. 789; *sub nom.* MAXSE v. CUBITT, 37 J. P. 808.

*Annotation* :—*As to (1) Reidd. Leigh U. C. v. King*, [1901] 1 K. B. 747.

**182. — — — — —.]—In 1830, A. projected the formation of a seaside town, to be built on his lands, & a plan was prepared which showed the sites of various streets, roads, & squares, proposed to be made & formed on such lands. In June, 1833, a private Act of Parliament was obtained by which the lands described on the plan were made a distinct parish for the purposes of the Act, & by which comrs. were appointed in whom were vested all roads, streets, & ways, then made & used by the public, or thereafter to be made & adopted by the comrs. as public ways under the Act. The Act also conferred plenary powers on the comrs. with regard to the paving, lighting, draining, & repairing, of such streets, roads, & ways. In Feb. 1833, A. had sold & conveyed to B. who was one of the principal promoters of the Act, & one of the first comrs. appointed thereunder, several of the plots of land described on the plan & on which were delineated the sites of certain of the proposed roads, streets, & squares. Previously & subsequently to the Act numerous houses had been built, & some of the roads, streets, & ways shown on the plan had been wholly or partially formed, & had been adopted by the comrs., but no houses were at any time erected on the lands conveyed to B., & the same, including such parts as comprised the sites of the proposed roads, streets, & squares, were from 1833 to 1867 uninterruptedly held & enjoyed & cultivated as arable & pasture lands by B. & his lessees. In 1868, the comrs. gave B.'s devisees notice of their intention to take possession of the sites of the proposed streets, roads, & squares shown on the plan, & in 1871 they proceeded to mark, grip up, & stamp out such sites on the ground that the**

afforded no ground for opposing the action of the municipality in resuming possession of the road to open it up.—*NASH v. GLOVER* (1876), 24 Gr. 219.—**CAN.**

**PART III. SECT. 2, SUB-SECT. 1.**

**179 I. Dedication alone insufficient—Necessity for acceptance by public.]—SKILTZKY v. CHANNON** (1892), 22 Q. B. 590.—**CAN.**

**179 II. — — — — —.]—In order to**

establish the existence of a public highway by dedication it must appear that the public accepted such dedication by user thereof as a public highway.—*MOORE v. WOODSTOCK WOOLLEN MILLS Co.* (1899), 29 S. C. R. 627.—**CAN.**

**179 III. — — — — —.]—OTTAWA (CITY) v. GRAND TRUNK RY. CO., OTTAWA (CITY) v. OTTAWA & NEW YORK RY. CO.** (1921), 64 D. L. R. 337; 50 O. L. R. 239.—**CAN.**

**179 IV. — — — — —.]—There must be not only the intention of the owner to dedicate, but also acceptance by the public. In the absence of user by the public, acceptance by a municipality without statutory authorisation for that purpose is not tantamount to acceptance by the public.—CITY OF VICTORIA v. BAILEY**, [1920] 1 W. W. R. 917; 54 D. L. R. 50; 60 S. C. R. 38.—**CAN.**

same had been dedicated to the purposes of the Act by the promoters of the Act, & that they were acting within their statutory powers. On bill being filed to restrain the comrs. from so doing:—*Held*: although there might have been a dedication of their lands by the promoters of the Act, such dedication was not complete until the intended streets & roads had been used & adopted by the public; & there having been no such use & adoption for upwards of forty years, the proposed sites were not within the statutory powers of the comrs., & an injunction would be granted accordingly.—*MACKETT v. HERNE BAY COMRS.* (1876), 35 L. T. 202; *affg.* (1877), 37 L. T. 812, C. A.

*See, further*, Sub-sect. 9, *post*.

**183. Actual dedication necessary—Abandonment of scheme.**—In Jan. 1850, the owner in fee of a plot of land near a town demised the coals under it for six years to K., the owner in fee of the adjoining land; & in the lease was an agreement that a street, to be called Union Street, should within five years be made across the land under which the coal lay & K.'s land; that a sewer should be made under such road; that the lessor & lessee should, at their own cost, construct & repair so much of the said road & sewer as should extend along their respective lands; & that the road should be used as a public road for all purposes for ever thereafter, & should be maintained by each of the parties so far as the same should extend over his land, until the same should be adopted by the surveyor of highways. The road & sewer were never made, & there was no dedication of a highway to the public by notice under Highway Act, 1835 (c. 50). A brickfield, & afterwards, in 1851, a colliery, were opened on K.'s land, & gaps were opened through which access was obtained to the premises for carts & foot-passengers. In 1869 posts & chains were placed across one of the openings, but after a few months the chains were removed. In 1870 K.'s land was sold, & in 1871 conveyed to plff. in fee, & in 1872 the local board of health called upon him to sewer & pave the alleged street under Public Health Act, 1848 (c. 63):—*Held*: the agreement in the expired lease had been abandoned & could not be enforced, & it did not amount to a dedication of a right of way to the public.—*HEALEY v. BATLEY CORPN.* (1875), L. R. 10 Eq. 375; 44 L. J. Ch. 612; 39 J. P. 423

*Annotation*: *Reid*, *Cababér* Walton-upon-Thames District Council, [1913] 1 K. B. 481.

**184.** ———.—*H.*, a lessee for a term of seventy-five years of a plot of building land, laid out, in 1865, a proposed road across part of the land, & built six houses on one side of it, but subsequently abandoned her intention of making the road, & in 1874, demised the remainder of the land, including the site of the abandoned road, for use as a timber yard. The public had occasionally used the road from 1865 up to 1880, when the urban authority required *H.*, as the owner of the houses abutting on the road, to sewer, flag, & pave the same, & on the lessee declining to comply with this request, the urban authority executed the works:—*Held*: the mere setting-out of an intended road was not such an irrevocable act as that the person who did it, & allowed the public to traverse & use the road, was to be held to have dedicated the same to the public, & the urban authority had no right to cast upon the lessee the whole of the expense of sewerage &

paving the road.—*HALL v. BOOTLE CORPN.* (1881), 11 L. T. 873; 29 W. R. 862.

**185.** ———.—**Agreement to dedicate insufficient.**—*B.*, who was in possession of certain lands under an agreement for a lease, entered into an agreement with the vestry of the parish in which the land was situate, whereby the vestry consented to a proposed diversion by *B.* of a public footpath which crossed the land on condition that he should make a certain new roadway & throw it open to the public. The footpath was diverted, an order authorising its diversion having been obtained from the ct. of quarter sessions in accordance with the provisions of Highway Act, 1835 (c. 50), but the proposed new roadway was not mentioned to the ct., & the new roadway was made. A lease of the land was subsequently executed to *B.*, the land being described in the lease by the reference to a plan, on which the roadway was marked "private road," & being devised "subject to the existing rights of way" over it. *B.* assigned the lease to a co., & it afterwards became vested in *W.*, as an assignee for value without notice of the existence of any public right of way over the land, & from him it passed to defts., whom the present information & suit sought to restrain from obstructing the new roadway:—*Held*: (1) if there had been an actual dedication of the roadway to the public, which the ct. held on the evidence there had not been, the public would have been entitled to have kept it open against all persons, whether they took with notice of the existence of the highway or not; (2) the making of the new road could not, under Highway Act, 1835 (c. 50), be made a condition of the diversion of the old footpath, & the public could not be parties to the arrangement made between *B.* & the vestry of the parish, & although there was a moral obligation on *B.* to make & throw open the new roadway to the public, & an *animus dedicandi* on his part, that could lead to no inference of an actual dedication so as to bind a purchaser for value without notice

whether there can be a dedication of a highway to the public by a lessee.—*A.-G. v. BIPHOSPHATED GUANO CO.* (1879), 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621, C. A. *Annotations*—*As to* (1) *Reid*, *Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391; *Wilkes v. Spooner*, [1911] 2 K. B. 473. *As to* (2) *Consd.*, *Corsellis v. L. C. C.*, [1907] 1 Ch. 704.

**186. Dedication question of fact—For jury.**—On indictment for encroaching on a public highway, it appeared that in 1771, comrs. under an Inclosure Act had been empowered to set out public & private roads, the former to be repaired by the township, the latter by such persons as the comrs. should direct. The public roads were to be sixty feet wide between the fences. The comrs. in their award described a road as private, & eight yards wide; but in setting it out a space of sixty feet was left between the fences; & they directed both the public & private roads to be repaired by the township. The centre only of the sixty feet was ordinarily used as a carriage road, & the township repaired it. The space said to be encroached upon was at the side of this road, & there was a diversity of evidence as to the use made of this space by the public, & its condition, since the time of the award:—*Held*: the comrs. had exceeded their authority in awarding that private roads should be repaired by the township, but on the whole of this evidence it was a proper question for the jury, whether or not the road in

**Sect. 2.—Highways by dedication and acceptance:**  
*Sub-sect. 1.]*

question, though originally intended to be private, had been dedicated to, & adopted by, the public.

*Semble*: when a road runs through a space for fifty or sixty feet between enclosures set out by Act of Parliament, it is *prima facie* to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road.—*R. v. WRIGHT* (1832), 3 B. & Ad. 681; 1 L. J. M. C. 74; 110 E. R. 248.

*Annotations*:—**Expld.** *R. v. United Kingdom Electric Telegraph Co.* (1862), 31 L. J. M. C. 166. **Consd.** *Neeld v. Hendon U. D. C.* (1899), 81 L. T. 405. **Refd.** *R. v. Leake* (1833), 2 Nev. & M. K. B. 583; *Beckett v. Upton* (1855), 1 Jur. N. S. 1136; *Harvey v. Truro U. C.* (1903), 2 Ch. 638; *Offin v. Rochford U. C.* (1906) 1 Ch. 342.

**187.** ———.]—Public user of a road for some time is sufficient *prima facie* evidence of a dedication by an owner of the freehold to the public, & it is not necessary to show by whom the dedication was made.

A road had been used by the public from 1829 to 1835, & in 1835 defts. obstructed the passage of the public over a part of it. The land at the part obstructed was settled in 1822 upon the marriage of G., the owner of the fee, in strict settlement. The tenant for life, under a power in the settlement, granted, in 1823, a long building lease of land adjoining the part obstructed, to one of defts.; & under a further power in the settlement, the reversion in fee expectant upon the determination of this lease was conveyed, in 1829, to L. The settlement also empowered the trustees & G. to sell; & G., who was examined as a witness, stated that in 1829 all the settled property adjoining R. Street had been conveyed away. The son of G., to whom an estate of inheritance was limited by the settlement in 1822, attained the age of twenty-one in 1811. The judge at the trial left it to the jury to say, whether there had been a dedication in 1829 by L. or by any other person in whom the fee then was, & declined to direct them to find by whom the dedication had been made; & the jury found that there had been a dedication in 1829 by L., or whoever was the owner in fee, & a verdict was entered for the Crown:—*Held*: the case had been properly left to the jury.

I take the principle to be that, when there is satisfactory evidence of such a user of the road, as to time, manner & circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was from whom the dedication, necessarily repealed from such a user, first proceeded (*COLERIDGE, J.*).—*R. v. PETRIE* (1855), 1 E. & B. 737; 3 C. L. R. 829; 21 L. J. Q. B. 167; 21 L. T. O. S. 271; 10 J. P. 483; 1 Jur. N. S. 752; 3 W. R. 213; 6 Cox, C. C. 512; 119 E. R. 272.

*Annotations*:—**Consd.** *Turner v. Walsh* (1881), 6 App. Cas. 636; *Shearburn v. Chersey R. D. C.* (1911), 78 J. P. 259. **Expld.** *Folkestone Corp'n. v. Brockman*, [1914] A. C. 338. **Refd.** *Powers v. Bathurst* (1880), 49 L. J. Ch. 294; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 419; *Roberts & Lovell v. James* (1903), 89 L. T. 282; *Thornhill v. Weeks* (1911), 78 J. P. 154.

**188.** ———.]—*RET福德 CORPN. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1887), 51 J. P. Jo. 473.

**189.** ———.]—(1) Proof of long, continuous, &

**189 i. Dedication question of fact.**—The dedication & acceptance is a matter of fact & not of law.—*RIDGOUT v. HOWLERT* (1913), 12 E. L. L. 537; 13 D. L. R. 293; 42 N. B. R. 200.—**CAN.**

**189 II.** ———.]—*O'NEIL v. HARPER*

(1913), 28 O. L. R. 635; 4 O. W. N. 1276.—**CAN.**

**189 III.** ———.]—*DE YOUNG v. GILES* (1916), 49 N. S. R. 398.—**CAN.**

**189 IV.** ———.]—*BATT v. BEAVERTON VILLAGE*, [1923] 3 D. L. R. 421; 52 O. L. R. 159.—**CAN.**

uninterrupted user of a way by the public, though it is evidence from which dedication may be inferred, does not create a *presumptio juris* in favour of dedication which, unless rebutted, must prevail.

An objection to a provisional apportionment in respect of certain proposed private street works on the ground that the street in question was a highway repairable by the inhabitants at large was overruled by the justices of the borough, subject to a case stated for the opinion of the K. B. Div. By a private estate Act of 1825 R., a tenant for life of settled lands, was empowered to let the lands on building leases, & to set out a competent part thereof for public squares, roads, streets or otherwise for the convenience of the occupiers of the houses to be erected thereon. The road in question was made by R. in 1827 on waste land over which the public had previously been allowed to wander, & on the completion of the road, residential houses were built along its course. It did not appear that the road was required for any other purpose than the use of the occupiers of the houses. A toll gate & a bar were placed across the road, but with a space left on either side for foot passengers, & at the toll gate & bar were notice boards headed "private road." Tolls were charged for horse & wheeled traffic, but there had been a free user of the road by foot passengers for upwards of eighty years without interruption. The road was repaired by the owner & not by the local authority. There had been no formal dedication of the road under Highway Act, 1835 (c. 50). Upon these facts the justices came to the conclusion that R. did not intend to dedicate the road as a public highway & that there was in fact no dedication of the road as a highway for foot passengers or otherwise prior to 1836, when above Act came into operation; they therefore decided that the road was not a highway repairable by the inhabitants at large: *Held*: there was evidence to support the conclusions of the justices, & the ct. had no jurisdiction to interfere with their decision.

(2) While public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge & with the acquiescence of the owner of the fee (*LORD KINNEAR*).

(3) Dedication, in my opinion, is a matter of fact (*LORD KINNEAR*). *FOLKESTONE CORPN. v. BROCKMAN*, [1914] A. C. 338; 83 L. J. K. B. 715; 110 L. T. 831; 78 J. P. 273; 30 T. L. R. 297; 12 L. G. R. 331, H. L.; *reseq.* S. C. *sub nom.* *BROCKMAN v. FOLKESTONE CORPN.* (1912), 107 L. T. 483, C. A.

*Annotations*:—*As to* (1) & (2) **Consd.** *S. E. Ry. v. Warr* (1923), 21 L. G. R. 669. **Refd.** *A-G v. Sewell* (1918), 88 L. J. K. B. 425. *As to* (3) **Consd.** *S. E. Ry. v. Warr* (1923), 21 L. G. R. 669.

**Evidence from which dedication presumed.]—**  
*See Sect. 2, sub-sect. 4, post.*

**190. Dedication must be by an owner capable of dedicating.]—ROBERTS & LOVELL v. JAMES** (1903), 89 L. T. 282; 10 T. L. R. 573, C. A.

**191.** ———.]—Dedication of a highway may be established by proof of definite acts of dedication on the part of the owner, or it may be inferred

*t. Whether doctrine of dedication to public use known in Scotland.*—The doctrine of dedication of private property to the public use is not known in the law of Scotland.—*CUMMING v. SMOLLETT* (1852), 14 Dunl. (Ct. of Sess.) 885; 24 Sc. Jur. 529; 1 Stuart, 875.—**SCOT.**

from use & enjoyment on the part of the public ; but such use & enjoyment must be use & enjoyment as of right known to the owner & acquiescent in by him. Further, this knowledge & recognition on the part of the owner may itself be inferred from the fact that the use & enjoyment has been so open & notorious as of right as to give rise to the presumption that the owner must have been aware of it & has acquiesced in it, or during living memory the use & enjoyment has been such that had there been an absolute owner capable of dedicating the way, dedication would have been inferred. If at the same time the circumstances are consistent with such use & enjoyment having been still more ancient, dedication may be inferred by some owner before living memory ; but if it is shown that before a definite date the rights could not have existed, & since that date there has been no owner who could dedicate, then it would be impossible to infer any dedication. —WEBB v. BALDWIN (1911), 75 J. P. 561.

192. — — *Onus of proof.*—At the trial of an action & information in which a declaration was claimed that the portion of Shire Lane between Swillett Corner & Newlands Corner was a public highway for carts & carriages repairable by the deft. council, it was admitted that Shire Lane commenced towards the south in the main road from Rickmansworth to Uxbridge, its extreme limit northward being at a point where the lane formed a junction with an old road called Greener Street, which was a public highway for all purposes repairable by the inhabitants at large. Between the two extreme limits of the Rickmansworth to Uxbridge road on the south & Greener Street on the north, running southwards from Greener Street, was Swillett Corner, & between these points Shire Lane was admitted also to be a public road for all purposes similarly repairable. From Swillett Corner running south to Newlands Corner, Shire Lane was admitted by the deft. council only to be a public footpath. From Newlands Corner southwards for a considerable distance, & again between two points still further south, Shire Lane was once more a highway for all purposes, repairable by the inhabitants at large. Shire Lane varied considerably in width, & was bounded on each side by the banks & ditches of old inclosures, the centre line between the ditches forming until recently the county boundary, & the boundary between adjacent parishes & manors & ecclesiastical districts. Although very narrow in places, the lane was throughout its entire length sufficiently wide to admit of vehicular traffic. It was an open road without cross-gates, & formed a convenient route between Denham on the south & Chenes on the north. The lane was an old one, one map showing that it existed physically in 1788. At the beginning of the nineteenth century in one part of the lane a strip of land extending from the old ditch on the east to beyond the centre line of the lane had been inclosed, & the person inclosing it was admitted tenant of the manors on either side of the county boundary. In most parts of Shire Lane there existed cart ruts, pointing to its use for cart traffic till comparatively recent times, but the ruts were consistent with a private user. At one time the lane had been a metalled road, the metalling throughout being of sufficient width to accommodate carts & carriages. In & prior to 1865, & for some years afterwards, the lane was in as good a state of repair, so far as metalling was concerned, as most of the other roads in the neighbourhood, & there was then no difficulty in driving a cart or carriage throughout its entire length. There was no direct evidence

how or when the portions admitted to be highways were dedicated to the public or became repairable, although they existed physically as roads before the passing of Highway Act, 1835 (c. 50), & the evidence was consistent with dedication having been made long before 1835 ; but there was no evidence that these portions of Shire Lane were roads to which sect. 23 of above Act applied if they were dedicated after the passing of the Act, or whether the formalities required by that sect. had been complied with, & there was no evidence of the private user of the lane or pointing to its being a mere occupation road or otherwise inconsistent with its having been dedicated to the public for all purposes. The evidence of actual user of the lane by the public was meagre, owing probably to the facts (a) that for many years the lane between the points in question had been overgrown with underwood as to make its use for carts or carriages difficult if not impossible, & (b) that even before this growth the lane had been little used because the country through which it passed was then sparsely populated, but the evidence of living witnesses, which went back to 1865, showed that they had driven through the lane as of right, & had been told by persons since deceased that Shire Lane was a public highway both on foot & with carts & carriages, & also that by general reputation the lane was a highway. There was also evidence from which it appeared that the surveyors of the local authorities interested & those authorities had, in correspondence & in arrangements as to the repair of Shire Lane, & in or in relation to proceedings before the Local Govt. Board, shown no trace of having considered the portion of Shire Lane between Swillett Corner & Newlands Corner, the portion in dispute, as being in any different condition, with regard to liability for repair or otherwise, from any other portion of the lane. The only evidence against public liability to repair Shire Lane was that its repair had been neglected, & the only evidence of dedication for foot passengers only was that in recent years no cart or carriage traffic had been possible by reason of that neglect : —*Held* : (1) the evidence, positive & negative, justified a finding that Shire Lane, throughout, was a public highway for carts & carriages repairable by the deft. council ; (2) although the *onus* of proving that the lane was a highway lay on plffs., proof of user of such a nature that dedication might be reasonably inferred therefrom was sufficient without proving that during the period of user there was a person capable of dedicating — the *onus probandi* that there was no such person being on the inhabitants ; (3) the absence of evidence that the inhabitants had ever repaired the lane, though relevant on the question of whether the lane was or was not a public way, did not rebut the inference based on public user & was not by itself evidence to displace the inhabitants' liability to repair, though, coupled with evidence that some one else was liable, it might have some weight ; (4) plff. need not give evidence of the inhabitants' liability, before 1835, to repair ; (5) sect. 23 of above Act gave the inhabitants a new method of displacing their liability to repair at common law & did not impose on the Crown a new *onus* of proof, & therefore, it was for the inhabitants to prove that a road was one to which the sect. applied, & not for the Crown to prove that sect. 23 did not apply, although, in case of proof that sect. 23 applied, the *onus* of proving that the formalities required by that sect. to make the inhabitants liable might be shifted ; (6) the decision of the ct. was without prejudice to the right of the deft. council to raise the point whether the portion of

*Sect. 2.—Highways by dedication and acceptance:*  
*Sub-sects. 1 & 2.]*

Shire Lane in question was a highway unnecessary for public use within Highways & Locomotives Amendment Act, 1878 (c. 77), s. 24.—*A.-G. v. WATFORD RURAL COUNCIL*, [1912] 1 Ch. 417; 81 L. J. Ch. 281; 106 L. T. 27; 76 J. P. 74; 10 L. G. R. 361.

*Annotation.*—*As to (3) & (5) Reidd. Cababé v. Walton-upon-Thames District Council*, [1912] 2 K. B. 432.

**Capacity to dedicate.]—See, generally, Sub-sect. 3, post.**

**Extent of dedication—Whether limited dedication possible.]—See Sub-sect. 8, post.**

**SUB-SECT. 2.—INTENTION TO DEDICATE.**

**193. Necessity for.]—(1)** On an issue whether or not certain land, in a district repairing its own roads, was a common highway, it is admissible evidence of reputation, though slight, that the inhabitants held a public meeting to consider of repairing such way, & that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation on the subject.

(2) In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event. Thus, where the owner of land agreed with an iron co., & with the inhabitants of a hamlet repairing its own roads, that a way over his land, in such hamlet, should be open to carriages, that the co. should pay him 5s. a year & find cinder to repair the way, & that the inhabitants of the hamlet should lead & lay down the cinder, & the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time, a dispute arising, the passage was interrupted, & the interruption acquiesced in for five years:—*Held*: the evidence showed no dedication, but a licence only, resumable on breach of the agreement.

A dedication must be made with intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction (*LORD DENMAN, C.J.*).

It is said that an intention to dedicate must be inferred from the acts of a proprietor; & it is true that the question is not decided by what he says. A man may say that he does not mean to dedicate a way to the public, & yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not. The facts may warrant them in believing that the way was dedicated, though he has said that he did not so intend; & if his intention be insisted upon, it may be answered that he should have shown it by putting up a

gate, or by some other act. The intent is a proper ingredient in the decision of such a question as this (*LIDDLEDALE, J.*).—*BARRACLOUGH v. JOHNSON* (1838), 8 Ad. & El. 99; 3 Nev. & P. K. B. 233; 1 Will. Woll. & H. 162; 7 L. J. Q. B. 172; 2 Jur. 839; 112 E. R. 773.

*Annotations.*—*As to (1) Reidd. R. v. East Mark Tithing* (1848), 12 J. P. 504; *Mercer v. Denne*, [1905] 2 Ch. 538; *Folkestone Corp. v. Brockman*, [1914] A. C. 338. *As to (2) Consd. Grand Surrey Canal Co. v. Hall* (1840), 1 Man. & G. 392; *Folkestone Corp. v. Brockman*, [1914] A. C. 338. *Reidd. Simpson v. A.-G.*, [1904] A. C. 476; *Thornhill v. Weeks* (1914), 78 J. P. 154.

**194.**—*J.*—(1) There may be a dedication of a way to the public for a limited purpose, as for a footway, etc.; but there cannot be a dedication to a limited part of the public, as to a parish; & such a partial dedication is simply void, & will not operate in law as a dedication to the whole public.

(2) In order to constitute a dedication of a way to the public by the owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence of interruption by the owner.

As to the ownership of the soil I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation & which is allotted to others (*PARKE, B.*).—*POOLE v. HUSKINSON* (1843), 11 M. & W. 827; 152 E. R. 1039.

*Annotations.*—*As to (1) Consd. Bermondsey Vestry v. Brown* (1865), L. R. 1 Eq. 204. *Reidd. Hildroth v. Adamson* (1860), 8 C. B. N. S. 567; *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449; *Farquhar v. Newbury R. C.*, [1909] 1 Ch. 12. *As to (2) Consd. R. v. East Mark Tithing* (1848), 11 Q. B. 877; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449; *Mann v. Brodie* (1885), 10 App. Cas. 378. *Folld. Chinnock v. Hartley Wintney R. D. C.*, *Figges v. Same, Phillips v. Same* (1899), 63 J. P. 327. *Apld. Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. C.* (1904), 68 J. P. 464. *Consd. Folkestone Corp. v. Brockman*, [1914] A. C. 338. *Moser v. Ambleside U. D. C.* (1924), 89 J. P. 59. *Reidd. Bermondsey Vestry v. Brown* (1865), L. R. 1 Eq. 204; *Healey v. Batley Corp.* (1875), L. R. 19 Eq. 375; *Neaveison v. Peterborough R. C.*, [1901] 1 Ch. 22; *Farquhar v. Newbury R. C.*, [1909] 1 Ch. 12; *Trafford v. St. Faith's R. D. C.* (1910), 74 J. P. 297; *C. L. Ry. v. City of London Land Tax Commrs.*, [1911] 2 Ch. 467; *Thornhill v. Weeks* (1914), 78 J. P. 154; *S. E. Ry. v. Wair* (1923), 21 L. G. R. 669.

**195.**—*J.*—To constitute a valid dedication to the public of a highway by the owner of the soil there must be an intention to dedicate, of which the user by the public is evidence & no more, & a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyments.

*Semble*: user by the public over land belonging to a non-resident owner is less cogent evidence of dedication than where the user is necessarily brought to his personal notice; & further, the weight to be attached to user must depend somewhat upon the nature of the land itself, whether it is cultivated land or rough & unproductive land.—*CHINNOCK v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, *FIGGES v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, *PHILLIPS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL* (1899), 63 J. P. 327.

*Annotations.*—*Apld. Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. C.* (1904), 68 J. P. 464. *Reidd. Thornhill v. Weeks* (1914), 78 J. P. 154.

(1913), 28 O. L. R. 635; 4 O. W. N. 1276.—*CAN.*

**193 v.**—*J.*—*CAMPBELL v. POND* (1915), 44 N. B. R. 357.—*CAN.*

**193 vi.**—*J.*—*SAANICH CORPN. v. MCFADDEN*, [1923] 3 D. L. R. 171; 32 B. C. R. 221; [1923] 2 W. W. R. 429.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 2.**

**193 i. Necessity for.]—LAWSON v. WESTON** (1850), 1 Legge, 666.—*AUS.*

**193 ii.**—*J.*—A dedication of land to public use takes effect from the intention of the person making it, & the merely opening or widening a street for the convenience or benefit

of the person doing it & permitting the public to use it, will not constitute a dedication.—*BELFORD v. HAYNES* (1850), 7 U. C. R. 464.—*CAN.*

**193 iii.**—*J.*—There must be an intention, express or implied, of dedication to the public.—*LEARY v. SAUNDERS* (1860), 1 Old. 17.—*CAN.*

**193 iv.**—*J.*—*O'NEIL v. HARPER*



196. —J—(1) Under letters patent in the seventeenth century the owner of land adjoining the river Ouse between St. Neots & St. Ives, which was there a public river navigable only in sections, made in his own land cuts from the river & locks in the cuts & took tolls from the vessels passing through the locks. In 1720 by a local Act, the then landowner was empowered to rebuild a stanch in the river below St. Ives & to repair & maintain it & to take tolls on vessels passing through it. Tolls were collected at the locks for more than two hundred years & at the stanch for a long period by the predecessors in title of applt.:—*Held*: there was no evidence that the locks had ever been dedicated to the public as a highway, & applt. was not bound to maintain or repair or allow the public to pass through the locks or the stanch.

A dedication must be made with intention to dedicate, & the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication (LORD MACNAUGHTEN).

(2) It is laid down in books of great authority that a river common to all men is called a highway, or is in the nature of a highway, but there are many important differences between water highways & land highways (LORD LINDLEY).

(3) The doctrine once a highway always a highway is, I believe, as applicable to rivers as to roads (LORD LINDLEY).—*SIMPSON v. A.-G.*, [1904] A. C. 476; 74 L. J. Ch. 1; 91 L. T. 610; 69 J. P. 85; 20 T. L. R. 761; 3 L. G. R. 190, II. L.; *revisg.* S. C. sub nom. *A.-G. v. SIMPSON*, [1901] 2 Ch. 671, C. A.

*Annotations*:—As to (1) *Refd.* *Folkestone Corp'n. v. Brockman*, [1914] A. C. 338. *Generally, Mentd.* *Newcastle v. Workop U. C.*, [1902] 2 Ch. 145; *Queensborough Corp'n. v. Smoed, Dean* (1904), 68 J. P. 244; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *Dibden v. Skirrow*, [1908] 1 Ch. 41; *Robinson v. Smith* (1908), 24 T. L. R. 575; *Re Hatschek's Patents*, *Ex p. Zernuner*, [1909] 2 Ch. 68; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *Morpeth Corp'n. v. Northumberland Farmer's Auction Mart Co. & Donkin* (1920), 90 L. J. Ch. 420.

197. —J—*LECKHAMPTON QUARRIES CO., LTD. v. BALLINGER & CHELTENHAM RURAL DISTRICT COUNCIL* (1904), 68 J. P. 466; 20 T. L. R. 559; *subsequent proceedings* (1905), 93 L. T. 93, C. A.

*Annotation*:—*Mentd.* *I. R. Commrs. v. Lonsdale's S. E. Trustees*, [1919] 2 K. B. 183.

198. —J—*FOLKESTONE CORPN. v. BROCKMAN*, No. 189, *ante*.

*See, further*, Nos. 183, 184, *ante*.

200. Question of fact—For jury.—*BARRACLOUGH v. JOHNSON*, No. 193, *ante*.

201. —J—For magistrates.—*FOLKESTONE CORPN. v. BROCKMAN*, No. 189, *ante*.

202. Evidence of intention.—*BARRACLOUGH v. JOHNSON*, No. 193, *ante*.

203. —J—Difficulty & expense of controlling traffic.—By 41 Geo. 3, c. xxxi, s. 66, the incorporated co. of the Proprietors of the Grand Surrey Canal were required to make & maintain bridges over the canal for the use of the owners & occupiers of adjoining lands, & also where the canal was

carried across any common highway, public bridleway or footpath. In 1801, the co. erected a swivel bridge at a spot where there was a public bridleway, & footpath, which bridge, as a carriageway, was intended to be for the exclusive accommodation of the tenants of an adjoining estate, called the Rolls estate. From 1810 to 1812, the public occasionally used the bridge with carriages. In 1822, a church was built near to the canal, streets were formed, & the neighbourhood became very populous. From 1822 to 1832, the bridge was used by the public as a carriageway without interruption. In 1832, the co. began to exact a toll from persons, not tenants of the Rolls estate, crossing the bridge with carriages, & in 1834, they removed the swivel bridge, & built a stone bridge in its stead. In trespass by the co. against doft. for passing along the bridge with a horse & chaise, without the leave of the co.; the judge after reading the evidence to the jury, told them that, supposing the bridge in question to have been originally built, as a carriageway, for the exclusive accommodation of the tenants of the Rolls estate, still if in consequence of the acts of the co., an idea grew up in the minds of the public that they intended to dedicate the bridge to the public use, such acts would amount to a dedication:—*Held*: (1) taking all the summing up together, there was no misdirection, & the evidence warranted the jury in finding that there had been a dedication; (2) there was nothing in the constitution of the co., or in the nature of their property, to prevent them from dedicating the bridge in question to the public.

It seems to me that the circumstance of the bridge being originally erected, as a carriageway, for the accommodation of a considerable number of individuals, inasmuch as the co. must either have permitted the bridge to be used indiscriminately, or have put themselves to great expense in employing some person to see that those passing had a right to do so, furnishes a strong reason why they should have intended to dedicate the bridge to the public (MAULE, J.). *GRAND SURREY CANAL CO. v. HALL* (1810), 1 Man. & G. 392; 1 Scott, N. R. 261; 9 L. J. C. P. 329; 133 E. L. 380.

*Annotations*:—As to (1) *Consd.* *Vernon v. St. James Westminster, Vestry* (1880), 16 Ch. D. 419; *A.-G. v. Fisher Llanoleum Co.*, [1901] 2 Ch. 617. *Refd.* *Robert's v. Hunt* (1850), 15 Q. B. 17; *R. v. Wilson* (1852), 21 L. J. Q. B. 281; *Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 69 J. P. 351; *A.-G. v. Hemingway* (1916), 81 J. P. 112. As to (2) *Refd.* *Grand Junction Canal Co. v. Petty* (1888), 57 L. J. Q. B. 572; *Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 69 J. P. 351.

204. —J—Grant of building lease—New street built in continuation of existing street.—*A. & B.* being owners of freehold property, by agreement in 1808 undertook, after a certain part thereof should have been let on building leases, to demise the remainder to trustees for C. for sixty-one years, upon trust to lease the same upon the like plan as should have been adopted with respect to the other part, or in such manner as C. should think fit. In pursuance of the agreement, a lease was accordingly granted in 1813 to C.'s trustees, the lease reciting the agreement & showing by a plan the manner in which the other part of the property had been dealt with. Upon this plan

202 I. Evidence of intention.—*BEVERIDGE v. CREELMAN* (1877), 42 U. C. H. 39.—CAN.

202 II. —J.—*Re ADAMS & EAST WHITBY TOWNSHIP CORPN.* (1882), 2 O. R. 473.—CAN.

202 III. —J.—*RHODES v. PERUSSE* (1908), 41 S. C. R. 264; 6 E. L. R.

158.—CAN.

202 IV. —J.—*A.-G. FOR BRITISH COLUMBIA v. BAILEY*, [1919] 1 W. W. R. 191; 44 D. L. R. 338.—CAN.

202 V. —J.—In determining whether a road through private property is a public highway, although not expressly dedicated to the public,

it is important to distinguish between evidence showing an intention to dedicate to the public generally & evidence showing that visitors to or traders with tenants whose shops abut on the road have by permission a right of passage.—*MUHAMMAD RUSTAM ALI KHAN v. KARUAL CITY MUNICIPAL COMMITTEE* (1919), 1 L. R. 47 Ind. App. 26.—IND.



*Sec. 2.—Highways by dedication and acceptance:*  
*Sub-sects. 2 & 3, A., B., C. & D.]*

there appeared a street, part of the land comprised in the lease adjoining one end of the street. C. & his trustees leased this land for building purposes for the whole term, less ten days, to D., who erected houses in such a manner as to continue the street. The street was used by the public for upwards of twenty years:—*Held*: there had been a direction by the freeholders to continue the street, & it had become a public road.—*PRYOR v. PRYOR* (1872), 20 L. T. 758; *on appeal*, 27 L. T. 257, L. J.J.

205. — *Weight of evidence—Owner non-resident.*—*CHINNOCK v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL, FIGGESS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL, PHILLIPS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, No. 195, *ante*.

206. — *User by public.*—*POOLE v. HUSKINSON*, No. 194, *ante*.

207. — *To knowledge of owner.*—*MANN v. BRODIE*, No. 177, *ante*.

208. — *— — — — —*—*WEBB v. BALDWIN*, No. 191, *ante*.

209. — *Plan on building lease.*—Although it may be inferred from the delineation upon the plan [on a building lease] of what were called “new streets” to the east & to the north that it was intended by both lessor & lessee, & indeed expressed in the lease, that there were to be streets then made or afterwards to be made, & though it is possible that a covenant might be implied that new streets should there be made, there is nothing in the lease to bind the lessor to make them public streets, or to dedicate them to the public; & it was competent to him to make them into private streets for the use only of the lessees of the houses to be built upon the lands demised (*KELLY, C.B.*).  
*ESPLEY v. WILKES* (1872), L. R. Exch. 298; 41 L. J. Ex. 211; 20 L. T. 918.

*Annotations: Reidd. Furness Ry. v. Cumberland Co-op. Bldg. Soc.* (1881), 52 L. T. 144; *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Mellor v. Walmesley*, [1905] 2 Ch. 161.  
*Mentid. Bolton v. London School Board* (1879), 40 L. T. 582; *Cooke v. Ingram* (1893), 68 L. T. 671.

210. *Rebuttal of intention—Agreement consistent with conduct.*—*BARRACLOUGH v. JOHNSON*, No. 193, *ante*.

211. *Interruption of user.*—*POOLE v. HUSKINSON*, No. 191, *ante*.

208 i. — *User by public.*—An intention to dedicate land as a highway will not be presumed from mere user if that user is explained by circumstances respecting such an intention.—*NARRACAN (SHIR.) PRESIDENT v. LEVISTON* (1906), 3 C. L. R. 816. — *AUS.*

208 ii. — *— — — — —*—The fact of the public using a highway for ten years or expending labour & money upon it is not sufficient to establish it as a lawful highway against the will of the owner of the soil, where there is no sufficient ground for presuming a dedication. *R. v. RANKIN* (1858), 16 U. C. R. 304. — *CAN.*

208 iii. — *— — — — —*—In a new country like Canada, user of a road by the public is not to be too readily regarded as evidence of an intention on the part of the owner to dedicate it. *DUNLOP v. YORK TOWNSHIP* (1869), 16 Gr. 216. — *CAN.*

208 iv. — *— — — — —*—*OTTAWA (CITY) v. GRAND TRUNK RY. CO., OTTAWA (CITY) v. OTTAWA & NEW YORK RY. CO.* (1921), 30 O. L. R. 239. — *CAN.*

208 v. — *— — — — —*—In a new country like Canada user by the public of a trail or road over privately owned lands

should not be too readily admitted as evidence of an intention by the owner of the soil to dedicate the trail or road to the public as a highway. Such user is generally permissive & allowed in a neighbourly spirit by reason of access to market or from one part of a township to another being more easy than by the regular road. Such user may go on for years with nothing further from the mind of the owner of the land, or from the minds of those using it as a line of road, than that the rights of the owner should be thereby affected.—*TAYLOR v. CLANWILLIAM RURAL MUNICIPALITY*, [1921] 4 D. L. R. 218; 2 W. W. R. 1153; 34 Man. L. R. 319. — *CAN.*

*a. Rebuttal of intention.*—Where the owner of land leases it for a term of years, he evinces an intention against dedication sufficiently strong to override any intent to be inferred in favour of dedication from the use of words such as “park for athletic sports” on a registered plan.—*JACKSON v. STONEWELL TOWN*, [1917] 3 W. W. R. 1. — *CAN.*

**PART III. SECT. 2, SUB-SECT. 3.—A.**  
 213 i. *Owner of fee only.*—*FRITZ v. TORONTO CITY CORPN.*

212. — *By acts of ownership—Intention to exclude public.*—*COATS v. HEREFORDSHIRE COUNTY COUNCIL*, No. 230, *post*.

*Abandonment of scheme.*—*See* Nos. 183, 184, *ante*.

**SUB-SECT. 3.—CAPACITY TO DEDICATE.**

*A. In General.*

213. *Owner of fee only.*—*WOOD v. VEAL*, No. 218, *post*.

214. — *— — — — —*—*R. v. PETRIE*, No. 187, *ante*.

*B. The Crown.*

215. *General rule.*—(1) On the trial of an indictment, for non-repair of a road, against a tithing, bound by custom to repair all public roads therein, it appeared that the road had formed part of the waste of a manor, & had been set out as a private road by award of comrs. under a Private Inclosure Act, & had been used by the public generally ever since it had been so set out. A portion of the waste had been allotted to the lord, as the Act directed, in respect of his interest in the soil. After verdict for the Crown, it was argued, for defts., on motion to enter a verdict for them, that the soil of the road had been taken from the lord, & transferred to no other person, & therefore there was no owner, or none against whom a dedication to the public could be presumed; & that, if the Crown were the owner, the jury should have been directed that stronger evidence was necessary to raise a presumption of dedication than if the owner had been a private person:—*Held*: dedication might be presumed against the Crown from long acquiescence in public user.

The Crown certainly may dedicate a road to the public, & be bound by long acquiescence in public user. . . . Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible (*LORD DENMAN, C.J.*).

(2) The jury was rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that a dedication to the public was intended.

(1865), 25 U. C. R. 137.—*CAN.*

213 ii. — *— — — — —*—*CITY OF VANCOUVER v. CANADIAN PACIFIC RY. CO.* (1893), 23 S. C. R. 1. — *CAN.*

*b. Not mortgagors unless mortgagee consents.*—A mtgor. cannot without the consent of the mtgee., dedicate as a highway part of the land the subject of the mtge.—*NARRACAN (SHIR.) PRESIDENT, ETC. v. LEVISTON* (1906), 3 C. L. R. 816. — *AUS.*

*c. — — — — —*—*BUTT v. BEAVERTON VILLAGE*, (1923) 3 D. L. R. 121; 52 O. L. R. 139. — *CAN.*

*d. Parties in possession of Crown lands.*—Parties in possession of Crown lands before patent issued cannot dedicate any portion of the same.—*RAE v. TRIM* (1880), 27 Gr. 371.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 3.—B.**

215 i. *General rule.*—The power of the Crown to dedicate land for the purpose of public roads is not affected by Crown Lands Alienation Act, 1861, sects. 3, 5, but remains as it existed at common law.—*TURNER v. WALSH* (1881), 6 App. Cas. 636.—*AUS.*

215 ii. — *— — — — —*—The Crown may dedicate, as a private person may, any lands for use as a public highway.—

U

**Sect. 2.—Highways by dedication and acceptance:**  
*id.* 3, D. & E.]

—(1) Where land is settled upon a tenant for life with an immediate remainder to a tenant in fee, both of whom are *sui juris*, it is competent for the tenant for life & remainderman together to dedicate to the public a road over the settled land. Accordingly, where land was thus settled & was under the control & management of the remainderman, & a new road was laid out by him across the land & was treated by him as a public road, & since the date of its construction, more than sixty years ago, the road had been used by the public in such a way as would have compelled the ct. as against an owner in fee to infer dedication, but there was no evidence that the tenant for life, who had been dead for fifty years, had any knowledge of the user of the road by the public:—*Held*: the ct. ought to infer from the facts that there had been a dedication to the public by the tenant for life & remainderman.

(2) A landowner desiring to divert or improve a churchway by laying out a new road in substitution therefor cannot confer on the public such rights only over the new road as existed over the churchway.—*PARQUHAR v. NEWBURY RURAL COUNCIL*, [1909] 1 Ch. 12; 78 L. J. Ch. 170; 100 L. T. 17; 73 J. P. 1; 25 T. L. R. 39; 53 Sol. Jo. 46; 7 L. G. R. 364, C. A.

**Land in strict settlement under Act of Parliament**  
 —Presumption of dedication before settlement.]—*See* No. 247, *post*.

*E. Statutory Corporations and Public Trusts.*

**225. General rule.—Dedication compatible with statutory duties.**—(1) Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. By an Act for draining fen lands, comrs. were authorised to make drains & other works therein prescribed, & also to make a new cut or main drain as therein mentioned, & to dispose of all earth & soil arising from the drains directed to be made, in forming banks, at certain distances, on each side thereof; & the banks, drains, etc., were to remain under their control, for the purposes of the Act. The comrs., under the powers of the Act, made a drain according to the Act, & with the earth taken from it made a bank on one side of it, of the average breadth of forty feet; this drain & bank were never part of the fen, but were old inclosed land, & bounded by old inclosures on both sides; & the land upon which they were respectively made, was purchased by the comrs. for the purposes of the Act. The bank had been used for about twenty-five years as a public highway, & was a convenient & useful road for the public. Upon a special case, stating these facts:—*Held*: the dedication of this part of the bank as a road to the use of the public was not inconsistent with the purposes to which the comrs. were bound by the Act to apply it, it not appearing by the case that the cleansing of the drains or any other purpose of the Act had been or was likely to be interfered with by such user of the soil.

(2) The inhabitants of a parish are bound by law to repair all roads within it dedicated to & used by the public, although there be no adoption of such roads by the parish.

(3) The repair by the parish of the part in question is undoubtedly a sufficient adoption, if adoption be necessary (*PARKE, J.*).—*R. v. LEAKE (INHABITANTS)* (1833), 5 B. & Ad. 469; 2 Nev. & M. K. B. 583; 1 Nev. & M. M. C. 544; 110 E. R. 863.

*Annotations*:—*As to* (1) *Apld.* *Grand Junction Canal Co. v. Petty* (1888), 21 Q. B. D. 273; *Arnold v. Morgan*, [1911] 2 K. B. 314; *S. E. Ry. v. Cooper*, [1924] 1 Ch. 211. *Consd.* *Southport Corp. v. Birkdale District Electric Supply Co.*, [1925] Ch. 794. *Reid.* *Greenwich Board of Works v. Maudsley* (1870), 39 L. J. Q. B. 205; *Foster v. L. C. & D. Ry.* (1894), 10 T. L. R. 566; *Foster v. L. C. & D. Ry.*, [1895] 1 Q. B. 711; *Re Gonty & M. S. & L. Ry.*, [1896] 2 Q. B. 439; *G. W. Ry. v. Solihull R. D. C.* (1902), 86 L. T. 852; *A.-G. v. L. & S. W. Ry.* (1905), 69 J. P. 110; *Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126; *L. & Y. Ry. v. Davenport* (1906), 70 J. P. 129; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Thames Conservators v. Kent*, [1918] 2 K. B. 272. *As to* (2) *Reid.* *Grand Surrey Canal Co. v. Hall* (1840), 1 Man. & G. 392; *R. v. Lordsmere* (1850), 15 Q. B. 689; *Wallington v. White* (1861), 10 C. B. N. S. 128; *R. v. Horley* (1863), 8 L. T. 382; *Robbins v. Jones* (1863), 15 C. B. N. S. 221; *R. v. Newbold* (1868), 19 L. T. 656; *R. v. French* (1879), 4 Q. B. D. 507. *As to* (3) *Reid.* *R. v. Bradfield* (1874), 30 L. T. 700. *Generally.* *Reid.* *Le Neve v. Mile End Old Town Vestry* (1858), 8 E. & B. 1054; *Tyne Improvement Comrs. v. Inmie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174.

**226. ———.]—Land acquired by a co. under an Act of Parliament for the purposes of their undertaking as specified by such Act may be dedicated by them as a public highway, if such use by the public be not incompatible with the objects prescribed by the Act. Therefore, where land was acquired & used by a canal co. under their statutes for the purposes of a towing-path, & it appeared that the use of it as a public footpath was not inconsistent with its use as a towing-path by the co.:—*Held*: the co. could dedicate the land as a public footpath subject to its use by them as a towing-path.—*GRAND JUNCTION CANAL CO. v. PETTY* (1888), 21 Q. B. D. 273; 57 L. J. Q. B. 572; 59 L. T. 767; 52 J. P. 692; 36 W. R. 795, C. A. *Annotations*:—*Apld.* *Re Gonty & M. S. & L. Ry.*, [1896] 2 Q. B. 439; *Arnold v. Morgan*, [1911] 2 K. B. 314. *Expld.* *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *Consd.* *S. E. Ry. v. Cooper*, [1924] 1 Ch. 211. *Reid.* *Foster v. L. C. & D. Ry.* (1894), 10 T. L. R. 565; *Tyne Improvement Comrs. v. Inmie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174; *G. W. Ry. v. Solihull R. D. C.* (1902), 86 L. T. 852; *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59; *A.-G. v. L. & S. W. Ry.* (1905), 69 J. P. 110; *Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126; *L. & Y. Ry. v. Davenport* (1906), 70 J. P. 129; *Arnott v. Whitby U. D. C.* (1909), 101 L. T. 14; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Thames Conservators v. Kent*, [1918] 2 K. B. 272; *S. E. Ry. v. Warr* (1923), 21 L. G. R. 669.**

**227. ———.]—A statutory body cannot dedicate to the public a right of way which would be incompatible with the special purpose for which it was incorporated. So a canal co., which was empowered & obliged to make a canal & the works incident & necessary for the purpose of making & maintaining the canal, was held to have been incapable of dedicating to the public a right of way over the embankments of reservoirs constructed by or in pursuance of its powers in a case where it was subsequently proved that the user by the public of the right of way must ultimately lead to the destruction of the embankment & consequent damage to the public unless great expense was incurred by the co. to prevent such a result.—*GREAT WESTERN RY. CO. v. SOLIHULL RURAL DISTRICT COUNCIL* (1902), 86 L. T. 852; 66 J. P. 772; 18 T. L. R. 707, C. A. *Annotations*:—*Consd.* *A.-G. v. L. & S. W. Ry.* (1905), 3 L. G. R. 1327. *Reid.* *G. W. Ry. v. Talbot*, [1902] 2 Ch. 759; *Taff Vale Ry. v. Pontypridd U. D. C.* (1905), 93 L. T. 126; *L. & Y. Ry. v. Davenport* (1906), 70 J. P.**

for a highway.—*R. v. DEANE* (1851), 2 All. 233.—*CAN.*

**1. ———.]—Grantees of land for particular purpose.]—*Held*: a city cor-**

**PART III. SECT. 2, SUB-SECT. 3.—E.**  
**e. Whether dedication is consistent with powers.—Rights of Crown.]—**  
 Land was granted to the corp., of

St. J. in 1785, reserving a right to the Crown to enter at any time & erect barracks, batteries, etc.—*Held*: this did not prevent the corp. from dedicating a part of the land to the public

129; *A.-G. v. G. C. Ry.* (1912), 106 L. T. 413; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Thames Conservators v. Kent*, [1918] 2 K. B. 272; *S. E. Ry. v. Cooper*, [1924] 1 Ch. 211; *York Corp. v. Leatham*, [1924] 1 Ch. 557.

228. ———.]—A railway co. have no power to alienate land, other than superfluous land, acquired by them for the purposes of their statutory undertaking, where the effect of such alienation may be to hinder the co. from carrying out the purposes for which they were incorporated. Where, therefore, a railway co. had erected an accommodation bridge over their lines to connect the properties of a landowner which had been severed by the railway & had permitted the public to use the roadway over the bridge as a public highway for a number of years:—*Held*: the roadway over the bridge was not a public highway, on the ground that if such were the case the co. would be precluded from subsequently widening their lines at the point where the bridge crossed the railway & would thus be prevented from carrying out their statutory undertaking.—*TAFF VALE RY. CO. v. PONTYPRIDD URBAN DISTRICT COUNCIL*, (1905), 93 L. T. 126; 69 J. P. 351; 3 L. G. R. 1339.

*Annotation*.—*Refd.* *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251.

229. ———.]—A statutory body has no power to dedicate to the public a right of way over its property if such dedication would be incompatible with the special purposes for which the statutory powers were conferred upon it, but such a body has power to dedicate a right of way along the embankment of a reservoir where such dedication need not result in the cost of the upkeep & maintenance of the undertaking being materially increased.—*LANCASHIRE & YORKSHIRE RY. CO. v. DAVENPORT* (1906), 70 J. P. 129; 4 L. G. R. 425, C. A.

*Annotation*.—*Refd.* *Thames Conservators v. Kent*, [1918] 2 K. B. 272.

230. ———.]—A strip of land running alongside a high road & forming the site of a tramway, the user of which as such had been discontinued, was vested in a railway co., with power for the co. at any time to use the strip for the purpose of their undertaking or to sell it, subject in the latter event to a right of pre-emption in the adjoining owners:—*Held*: (1) the strip of land was capable of being dedicated by the co. to highway uses, & the co., so long as they did nothing incompatible with their statutory objects, were in a position to dedicate it for the purposes of a public right of way along it, & were not incapacitated from so doing by the right of pre-emption vested in the adjoining owner; (2) upon the evidence of public user, dedication of the land in question must be presumed.

(3) On an inquiry whether part of a continuous strip of land has been dedicated to highway purposes, evidence that portions of the strip at each end of the part in dispute have been inclosed to the knowledge of or without interference from the highway authority is not admissible.

(4) In appreciating the true effect of acts of ownership as rebutting an intention to dedicate, it is important to observe whether they are referable to the ownership of the soil rather than to any intention to exclude the passage of the public. In the former case they may tend to confirm the owner's general acquiescence in the continuous user of the surface by the public for highway purposes.

(5) When an owner, alive to the necessity of evidencing his continued possession by periodical perambulations, & active in preventing encroachment upon or interference with his soil & in warning off trespassing wayfarers from parts of his land, at the same time permits, without protest or interference, the unrestricted passage of the public over the surface of the very soil of which he is asserting his ownership, there are cogent grounds for attributing to the public user an origin which, as against the owner of the soil, has established public rights.—*COATS v. HEREFORDSHIRE COUNTY COUNCIL*, [1909] 2 Ch. 579; 78 L. J. Ch. 568; 100 L. T. 695; 73 J. P. 355; 53 Sol. Jo. 245; *on appeal*, [1909] 2 Ch. 601.

231. ———.]—In answer to an information charging deft. before two justices of the peace under a private Act, with trespassing on a railway in such manner as to expose himself to danger, deft. alleged that he was lawfully upon the railway in exercise of a right which he claimed as one of the public to pass & repass along the railway as upon a highway dedicated before the passing of Regulation of Railways Act, 1868 (c. 119), by the railway co. or by another railway co. with which it had been amalgamated:—*Held*:—(1) the jurisdiction of the justices was ousted, for a railway co., like any other statutory body, might dedicate a highway over land vested in it by statute, provided that the dedication was not incompatible with the objects prescribed by the statute; (2) the question whether such a dedication was compatible with those objects was not a question to be tried by justices in petty sessions; (3) the question, whether a highway dedicated by a railway co. before the passing of Regulation of Railways Act, 1868 (c. 119), had been extinguished by sect. 23 of that Act, was not a question for the justices, &, if it were, it ought to be answered in the negative.—*ARNOLD v. MORGAN*, [1911] 2 K. B. 314; 80 L. J. K. B. 955; 103 L. T. 763; 75 J. P. 105; 9 L. G. R. 917, D. C.

232. ———.]—A railway co. brought an action for trespass for the climbing over a locked wicket gate at a level crossing. The defence was that a public footway ran through the crossing & had been dedicated to the public by long user. The co. contended that for the last thirty years the gate had been locked from time to time, & further, a railway co. could not dedicate a public highway across its lines, & that even if there had been presumed dedication over land granted to the co. for statutory purposes such dedication was *ultra vires* the co. & void:—*Held*: (1) although there might have been interruption of the footway at intervals during the last thirty years, yet evidence of long user prior to that period established the dedication; (2) though a statutory co. could not dedicate any part of its land so as to interfere with the objects for which the co. came into being, yet there was nothing to prevent it dedicating a right of way to the public where the user of that right of way was not inconsistent with the objects & obligations of the co.—*SOUTH EASTERN RY. CO. v. WARR* (1923), 21 L. G. R. 609, C. A.

*See, also*, No. 656, *post*; *CORPORATIONS*, Vol. XIII., p. 385, No. 1129.

233. Whether dedication is consistent with powers—Jurisdiction to try.]—*ARNOLD v. MORGAN*, No. 231, *ante*.

234. ———.]—Accommodation bridge over canal.]—*GRAND SURREY CANAL CO. v. HALL*, No. 203, *ante*.

poration to whom land had been conveyed for the purposes of a public market, being in the position of

trustees, were incapable of dedicating any part of the land to the purposes of a highway, or of diverting it in any

respect from its original purpose of a public market.—*HAMILTON (CITY) v. MORRISON* (1868), 18 C. P. 228.—*CAN.*

*Sect. 2.—Highways by dedication and acceptance:*  
*Sub-sect. 3, E. & F.; sub-sect. 4, A.]*

**235. — Accommodation bridge over railway—Interfering with widening of line.]—**TAFF VALE RY. CO. v. PONTYPRIDD URBAN DISTRICT COUNCIL, No. 228, *ante*.

**236. — Public right of way along sea wall.]—**(1) There is no such inconsistency between the powers & duties of comrs. of sewers to keep up a sea or river wall, & a right of way enjoyed by the public along such a wall, as to prevent such a right of way being acquired.

(2) Evidence of long & uninterrupted user may establish the right of way in such a case as well as in the ordinary case of a right of way claimed & used over the land of an individual.—GREENWICH BOARD OF WORKS v. MAUDSLAY (1870), L. R. 5 Q. B. 397; 39 L. J. Q. B. 205; 23 L. T. 121; 35 J. P. 8; 18 W. R. 948.

*Annotations:—As to (1) Rejd. Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs. (1899), 81 L. T. 171; (G. W. Ry. v. Solihull R. D. C. (1902), 86 L. T. 852. As to (2) Apprvd. Moser v. Ambleside U. D. C. (1925), 89 J. P. 118. Rejd. A.-G. v. Antrobus, [1905] 2 Ch. 188; Folkestone Corp'n. v. Brockman, [1911] A. C. 334.*

**237. — Public right of way along reservoir embankment—Tending to destruction of embankment.]—**GREAT WESTERN RY. CO. v. SOLIHULL RURAL DISTRICT COUNCIL, No. 227, *ante*.

**238. — Cost of upkeep not increased.]—**LANCASHIRE & YORKSHIRE RY. CO. v. DAVENPORT, No. 229, *ante*.

**239. — Right of way over railway lines—Level crossing.]—**(1) A railway co. that has once dedicated to the public the use of a level crossing along the line of an old public footway may not obstruct its use where the facts show no danger to the user of the line or to the safety of the public who use the trains.

(2) The dedication of such a level crossing is not *ultra vires* so long as its user is not incompatible with the statutory objects of the co.—A.-G. v. LONDON & SOUTH WESTERN RY. CO. (1905), 69 J. P. 110; 21 T. L. R. 220; 3 L. G. R. 1327.

*Annotations:—Expld. Taff Vale Ry. v. Pontypridd U. D. C. (1905), 93 L. T. 126. Apprvd. S. E. Ry. v. Warr (1923), 21 L. G. R. 669. Rejd. Arnold v. Morgan, [1911] 2 K. B. 314.*

**240. — A railway co. cannot dedicate a perpetual right of way over & across their railway or land which may come to be used as a railway.]—**GREAT CENTRAL RY. CO. v. BALBY-WITH-HEXTHORPE URBAN COUNCIL, A.-G. v. GREAT CENTRAL RY. CO., [1912] 2 Ch. 110; 81 L. J. Ch. 506; 106 L. T. 413; 76 J. P. 205; 28 T. L. R. 208; 56 Sol. Jo. 343; 10 L. G. R. 687.

*Annotations:—Expld. S. E. Ry. v. Warr (1923), 21 L. G. R. 669. Rejd. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; S. E. Ry. v. Cooper, [1921] 1 Ch. 211. See, generally, RAILWAYS.*

**241. — Public road along burgh golf links.]—**Magistrates for a burgh held the links from time immemorial for behoof of the inhabitants, & (*inter alia*), subject to the obligation of preserving the same for the purposes of the game of golf & for the recreation & amusement of the inhabitants. They had from time to time exercised powers of administration & management over the links, such as the letting of the pasturage, the regulation of bleaching clothes on the links, the construction of a sloping walk, & the levelling & filling up other portions of the ground. The magistrates proposed to make a macadamised road along the outside boundary of the links, where that boundary adjoins certain feus let off by them in 1820, which feus are no longer, in point of law, part of the links. P., an inhabitant of the burgh & member of the principal golfing

club there, & others, applts., sought by note of suspensions & interdict to restrain the magistrates either from making the road or from permitting any road to be used in that place for wheel traffic:—*Held*: the evidence proved that the proposed road would have no substantial interference with the obligation of golfing, etc., & the road might be reconciled with its due observance; but it was inconsistent with that obligation for the magistrates to alienate any part of the *solum* of the ground in question, or abdicate their existing powers of administration either by granting private easements to particular individuals, or, having made the road, to create a public easement by dedicating it to the public.—PATERSON v. ST. ANDREWS PROVOST (1881), 6 App. Cas. 833, H. L.

**242. Power to contract to dedicate road—Public Health Act, 1875 (c. 55).]**—A petition was presented by ptfs. & defts. to the Local Govt. Board, stating an agreement whereby ptfs. were to transfer to defts. certain land forming part of ptfs.' district, on condition that defts. should adopt a certain road & dedicate it as a public highway. The agreement referred to was not under seal, but the petition was sealed with the common seals of ptfs. & defts. The cost of completing the road was estimated at over £50. On action for specific performance of the agreement:—*Held*: (1) under Public Health Act, 1875 (c. 55), s. 174, the agreement must be under seal, & the petition, though under seal, was not a deed, & therefore was not a contract under seal within the sect.; (2) if the deed were valid, the local authority had no power to enter into an agreement for the dedication of a road or street as a highway.

The power to dedicate a road which arises under Public Health Act, 1875 (c. 55), where the road comes under the definition of a street, is a power given to a public body for public purposes. . . . They are not at liberty to contract that they will dedicate or that they will not dedicate. . . . This is a discretionary power given to them for public purposes, & they have no right to bind themselves in any way as to the exercise of that power (KAY, J.).—TURNBRIDGE WELLS IMPROVEMENT COMRS. v. SOUTHBOROUGH LOCAL BOARD (1888), 60 L. T. 172; 5 T. L. R. 107.

**243. Land acquired by municipal corporation as public park—Appropriation of part for street widening.]—**In 1870 an inhabitant of a borough offered to sell to the corpn. fifty-three acres of park land at about half its market value, provided they left forty acres unbuilt upon & open to the public. The offer being accepted, the land was conveyed to the corpn., & they covenanted to appropriate forty acres of it at the least for the purpose of a public park & recreation ground. The corpn. now proposed to appropriate part of the fifty-three acres, nearly all of which had always been used as a public park or recreation ground, for the purpose of widening a road by the side of the park:—*Held*: (1) the corpn. did not originally acquire the whole fifty-three acres for park purposes & never definitely appropriated the whole to park purposes, & therefore they were still entitled to appropriate part of the land to other purposes, more than forty acres being still left for park purposes; (2) even assuming the whole fifty-three acres were acquired for park purposes, the ct. would not interfere with the discretion of the corpn. in deciding that the widening of the street was partly for the improvement of the park.—A.-G. v. BRADFORD CORPN. (1911), 75 J. P. 553; 55 Sol. Jo. 715; 9 L. G. R. 1190.

*F. In respect of Copyholds.*

**244. Lord of manor and copyholder.]—**POWERS *v.* BATHURST, No. 258, *post*.

## SUB-SECT. 4.—PROOF OF DEDICATION.

*A. In General.*

See Highway Act, 1835 (c. 50), s. 23.

**245. Whether exact time or mode must be proved.]—**In an action to restrain trespass on a road, defts. pleaded that it was a highway, & were ordered to amend their defence so as to show the mode or title in or under which they claimed that the road had become a highway. Defts. amended by alleging that the road had for many years been used by the public as of right & was a highway, having been dedicated to the public by plff. & her predecessors in title or some of them. The judge on the application of plff., then made an order that defts. should deliver to plff. full particulars of the nature of all acts of dedication relied on by defts., & if defts. claimed by acts of dedication other than permissive user, particulars of such acts of dedication, with dates, & by whom made. Defts. appealed: — *Held*: the proper order was that if defts. relied on any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature & dates of those acts or declarations, & the names of the persons by whom they were done or made.—SPEDDING *v.* FITZPATRICK (1888), 38 Ch. D. 410; 58 L. J. Ch. 139; 59 L. T. 492; 37 W. R. 20; 4 T. L. R. 505, C. A.

*Annotations*: *Mentd.* Briton Medical & General Life Assn. *v.* Britannia Fire Assn. & Whinney (1888), 59 L. T. 888; Weinberger *v.* Inglis, [1918] 1 Ch. 133.

**246. — Land in settlement before 1835.]—**PARIS *v.* LYMINGTON RURAL DISTRICT COUNCIL (1911), 75 J. P. Jo. 88.

**247. — — —.]—**On complaint by a borough corpn. to the county council, under Highways & Locomotives Amendment Act, 1878 (c. 77), s. 10, that a rural district council had made default in repairing a public footpath, a committee of the county council held an inquiry & reported that the land where the footpath was situate had been in strict settlement since 1628 & that the footpath was a highway in 1851 & was now a highway, but that there was considerable doubt whether it was a highway in existence before Highway Act, 1835 (c. 50), & as such now repairable by the rural district council. The rural district council had never repaired the footpath & the report recommended that no order throwing the repair on them should be made by the county council. The report was adopted by the county council, & the borough council then obtained a rule *nisi* for a *mandamus* directing the county council to order the rural district council to repair the footpath: — *Held*: as the land had been in strict settlement since 1628 & therefore could not have been dedicated as a highway since that date, & as the footpath had been found by the county council to have been in fact a highway in 1851, the legal presumption was that it must have been dedicated before 1628, & consequently before 1835, & was therefore now repairable by the rural district

council, & the rule must be made absolute.—R. *v.* WEST SUSSEX COUNTY COUNCIL, *Ex p.* ARUNDEL CORPN. (1921), 125 L. T. 407; 85 J. P. 162; 19 L. G. R. 337, D. C.

**248. Whether dedication by particular owner must be shown.]—**R. *v.* PETRIE, No. 187, *ante*.

**249. Against whom presumed—Landlord—Though never in actual possession.]—**Where a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord & a dedication by him to the public may be presumed, although he was never in the actual possession of the close himself, & he is not proved to have been near the spot.—R. *v.* BARR (1814), 4 Camp. 16, N. P.

*Annotations*: — *Consd.* Vernon *v.* St. James, Westminster Vestry (1880), 16 Ch. D. 449. *Distd.* Thornhill *v.* Weeks (1914), 78 J. P. 154. *Refd.* Barraclough *v.* Johnson (1838), 7 L. J. Q. B. 172; Simpson *v.* A.-G., [1901] A. C. 476; Shearburn *v.* Chertsey R. D. C. (1911), 12 L. G. R. 622.

**250. — Length of user—Presumption of knowledge.]—**DAVIES *v.* STEPHENS, No. 219, *ante*.

**251. — — — Land in lease during living memory—Presumption of anterior dedication.]—**(1) From evidence of acts of user of a footway by the public extending over the whole time of living memory, during which time, however, the land over which the way had passed had been under lease, a jury may presume against the reversioner a dedication of the way by his ancestors to the public at a period anterior to the land having first been leased.

(2) To enable a plff. to maintain an action for obstruction of a highway, he must show a particular damage resulting to a particular person; it must not be such a damage as would naturally or necessarily arise to all Her Majesty's subjects, or, in other words, such as would result to all persons entitled to use a particular road. In an action for obstructing a footpath across deft's farm, alleged by plff. to be a public path, the only damage to himself that plff. proved was, that on several occasions he was delayed in passing along the way, & was, as all other persons using the way would have been, obliged either to turn back & proceed by a more circuitous route, or else to remove the obstruction at his own expense, both of which courses he had on different occasions adopted: — *Held*: this was not such a special & particular damage peculiar to himself beyond that suffered by the rest of the public as would entitle plff. to maintain the action.—WINTERBOTTOM *v.* DERBY (LORD) (1867), L. R. 3 Exch. 316; 36 L. J. Ex. 191; 16 L. T. 771; 31 J. P. 506; 16 W. R. 15.

*Annotations*: — *As to* (1) *Consd.* Folkestone Corpn. *v.* Brockman, [1914] A. C. 338. *Distd.* Thornhill *v.* Weeks (1911), 78 J. P. 154. *Consd.* Moser *v.* Ambleside U. D. C. (1925), 89 J. P. 59. *Refd.* Arnold *v.* Holbrook (1873), L. R. 8 Q. B. 96; Roberts & Lovell *v.* James (1903), 89 L. T. 282; Shearburn *v.* Chertsey R. D. C. (1911), 78 J. P. 289. *As to* (2) *Refd.* R. *v.* Metropolitan Board of Works (1869), 38 L. J. Q. B. 201; McCarthy *v.* Metropolitan Board of Works (1872), L. R. 8 C. P. 191; Cale. Ry. *v.* Walker's Trustees (1882), 7 App. Cas. 259; Martin *v.* L. C. C. (1898), 79 L. T. 170; Campbell Dayas *v.* Lloyd, [1901] 2 Ch. 518. *Generally, Mentd.* Buccleuch & Queensberry *v.* Metropolitan Board of Works (1868), 37 L. J. Ex. 177; De Mattos *v.* North (1868), 18 L. T. 797; Benjamin *v.* Storr (1874), L. R. 9 C. P. 400; Boyce *v.* Paddington B. C., [1903] 1 Ch. 109.

**252. — The Crown—No proof of knowledge.]—**HARPER *v.* CHARLESWORTH, No. 217, *ante*.

**253. — — —.]—**R. *v.* EAST MARK (INHABITANTS), No. 215, *ante*.

## PART III. SECT. 2, SUB-SECT. 4.—A.

**245 i. Whether exact time or mode must be proved.]—**A.-G. for BRITISH COLUMBIA *v.* CANADIAN PACIFIC RY. Co. (1903), 10 B. C. R. 184.—CAN.

**253 i. Against whom presumed—The**

*Crown.*—A squatter in possession of public lands, who afterwards became patentee of lands he occupied, had made a plan of sub-division into town lots which showed a new roadway or street laid down in the place of the old travelled trail, & subsequently, the

*Crown*, in making grants, described parcels of the lands as being bounded & abutting upon the new street: — *Held*: the space so shown upon the plan, as laid out for a street, had been adopted & dedicated by the Crown as & for a public street & highway.—



**Sect. 2.—Highways by dedication and acceptance:**  
**Sub-sect. 4, A. & B. (a).]**

**254. — Lord of manor.] — POWERS v. BATHURST, No. 258, post.**

**255. Onus of proof.] — A.-G. v. WATFORD RURAL COUNCIL, No. 102, ante.**

**256. Land vested in trustees for eighty years.] —**  
 (1) In 1834 the tenant in tail of the land over which an alleged highway ran barred the entail, & between then & 1842 was capable of dedicating. In 1842 he conveyed the land to trustees upon a settlement which was assumed to be strict. In 1875 he died, bequeathing the land to trustees for sale. In 1879 the trustees sold the land, & the purchaser immediately mortgaged it to the trustees of the will of another testator. In 1899 plffs., the trustees of a third testator, bought the land, & from then until the date of the action the land was admittedly in strict settlement. Two small scale maps, each a hundred years old, showed a road on the line of the alleged highway. It was not shown on the ordnance surveys until 1913. In the survey of that year it was shown as a foot-path on the same line:—*Held*: upon the evidence, both oral & as shown by the maps, plffs. had failed to establish that there was no right of way.

**BROWN v. EDMONTON TOWN (1894), 23 S. C. R. 308.—CAN.**

**253 ii. — — —.] —** The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government survey thereof does not give rise to a presumption that the lands over which they passed were dedicated as public highways.—**HERRINCK v. EDMONTON TOWN (1898), 28 S. C. R. 501.—CAN.**

**253 iii. — — —.] —** Where the Crown surveyor returned the plan of original survey of a township without indicating reservations for road allowances upon the boundaries of the township & his field notes appeared to the ct. to support the view that no such allowance had been made by him:—*Held*: the general instructions & model plan for similar surveys did not afford a presumption sufficiently strong for the inference that there was an intention upon the part of the Crown to establish such road allowance.—**EAST HAWKESBURY TOWNSHIP v. LOCHIEL TOWNSHIP (1904), 31 S. C. R. 513.—CAN.**

**255 i. Onus of proof.] —** In an action to restrain the owner of land from obstructing an alleged public highway over his land: *Held*: the onus of proving the existence of such highway rests on plffs.—**ST. VINCENT v. GREENFIELD (1887), 15 A. R. 567.—CAN.**

**255 ii. — — —.] —** **HALDWIN v. O'BRIEN (1917), 40 O. L. R. 24; 12 O. W. N. 256.—CAN.**

**g. Sufficiency of evidence.—Proof of statute labour & expenditure of public money.] —** A., owning land, laid out a plot for a town at the mouth of the river B., upon the map of which town a road was marked off leading along the edge of the river to its mouth. The road was made originally at the expense of A., but afterwards repaired & improved by statute labour & public money:—*Held*: sufficient evidence of dedication.—**R. v. GORDON (1857), 6 C. P. 213.—CAN.**

**h. — — —.] —** **PROUSE v. GLENNY (1863), 13 C. P. 560.—CAN.**

**i. — — —.] —** **Indefinite road.—Limited user.] —** **R. v. OUELLETTE (1865), 15 C. P. 260.—CAN.**

**j. — — —.] —** **HUBERT v. YARMOUTH TOWNSHIP (1889), 18 O. R. 458.—CAN.**

**k. — — —.] —** **PALMATIER v. MCKIBBON (1894), 21 A. R. 441.—CAN.**

**n. — — —.] —** *Held*: where a road in question was a mere cart road, not a thoroughfare, & there was not a public terminus at each end, & there was no statute labour performed on the road, strong evidence would be required to show a dedication.—**OULVIE v. CROWELL (1904), 40 N. S. R. 501.—CAN.**

**o. — — —.] —** **Variance between plans.] —** The main evidence to establish the continuation of a street in a village to the water's edge, was a map, alleged to be the original map by which the village was laid out about forty years before, but not authenticated by any signature or date; & for upwards of twenty years before suit another plan, duly registered, had been in general use, not showing the continuation; & no user was proved for the purpose of a highway:—*Held*: the ct. was not bound to declare the street so marked a public highway.—**O'BRIEN v. TREN-TON MUNICIPAL COUNCIL (1858), 7 C. P. 246.—CAN.**

**p. — — —.] —** **Laying out streets in building block.] —** P. laid off several new streets in a block which he conveyed to C.:—*Held*: there was no dedication to the public.—**CALLAGHAN v. HOBKIRK (1860), 1 P. E. I. 178.—CAN.**

**q. — — —.] —** **Registration of plan.] —** The registration of a plan of a subdivision of a town lot & sales made in accordance with it, does not constitute a dedication of the lands thereon to the public.—**RE MORTON & ST. THOMAS CORPN. (1881), 6 A. R. 323.—CAN.**

**r. — — —.] —** **Absence of public user.] —** Filling in the registry office a plan of property showing a street or lane, does not, in the absence of user by the public, amount to a dedication.—**WRIGHT v. WINNIPEG (CITY) (1886), 4 Man. L. R. 46.—CAN.**

**s. — — —.] —** **Deeds.] —** **GRAND TRUNK RY. CO. OF CANADA v. TORONTO (CITY) (1906), 37 S. C. R. 210.—CAN.**

**t. — — —.] —** **GLOSTER v. TORONTO ELECTRIC LIGHT CO. (1906), 38 S. C. R. 27.—CAN.**

**u. — — —.] —** **Designation as highway in plans prepared for public purposes.—Confirmatory patent from Crown.] —** **NIAGARA NAVIGATION CO. v. NIAGARA (1914), 31 O. L. R. 17; 5 O. W. N. 46; 6 O. W. N. 8.—CAN.**

**v. — — —.] —** **Designation in will as "public highway."]**—**CANADIAN NORTHERN ONTARIO RY. CO. v. BILLINGS (1912),**

(2) I find it difficult to accept as true in all cases that you must find a right of way from one public place to another public place, & that you cannot have a right of way to what is a *cul de sac* unless it be in a town. I do not think that is what was intended [by FARWELL, J., in *A.-G. v. Antrobus*, No. 285, post], & I do not think if that is what was intended that that is correct. It seems to me that there may be a number of cases in which the public have a need to go to a particular point, & there may well have been a dedication to them for their use for the purpose of reaching that point, although the return journey might be precisely the same route from the *terminus ad quem* to which the right of access is granted (POLLOCK, M.R.).—**MOSER v. AMBLESIDE URBAN DISTRICT COUNCIL (1925), 89 J. P. 118; 23 L. G. R. 533, C. A.**

**R. User.**

**(a) In General.**

**257. General rule.] —** **IL. v. PETRIE, No. 187, ante.**

**258. — — —.] —** Long user by the public of a way across copyhold land is evidence of dedication by both lord & copyholder.—**POWERS v. BATHURST**

**22 O. W. R. 659; 3 O. W. N. 1504; 5 D. L. R. 455.—CAN.**

**c. — — —.] —** **Erection of telephone poles.—Performance of statute labour.] —** Fencing, public user, the erection of telephone poles & performance of statute labour by direction of a municipal council:—*Held*: conclusive that the locus was a highway.—**DIX YOUNG v. GILES (1916), 49 N. S. R. 398.—CAN.**

**d. Necessity for grant or plan.—Dedication by Crown.] —** To establish a highway by dedication of the Crown, the particular land must be expressly reserved in a grant from the Crown, or be defined in the plan of a grant containing a reservation of roads.—**COLK v. MAXWELL (1855), 3 All. 183.—CAN.**

**PART III. SECT. 2, SUB-SECT. 4.—B. (a).**

**257 i. General rule.] —** Long user of a roadway by the public is evidence ordinarily of a dedication.—**LAWSON v. WESTON (1850), 1 Legge, 666.—AUS.**

**257 ii. — — —.] —** From long-continued user of a way by the public, whether land belongs to the Crown, or to a private owner, dedication from the Crown or private owner, as the case may be, in the absence of anything to rebut the presumption may & ought to be presumed.—**TURNER v. WALSH (1881), 6 App. Cas. 636.—AUS.**

**257 iii. — — —.] —** Dedication of a road to the public may be presumed from long user & the expenditure of statute labour on the road.—**R. v. BUCHANAN (1848), 3 Kerr, 674.—CAN.**

**257 iv. — — —.] —** **DALY v. ROBERTSON (1892), 1 Terr. L. R. 427.—CAN.**

**257 v. — — —.] —** **ANDERSON v. JUGGOODUMBA DARI (1880), 6 C. L. R. 282.—INDIA.**

**257 vi. — — —.] —** **MANNADA MUDALI v. NALLAYA GOUNDEN (1909), 1 L. R. 32 Mad. 527.—IND.**

**257 vii. — — —.] —** **VIBUDAPRIYA THIRTHASWAMY v. ESOOF SAHIB (1910), 1 L. R. 35 Mad. 28.—IND.**

**257 viii. — — —.] —** **CHERRY v. SNOOK (1893), 12 N. Z. L. R. 54.—N.Z.**

**257 ix. — — —.] —** **HUGHES v. BOAKES (1898), 17 N. Z. L. R. 113.—N.Z.**

**257 x. — — —.] —** **A.-G. v. REID, [1920] N. Z. L. R. 563.—N.Z.**

**e. Sufficiency of user.—Road through private property.] —** A road through private property, parallel to a public

(1880), 49 L. J. Ch. 294; 42 L. T. 123; 28 W. R. 390.

*Annotations*:—**Consd.** *Thornhill v. Weeks* (1914), 78 J. P. 154. **Refd.** *Dorrey v. Sanders*, [1919] 1 K. B. 223.

259. —.]—**TURNER v. WALSH**, No. 210, *ante*.

260. —.]—**EYRE v. NEW FOREST HIGHWAY BOARD**, No. 5, *ante*.

261. —.]—**A.-G. v. ESHER LINOLEUM CO., LTD.**, No. 178, *ante*.

262. —.]—**COATS v. HEREFORDSHIRE COUNTY COUNCIL**, No. 230, *ante*.

263. —.]—In an action in which a highway authority alleged that deft. had unlawfully obstructed a public highway opposite his land by inclosing three roadside strips partly overgrown by trees & underwood, plffs. alleged that the whole of the land between a straight artificial hedge to the north & an old irregular hedge on the top of a steep bank to the south of the strip had been dedicated to public use, & they relied upon the legal presumption to that effect, upon evidence of a considerable body of acts of user by the public, & on the taking of gravel for road purposes, deft. proving numerous acts of ownership by himself & his predecessors in title. Plffs. also relied upon tithe, ordnance & other maps as showing the extent of the highway:—**Held**: (1) the old hedge to the south having been originally planted naturally had no connection with the laying out of the highway, & there therefore arose *ab initio* no presumption that the two hedges constituted the boundaries of the highway; (2) deft.'s evidence as to acts of ownership outweighed that of plffs. in support of dedication through user by the public, & plffs.' action therefore failed.—**A.-G. v. LINDSAY-HOGG** (1912), 76 J. P. 450.

*See, also*, Nos. 177, 191, 194, *ante*.

264. **Sufficiency of user—User by one or two persons—As representing public.**—Upon a question whether a road was public or private, there was considerable evidence of user by persons connected with the houses on each side of it, & some evidence of its being used by a few other persons as a thoroughfare. There was also evidence of an intention to dedicate by the acts of a mtgor. with the knowledge of the mtgee., such as the setting out of the road & the like. For two years the road was repaired by the mtgor., & then application made to the parish surveyors under Highway Act, 1835 (c. 50), s. 23, but nothing done. The judge told the jury that if there had been a dedication, it was immaterial what was the extent of public user, for user by one or two persons was as good as user by one or two hundred:—**Held**: no misdirection.

Two or three other persons had used it as a thoroughfare, & if they did it, as representing the public, & without any interruption, it was evidence of a complete dedication, which involves an acceptance by the public, & I concur in the observation of the learned judge. The acts of the mtgor., with the knowledge of the mtgee., were clearly binding on him; & the evidence shows that the mtgee. was fully aware of what the mtgor. was doing. There was, therefore, good evidence of dedication on the part of the owner of the soil (**LORD CAMPBELL, C.J.**).—**R. v. SOUTH-EASTERN RY. CO.** (1850), 16 L. T. O. S. 124.

road, is not deemed a highway nor dedicated to the public, though it had been used for twelve years by persons having occasion to travel in the direction to which the public road extended.—**R. v. VAIL** (1826), N. B. Dig. 401.—**CAN.**

1. — **Assumption by municipal**

**council.**—A highway laid out by a private person had been used as such for many years, & a sidewalk had been built upon it by defts., & the council had by bye-law appropriated money to pay for the construction of it, & payment had been duly made to the persons who built it:—**Held**: sufficient to

265. — **Road set out as private road—Under Inclosure award.**—(1) On the trial of an indictment against a township for the non-repair of a highway, it appeared that the road had originally been set out in 1789 as a private road by an award under an Inclosure Act, & the adjoining landowners or occupiers were ordered by the award ever after to keep the road in repair. There was enough evidence given of user by the public to support the presumption of a dedication in an ordinary case, before the passing of General Highway Act, 1835 (c. 50), s. 23:—**Held**: there was nothing in the fact of the road having been set out by the award, which directed the repair to be by the adjoining landowners, to prevent the road becoming a highway repairable by the inhabitants at large.

There was nothing whatever that I can see to prevent the owners from dedicating it [an occupation road] to the public (**BLACKBURN, J.**).

(2) In the case of a road originally set out as an occupation road, the degree of user by the public should be more narrowly watched than in a case where the way had never been private (**BLACKBURN, J.**).—**R. v. BRADFELD (INHABITANTS)** (1874), L. R. 9 Q. B. 552; 43 L. J. M. C. 155; 30 L. T. 700; 38 J. P. 536; 22 W. R. 603.

266. — **Thinly populated district.**—In an action claiming a public right of way over a track or natural mountain pass about fourteen miles long, running through a thinly populated district of the Highlands of Scotland & connecting by the shortest route Braemar & Clova, it appeared from the evidence of user that the track in question had been used by the public on foot; by drovers twice a year driving sheep from a market held at Braemar to one held near Clova; that public subscriptions had been collected for a bridge in line of the track; that some distance up the disputed track there was an old milestone, & that a proprietor in planting trees had specially left a space for the track: **Held**: the amount of user, having regard to the character of the district, was such as might have been expected if the track had been admittedly a public way & not the subject of mere tolerance, & the evidence was sufficient to establish the right of way.—**MATHERSON v. SCOTTISH RIGHTS OF WAY & RECREATION SOCIETY** (1888), 13 App. Cas. 714, 11 L.

*Annotations*:—**Consd.** *A.-G. v. Sewell* (1918), 89 L. J. K. B. 425. **Refd.** *Folkestone Corp'n. v. Brockman*, [1914] A. C. 338.

267. — **Occupation road.**—**A.-G. v. GODSTONE RURAL DISTRICT COUNCIL**, No. 272, *post*.

268. — **Private traffic.**—**A.-G. v. ESHER LINOLEUM CO., LTD.**, No. 178, *ante*.

269. **User referable to other origin—Licence.**—**BRITISH MUSEUM TRUSTEES v. FINNIS**, No. 302, *post*.

270. — **Right of public to deviate.**—There can be no dedication of a way to the public for a limited time, certain or uncertain: if dedicated at all, it must be dedicated in perpetuity. Neither can the public, by non-user, release their rights.

An ancient highway over a common or down was, without authority or interference from the owner of the soil, diverted by an adjoining proprietor, who substituted for it a new road, which

establish that the highway had been assumed for public use by the corp'n.—**HOLLAND v. YORK TOWNSHIP** (1904), 24 C. L. T. 290; 7 O. L. R. 533; O. W. R. 287.—**CAN.**

2. — **To establish a public right of way it is not sufficient to prove that the road claimed was resorted to**



*Sect. 2.—Highways by dedication and acceptance:*  
*Sub-s cl. 4, H. (a), (b) & (c).]*

was used by the public for more than twenty years. After the lapse of that period, the original road was re-opened to the public, & the then owner of the soil over which the substituted road passed built a wall & planted trees across the road which had been so substituted. In an action against deft. for pulling down the wall & cutting down the trees:—*Held*: the above facts afforded no reasonable evidence of a dedication of the substituted road to the public, the public user thereof being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway, or suffers it to become foundrous.

It is also an established maxim. Once a highway always a highway; for the public cannot release their rights, & there is no extinctive presumption or prescription (BYLES, J.).—*DAWES v. HAWKINS* (1860), 8 O. B. N. S. 818; 29 L. J. C. P. 343; 4 L. T. 288; 25 J. P. 502; 7 Jur. N. S. 262; 141 E. R. 1399.

*Annotations*:—*Reid*. *Arnold v. Holbrook* (1873), 28 L. T. 23; *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704; *Piggott v. Goldstraw* (1901), 81 L. T. 91. *Mentd*. *Campbell-Davies v. Lloyd* (1901), 85 L. T. 59.

**271. Weight of evidence.**—*CHINNOCK v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, *FIGGESS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, *PHILLIPS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, No. 195, *ante*.

**272.**—[This was an action for a declaration that three ancient roads in the parish of Lingsfield were respectively public highways & repairable by defts. Defts. admitted that portions of two of the roads were highways & that they had been repaired, but as regards the remainder they denied that they were highways:—*Held*: on the evidence, there must be a declaration that they were highways repairable by the inhabitants at large.

While on the one hand little weight ought to be attached to occasional user by the public of a road systematically used for occupation purposes, it is on the other hand necessary to remember that user for occupation purposes may have arisen precisely because the road was a public road, it being open to every one with a field adjoining a highway to open from the highway a gate into his field & to use the highway for his own accommodation as owner of the field (PARKER, J.).—*A.-G. v. GODSTONE RURAL DISTRICT COUNCIL* (1912), 76 J. P. 188.

**Upon whom binding.**—*See* Nos. 215, 217, 219 240, 251, 258, *ante*

by parties strolling on it for a certain distance for pleasure. The evidence must show that the road was used by the public in passing on their ordinary avocations between the two termini.—*JENKINS, ETC. v. MURRAY* (1866), 4 Macph. (Ct. of Sess.) 1046; 38 Sc. Jur. 532. **SCOT.**

**PART III. SECT. 2, SUB-SECT. 4.—**  
**B. (b).**

**273. Living memory.**—*ABERCROMBY v. FERRY TOWN COMUS.*, [1900] 1 L. R. 302.—**IR.**

**276. Time immemorial.**—*WILSON v. HENDERSON* (1855), 17 Dunl. (Ct. of Sess.) 534; 27 Sc. Jur. 228.—**SCOT.**

**276 II.**—[In order to establish a public way across unenclosed ground it must be shown that the public have from time immemorial made use of a definite & ascertained tract across it from one public place to another.—*MACINTOSH v. MOIR* (1871), 10 Macph.

(Ct. of Sess.) 517; 44 Sc. Jur. 278.—**SCOT.**

**h. Not necessarily long series of years.**—It is not essential to the dedication of a right of way that it should be used by the public for a long series of years. The time during which it is openly used by the public with the owner's knowledge at the time when he could have prevented it may be very limited, & the inference of a dedication turns upon the circumstances of each particular case.—*GUEST v. GODSBROUGH & CO.* (1886), 12 V. L. R. 804.—**AUS.**

**k. Twenty years.**—An uninterrupted user of the land of another for twenty years, with the knowledge of the owner, constitutes a right of way over the same.—*CASEY v. HAMLIN* (1859), 4 Nfld. L. R. 285.—**NFLD.**

**l. Thirty years.**—*Held*: the user of a road for thirty years after the patent would be conclusive evidence

*(b) Length of User.*

**273. Living memory.**—*R. v. HUDSON* (1732), 2 Stra. 909; 93 E. R. 935.

**274.**—**Presumption of previous enjoyment.**—*YOUNG v. CUTHBERTSON*, No. 43, *ante*.

**275. Fifty years.**—*RUGBY CHARITY TRUSTEES v. MERRYWEATHER* (1790), 11 East, 375, n.; 103 L. R. 1049.

*Annotations*:—*Consd*. *Woodyer v. Hadden* (1813), 5 Taunt. 125; *Wood v. Veal* (1822), 5 B. & Ald. 454. *Reid*. *R. v. St. Benedict* (1821), 4 B. & Ald. 447; *Bateman v. Black* (1852), 18 Q. B. 870; *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449; *Bourke v. Davis* (1889), 44 Ch. D. 110; *A.-G. & London Property Investment Trust v. Richmond Corp.* & *Goshing* (1903), 89 L. T. 700; *Kingston-upon-Hull Corp. v. N. E. Ry.*, [1915] 1 Ch. 456; *A.-G. Sewell* (1918), 88 L. J. K. B. 425.

**276. Time immemorial.**—*PARSONS v. TANNER* (1844), 8 J. P. Jo. 55.

**277. Thirty-two years.**—Where a street in a town under the operation of 11 & 12 Vict. c. 63, had been set out & opened by the owners of the soil in the year 1828, & from that time to the present had been constantly used by the public, but had not since that year been subject to any repairs, & the local board having ordered the owners & occupiers of the houses to sewer, level, pave, etc., the said street, & they having neglected to do so, whereupon the said board themselves did the work & charged the amount to the said owners & occupiers pursuant to sect. 69 of above Act:—*Held*: the facts showed a dedication to & adoption of the street by the public, & the owners & occupiers were not liable to do the above works.—*ILLINGWORTH v. MONTGOMERY* (1859), 2 L. T. 726; 24 J. P. 101.

**278. Thirty-eight years.**—In 1852 a plot of land in a street, a public highway repairable by the local authority, was demised by a lease for nine hundred & ninety-nine years. Three cottages were erected on it, with a footway in front, abutting on the street & paved with cobbles. Between twenty & forty years ago, half the width of the cobble stones was taken up, & flags were substituted, but by whom there was no evidence to show. The other half in front of the cottages remained as it was. In 1890 the cottages were converted into shops. Up to about fifteen years ago the cobbled part was repaired by the leaseholder & then flags were substituted for the remaining cobbles by the local authority who had since repaired the whole footway. From 1890 the occupier of one of the shops had a showcase standing on the footway in front of his shop, but the public continued to use the whole footway except so far as they were obstructed by the showcase. The shopkeeper was prosecuted for obstructing the

of a dedication as against the owner.—*MYTTON v. DUCK* (1866), 26 U. C. R. 61.—**CAN.**

**m.**—*O'NEIL v. HARPER* (1913), 24 O. W. R. 88; 4 O. W. N. 841; 10 D. L. R. 433.—**CAN.**

**277 I. Thirty-two years.**—*MACOOMB v. WELAND TOWN* (1907), 9 O. W. R. 143; 13 O. L. R. 335.—**CAN.**

**n. Thirty-five years.**—The user of a bridge over a navigable river for 35 years is sufficient to raise a presumption of dedication.—*R. v. MOSS* (1896), 26 S. C. R. 322.—**CAN.**

**278 I. Thirty-eight years.**—*M'GREGOR v. CRIEFF CO-OPERATIVE SOCIETY, LTD.*, [1915] S. C. (H. L.) 93.—**SCOT.**

**o. Forty years.**—Where a road had been originally made by the proprietor of the land as a private approach for his own use:—*Held*: the use of it by the public for forty years, as a footpath, did not, in the circumstances, establish a right of way along it for

passage of the public over the footway & the justices found that the user of the footway by the public since 1852 until the cottages were turned into shops, a period of thirty-eight years, was a dedication of the land the subject of the lease to the public, & that such user had been so notorious as to lead to the presumption that the lessor had acquiesced in the dedication, & that the obstruction since 1890 was not sufficient to rebut the presumption of dedication. The shopkeeper was accordingly convicted, & on appeal by special case:—*Held*: (1) the conviction must be affirmed; (2) the question was one of fact for the justices who were entitled upon the statements in the case to find that the early user of the footway by the public was evidence upon which they could presume dedication, & the user subsequent to 1890, when the showcase was first erected, did not rebut the evidence of dedication at an earlier date.—*OPENSHAW v. PICKERING* (1912), 77 J. P. 27; 11 L. G. R. 142, D. C.

(c) *Nature of locus in quo.*

**279. Thoroughfare between houses—Joining existing highways.]—***WOODYER v. HADDEN*, No. 632, *post*.

**280. Cul de sac—Between houses.]—***WOODYER v. HADDEN*, No. 632, *post*.

**281. ——— Maintained by local authority.]—**A railway co. authorised to construct a line of railway under a public street is not bound to give notice to treat or pay compensation to the owner of the land adjoining the street in respect of any part of the soil of such public street. A *cul de sac* dedicated to the public is for this purpose in the same position as a public street. *Plff.* was the owner of a piece of ground with two rows of houses, which had existed more than twenty years, with a passage between them ending in a *cul de sac*, the whole of the soil of which was conveyed to him. A railway co., under the powers of their Act, gave notice to treat for some of the houses on each side, but the soil of the passage between the houses was expressly excluded from the notice. The railway was to be carried in a tunnel under the property. Evidence tending to show dedication being given:—*Held*: an injunction to restrain the co. from entering on the *cul de sac* without giving notice to treat would be dissolved.—*SOUCH v. EAST LONDON RY. CO.* (1873), L. R. 16 Eq. 108; 42 L. J. Ch. 477; 37 J. P. 644; 21 W. R. 590; *subsequent proceedings* (1874), 22 W. R. 566.

*Annotations*:—*Reid*, (Clark v. London School Board (1873), 21 W. R. 723; Bailey v. Jamieson (1876), 34 L. T. 62; Vernon v. St. James, Westminster Vestry (1880), 16 Ch. D. 449.

**282. ———.]—***VERNON v. ST. JAMES, WESTMINSTER, VESTRY*, No. 427, *post*.

**283. ———.]—***BOURKE v. DAVIS*, No. 313, *post*.

**284. ——— Not maintained by public authority.]—**A corpn. having acquired land to widen a street sold surplus land by auction under conditions requiring the purchasers to observe the bye-laws as to building. The corpn. reserved the right to waive or alter any stipulations as to any land not sold at the sale or, with the consent of the purchaser, as to any land so sold. The corpn. consented to alter the plans of a purchaser so that the air space required by the bye-laws was provided

out of a square, & not out of land sold at the sale. The square was a *cul de sac*, but not separated by any bar from the highway. It had never been paved or repaired by the local authority:—*Held*: there was under the circumstances no building scheme which the corpn. was not at liberty to alter, & although a *cul de sac* may be a highway, no dedication of the square to the public had been proved, & the user proved was only that of private rights of way to the houses in the square.—*A.-G. & LONDON PROPERTY INVESTMENT TRUST, LTD. v. RICHMOND CORPN. & GOSLING & SONS* (1903), 89 L. T. 700; 68 J. P. 73; 20 T. L. R. 131; 2 L. G. R. 628.

*Annotations*:—*Reid*, A.-G. v. Antrobus, [1905] 2 Ch. 188; Josselson v. Weller (1911), 75 J. P. 513.

**285. ———.]—**(1) The general public cannot acquire by user a right to visit a public monument or other object of interest upon private property, & a trust to permit access for that purpose will not be presumed against persons who show a clear documentary title. There can be no public right of way to such a monument or object acquired by mere user. A public highway must *prima facie* lead from one public place to another. A *cul de sac* may be a public highway, but the dedication of a *cul de sac* as a highway will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting, or other matters, by the public authority.

(2) A tithe commutation map & the deposited plans of a proposed railway are admissible as evidence of public repute.—*A.-G. v. ANTROBUS*, [1905] 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790; 69 J. P. 141; 21 T. L. R. 471; 49 Sol. Jo. 450; 3 L. G. R. 1071.

*Annotations*: As to (1) *Folld*, Whitehouse v. Hugh, [1906] 1 Ch. 253. *Consd.*, A.-G. v. Sewell (1918), 88 L. J. K. B. 425; Moser v. Ambleside U. D. C. (1925), 89 J. P. 118. *Reid*, Robinson v. Smith (1908), 24 T. L. R. 573; Trafford v. St. Faith's R. D. C. (1910), 74 J. P. 297; A.-G. v. Horner (No. 2), [1913] Ch. 140. As to (2) *Apud*, A.-G. v. Groydon R. D. C. v. Moorson-Roberts (1908), 72 J. P. 123; North Staffordshire RY. v. Hanley Corpn. (1909), 5 L. G. R. 375. *Folld*, Fuller v. Chippenham R. D. C. (1914), 79 J. P. 4. *Reid*, A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Collis v. Amphlett, [1918] 1 Ch. 232.

**286. ——— But cleansed, lighted & patrolled.]—**In 1907 the plans of a building estate deposited by the owner were passed by the local authority. The plans showed an intended new street with a southern outlet into a highway & extending northwards therefrom some distance without an outlet, so that it was a *cul de sac*. The plans also showed the land on the east side of the new street plotted out for the erection of houses. The new street was constructed, kerbed & channelled on its eastern side with a footpath, at the cost of the owner & to the satisfaction of the local authority, who, as the water authority, laid a water main in the new street. A gas main was also laid therein. By 1910 the owner had disposed of all the plots except the two northernmost plots, & had granted to his purchasers or lessees a right of way over the new street, & houses were built. In Sept. 1910, K. bought the two remaining plots & the north end of the new street so far as it was continuous with the two plots, with a right of way over the new street up to the two plots, & erected a fence with an opening for gates across the new street in a line with the southern boundary of the two plots, thus inclosing

foot-passengers.—*NAPIER'S TRUSTEES v. MORISON* (1851), 13 Dunl. (Ct. of Sess.) 1404; 23 Sc. Jur. 656.—*SCOT*. p. ———.]—The constitution of a public right of way does not depend upon any legal fiction, but upon the

fact of user by the public as matter of right continuously & without interruption for forty years.—*MANN v. BRODIE* (1885), 10 A. C. 378; 12 R. (Ct. of Sess.) 52; 22 Sc. L. R. 730, H. L.—*SCOT*.

q. *Seventy years.]—**FRANK v. HARTWICK TOWNSHIP CORPN.* (1889), 18 O. R. 344.—*CAN.*

r. ———.]—*FRASER v. DIAMOND* (1904), 25 C. L. T. 218; 5 O. W. R. 430; 10 O. L. R. 90.—*CAN.*

*Sect. 2.—Highways by dedication and acceptance:*  
*Sub-sect. 4, B. (c).]*

the north end of the new street he had bought. The local authority had not taken over the street or expended any public money upon it, but alleged that the new street throughout its entire length had been dedicated to the public & had become by user a highway, & threatened to pull down & remove the fence. In an action by K. to restrain the local authority from interfering with or pulling down his fence:—*Held*: (1) on the evidence, the new street had not by dedication or user become a highway, but was a private road; (2) the bye-laws & special Act of the local authority dealt only with the width & level, & not with the length, of new streets, & therefore in the absence of an order under Public Health Acts Amendment Act, 1907 (c. 53), s. 17, the owner was entitled to deviate from the plans & to inclose the north or dead end of his private road; (3) an injunction would be granted accordingly.

(4) The fact that the road has been cleansed, lighted & patrolled by the authority makes no difference [as to presumption of dedication].

(5) User of a *cul de sac* by persons going up it for the purpose of knowingly committing a trespass on land beyond will not raise any presumption of dedication.—*KIRBY v. PAIGNTON URBAN COUNCIL*, [1913] 1 Ch. 337; 82 L. J. Ch. 198; 108 L. T. 205; 77 J. P. 169; 57 Sol. Jo. 266; 11 L. G. R. 305.

**287. ——— Road to back yards of cottages.]**

—Defts. were the owners of a plot of land within pltf.'s urban district abutting upon the H. Road, in which was laid a public sewer. In or about the year 1861 defts. erected on this plot of land two rows of cottages, for occupation by their servants, with a road about twenty feet wide between them. The road was a *cul de sac* & formed the only access by road & for vehicles to the back yards of the cottages. The entrance to the road was originally closed by gates, but these were removed between 1865 & 1870 so that any member of the public might use the road, but it had never been repaired, cleansed, or lighted at the public expense. In 1877, in consequence of a requisition by the local authority, defts. laid a line of pipes in the centre of the road to take the drainage of the cottages, which were connected with it in pairs by means of Y-shaped pipes, into the public sewer in H. Road. Defts. subsequently constructed gullies & pipes whereby the surface water of the *cul de sac* road was conveyed into the line of pipes in question. Pltfs., purporting to act under Kingston-upon-Hull Corp'n. Act, 1903, s. 49, & Public Health Act, 1875 (c. 55), s. 41, having required defts. to abate a nuisance in respect of the drainage of the cottages & roadway, & having executed the necessary works themselves, claimed a declaration of charge upon the property for the cost of the work in connection with the main line of pipes:—*Held*: there was not sufficient evidence of dedication to constitute the *cul de sac* a highway, but whether that was so or not, the line of pipes was a "single private drain" within sect. 49 of the former Act, & pltfs. were accordingly entitled to the declaration of charge which they claimed.

First of all I think it convenient to consider whether the space between the backs of the houses, though never repaired by the local authority, has been so dedicated to the public as to constitute it a highway. In my opinion, the evidence does not establish such a dedication. It is a *cul de sac*. It leads only to the back gates of these houses. Nobody except the co. & their tenants can use it or require to use it. Originally there was a gate

at the end. . . . In or about 1878 the gate was taken down, or fell down, & it has not been replaced, but this circumstance seems to me to be altogether inadequate to establish a public right of way in this *cul de sac* (*LORD COZENS-HARDY, M.R.*).—*KINGSTON-UPON-HULL CORPN. v. NORTH EASTERN RY. CO.*, [1916] 1 Ch. 31; 113 L. T. 1140; 80 J. P. 57; 60 Sol. Jo. 58; *sub nom.* *HULL CORPN. v. NORTH-EASTERN RY. CO.*, 84 L. J. Ch. 905; 14 L. G. R. 23, C. A.

*Annotation*:—*Refd.* *Vine v. Wenham* (1915), 81 L. J. Ch. 813.

**288. ——— Public user.]**—Pltf. was the owner of a house built on a plot which formed part of an estate laid out by a building society in accordance with a scheme. On the sale of this plot by the society to pltf.'s predecessor in title, it was shown on a plan of the estate as bounded on one side by a vacant space which though not named in the plan as a road had been in fact roughly made up by the society as a road. This road ran from the street on which pltf.'s house fronted to a level crossing on a railway over which there was a private right of way for the benefit of the owners of a field on the opposite side of the line. The building society having acquired the field & released the right of way fenced off the road & sold the site to deft.'s predecessor in title. All the plots on the building estate were conveyed subject to a condition reserving to the building society the power of allowing a variation of the plans & conditions. In an action to restrain deft. from digging up the road on the ground that it was a violation of the building scheme & that the road had been dedicated to the public by user:—*Held*: under the conditions the society had an absolute power to alter the building scheme by closing the road & there was no sufficient evidence of user or dedication to entitle pltf. to succeed.

It is very difficult to make out dedication by user where the road so far as the public are concerned is a *cul de sac* (*ROMER, L.J.*).—*WHITEHOUSE v. HUGH*, [1906] 2 Ch. 283; 75 L. J. Ch. 677; 95 L. T. 175; 22 T. L. R. 679; 50 Sol. Jo. 615, C. A.

**289. ———.]**—Where courts which are *cul de sacs* are proved *prima facie* to have been dedicated by the owners to the public as highways, the mere fact that the owners have executed certain improvements & repairs on the property, or that it would have caused great inconvenience to the tenants of houses in the ets. to exclude the public from them, is not sufficient to negative the inference of dedication. There is no presumption of law against a *cul de sac* in a town being a highway, sufficient user by the public being proved.—*A.-G. v. CHANDOS LAND & BUILDING SOCIETY* (1910), 74 J. P. 401.

*Annotation*:—*Consd.* *Josselson v. Weller* (1911), 75 J. P. 513.

**290. ———.]**—A piece of land which is a *cul de sac* may be dedicated as a highway, but it is difficult to establish such dedication when there has been no overt act of dedication by the owner of the soil, & when the local authority has not, for a substantial period, exercised acts of authority by lighting or repairing. The mere fact that the owner intends to use the adjoining land for building purposes, & has seen the public using the land for purposes of recreation, & has good-naturedly refrained from interfering with their enjoyment of it, is not evidence of an overt act of dedication of the piece of land in question as a highway for foot passengers.—*A.-G. v. SEWELL*, (1918), 88 L. J. K. B. 425; 120 L. T. 363; 83 J. P. 92; 35 T. L. R. 193; 17 L. G. R. 197, C. A.

291. —[—]—*MOSEY v. AMBLESIDE URBAN DISTRICT COUNCIL*, No. 256, *ante*.

*See, further*, Part I., Sect. 1, sub-sect. 3, *ante*.

292. Road set out as private road.—Under inclosure award.]—*R. v. BRADFELD (INHABITANTS)*, No. 265, *ante*.

*See, generally*, COMMONS, Vol. XI., pp. 78 *et seq.*

293. Farm road—Used by strangers for pleasure purposes.]—(1) The occasional user of a farm road by strangers, chiefly for purposes of pleasure, is evidence of a public rather than a private way, & may be evidence of a dedication to the public as a highway, but must be well weighed with reference to permission, repair, & all other circumstances, tending to show whether the owner ever intended such a dedication, especially if it leads to a place of resort for mere purposes of pleasure.

If all the Queen's subjects had used the way at their free will & pleasure, & at all times, that is strong evidence of a dedication to the public as a highway. . . . Beyond all doubt there might be a user of a highway for purposes of pleasure (*FRILE, C.J.*).

(2) A witness having produced an old plan in reference to the *locus in quo*:—*Held*: its admissibility depended on the object with which it was put in, or the use which was to be made of it. If it was not put in with a view of showing that there was not the road in question, so as to disprove the right asserted by deft., it could not be admissible; but for some purposes it might be admissible.—*MILDRED v. WEAVER* (1862), 3 F. & F. 30; 6 L. T. 225, N. P.

294. Occupation road.]—*A.-G. v. GODSTONE RURAL DISTRICT COUNCIL*, No. 272, *ante*.

295. — On building estate.]—*SELBY v. CRYSTAL PALACE GAS CO.*, No. 39, *ante*.

296. Path to monument or object of interest.]—*A.-G. v. ANTHOBUS*, No. 285, *ante*.

297. Mountain pass.]—*MACPHERSON v. SCOTTISH RIGHTS OF WAY & RECREATION SOCIETY*, No. 266, *ante*.

298. Country paths—User for pleasure—By permission of owner.]—(1) Where a deft. sets up, as a defence to an action for trespass, a public right of way which he fails to establish, & the public use of the way does no present injury to the landowner, who, moreover, disclaims any intention of stopping it so long as it does not conflict with the due enjoyment of his property, the ct. will not interfere by injunction, but will make a declaration & impose nominal damages for the trespass.

(2) From the public use of country paths by permission for the purpose of pleasure no dedication can be inferred.—*BEHRENS v. RICHARDS*, [1905] 2 Ch. 614; 74 L. J. Ch. 615; 93 L. T. 623; 69 J. P. 381; 54 W. R. 141; 21 T. L. R. 705; 49 Sol. Jo. 685; 3 L. G. R. 1228.

*Annotation*:—*As to* (1) *Refd.* *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

299. Undefined tracks—In wood—Public not confined to tracks.]—The mere use by people of tracks in a wood, where they were free to wander about as they pleased, is not necessarily enough to show a dedication of such tracks to the public as public footways.—*CHAPMAN v. CRIPPS* (1862), 2 F. & F. 864, N. P.

*Annotation*:—*Refd.* *Brinkman v. Matley* (1904), 73 L. J. Ch. 160.

300. — — — — —.]—Evidence that in a place of resort for pleasure, as a wood, or the like, people have gone about wherever they pleased, there being no definite enduring trackway in any particular direction, but merely temporary & transitory tracks, not passable in wet weather & varying every season & never proved to be re-

paired:—*Held*: not evidence on which a jury could properly find either a public highway or a public right of resort for air & exercise, or a prescriptive right of way.—*SCHWINGE v. DOWELL* (1862), 2 F. & F. 845, N. P.

301. — Open land adjoining seashore.]—A gas co. laid down main pipes between two villages on the seashore, in an open tract of land above mean high water mark which belonged to the owner of the inclosed land fronting the shore. The inhabitants of the villages had always gone to & fro between them along the shore, & at high water passed over this piece of land as they chose, & in accordance with the tide, but by no defined track. The owners brought an action for a mandatory injunction to compel the co. to remove the pipes:—*Held*: the tract of land in question was not a "street, highway, or public place" within Gasworks Clauses Act, 1847 (c. 15).—*MADDOCK v. WALLASEY LOCAL BOARD* (1886), 55 L. J. Q. B. 267; 50 J. P. 404.

302. Land adjoining highway—Left open by decay of fences.]—(1) If a person opens his land, so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it & use it as a way; & if the person does not mean to dedicate it as a way, but only to give a license, he should do some act to show that he gives a license only. The common course is to shut it up one day in the year.

(2) If there is an old way near to a person's land, & by the fences decaying, the public come on the land, that is no dedication of the land as a way.

(3) By 57 Geo. 3, c. xxix, s. 114, the comrs. of paving of the metropolis are to enter their proceedings in a book, & such entries are made evidence.

*Qu.*: whether an entry, stating that A. sent a letter to the comrs., asking their permission to erect a rail at the side of a street, is evidence of such asking of permission.—*BRITISH MUSEUM TRUSTEES v. FINNIS* (1833), 5 C. & P. 400; 1 Nev. & M. M. C. 379, N. P.

*Annotation*:—*As to* (1) *Refd.* *Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. Co.* (1904), 68 J. P. 464.

303. — Cobble space between shop & pavement—Articles displayed for sale therein.]—*R. v. WIGAN J.J.* (1879), 43 J. P. Jo. 220.

*Annotation*:—*Refd.* *Leicester Urban Authority v. Holland* (1888), 52 J. P. 788.

304. — Paved recesses in front of building.]—A building erected in 1869 upon land leased from the corpn. of L. who were the owners of the freehold was built with recessed windows or embayments on the ground floor, & the main wall of the building on either side projected beyond the embayments & overhung them above the windows, the embayments being some eleven inches deep. In 1899 the tenant of the house reconstructed these windows so as to cause them to project three inches beyond the main wall, & so as to fill up the embayments. During the period from 1869 till the reconstruction in 1899, the paving of the embayments was not distinguishable or marked off from the paving of the footway, & had been cleaned & repaired by the corpn. as the highway authority, at the same time as the paving of the footway, & the public were in the habit, without any objection by any lessee of entering upon & passing in & out of the embayments, the windows of which were used for the exhibition of shop goods. Upon an information against the tenant for causing an obstruction in the street by building so as to fill up the embayments:—*Held*: neither the user by the public nor the fact that the paving of the

**Sect. 2.—Highways by dedication and acceptance:**  
**Sub-sect. 4, B. (c) & (d).]**

embayments was not marked off from the paving of the footway & was cleaned & repaired by the corpn. as highway authority was any evidence of the dedication of the embayments to the public use as part of the highway, & therefore no obstruction had been committed.—*PIGGOTT v. GOLDSTRAW* (1901), 84 L. T. 94; 65 J. P. 259; 19 Cox, C. C. 621, D. C.

**305. — Space in front of public-house—Used by carters & public calling at house—Occasional repair by local authority.]**—*HOARE & CO., LTD. v. LEWISHAM CORPN.*, No. 429, *post*.

**306. — — — — —.]**—*KING'S LYNN RURAL DISTRICT COUNCIL v. BLADE* (1914), 78 J. P. Jo. 112.

**307. — Roadside strip.]**—*A.-G. & CROYDON RURAL DISTRICT COUNCIL v. MOORSOM-ROBERTS*, No. 408, *post*.

**308. Waste adjoining navigable lake.]**—C. deposited timber on a piece of waste land between a highway & a navigable lake, which waste the public had been accustomed to use in connection with navigation. There was no evidence that the public had been interfered with, & no evidence of dedication of the waste as part of the highway. C. being charged under 5 & 6 Will. 4, c. 50, s. 72, with unlawfully laying timber on the highway:—*Held*: the justices properly dismissed the summons, there being no sufficient evidence that the waste was part of the highway.—*NOBLE v. CARR* (1872), 36 J. P. 310.

**309. Open space in town—Surrounded by highways.]**—The mere fact that the public have for more than thirty years used an open space in a town, surrounded on all sides by highways, by passing over it in all directions, is not conclusive evidence of an intention on the part of the owner of the soil to dedicate such space as a highway.—*ROBINSON v. COWPEN LOCAL BOARD* (1893), 63 L. J. Q. B. 235; 9 R. 858, C. A.

*Annotations.*—*Reid*, Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs. (1899), 81 L. T. 174; A.-G. v. Antrobus, [1905] 2 Ch. 188.

*See, generally, OPEN SPACES.*

**310. — Market place.]**—*MCINTOSH v. ROMFORD LOCAL BOARD* (1889), 61 L. T. 185; 5 T. L. R. 613.

*See, generally, MARKETS.*

**311. Sea wall or embankment—When used by public.]**—*GREENWICH BOARD OF WORKS v. MAUDSLAY*, No. 236, *ante*.

*See, generally, SEWERS & DRAINS; WATERS & WATERCOURSES.*

**312. Pier.]**—*TYNE IMPROVEMENT COMRS. v. IMRIE, A.-G. v. TYNE IMPROVEMENT COMRS.*, No. 9, *ante*.

*See, generally, WATERS & WATERCOURSES.*

**Sea shore.]**—*See WATERS & WATERCOURSES; Nos. 10, 20, ante.*

**313. Non-tidal river—Above mill-dam.]**—The river M. was a non-tidal tributary of the Thames. The flow of the M. on its course to the Thames was obstructed by a mill-dam, & in order to bring boats from the Thames on to the part of the M. above the dam, it was necessary to take them out of the water & carry them over private land. The M. above the dam flowed under bridges, first at C., & then at E.; & the part of the river between the bridge at C. & the dam was not a way from one public place to another, had never been used as a waterway except for purposes of pleasure & recreation, & its depth & capacity for boating traffic depended on the existence of the dam. Pltf. who was the owner of an estate lying on both

sides of this part of the M., obstructed the waterway of the river where it flowed through his land with posts & chains. Deft., who was not a riparian proprietor, but who had for eight years previously kept boats on a piece of land not belonging to him & let them out for hire, pulled down the obstruction & justified this act on the ground that this part of the M. was a highway. Pltf. brought this action for an injunction to prevent his obstruction being interfered with, & deft. counterclaimed for an injunction to restrain any hindrance to the passage of his boats. From the evidence it appeared that there had been no maintenance of the waterway by any person, with the exception of dredging by the owner of the mill, that as far back as living memory went there had been boating upon this part of the river by the riparian proprietors & their friends, that subsequently, by degrees & at first quite secretly, a few persons living on the bank began to take remuneration for lending their boats, not making any charge but receiving what the borrower chose to give, that thenceforth the growing practice of boating for pleasure, including fishing, had not been effectively interfered with until pltf. put his obstruction across the stream, though notices had been put up near the river warning persons against trespassing in boats for fishing or otherwise: but there was no evidence which could establish any public right of fishing:—*Held*: (1) the claim of deft. must be treated as if it were a claim to establish a right of highway on dry land; so considered, the claim in effect was to impose on land a new servitude, or establish a highway on conditions which were inconsistent with a right of that kind; the true inference from the evidence was that the use made of this part of the river had been permissive & not as of right; even if the boating of the public was not permissive deft. had not proved that this part of the river was a highway; pltf. was therefore entitled to maintain his obstruction as against deft., & an injunction must be granted to restrain deft. from interfering with it. A right of recreation by custom upon the land of another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district. (2) The riparian owners might possibly be able to establish a private right of way, or a right of boating for recreation for themselves & their friends by custom, but the existence of such a right or custom, if established, would not entitle the public to boat on the river or support the claim that it was a highway. *Qu.*: whether a lake in private grounds, touched at one point only by a public road, can be subjected to a right which will make it a highway by persons launching boats from the road on it for pleasure.

(3) Consideration of the circumstances under which a *cul de sac* may be a highway.

I must treat the claim of deft. as if it were a claim to establish a right of highway on dry land. Now in the case of such a claim, a very material consideration is by whom has the roadway been metalled, repaired, & maintained in order. In a dispute as to the alleged right, the answer to this question may be decisive. Here there has been no maintenance of the waterway by any one except that the millowner, I suppose to ensure the flow of water to his mill, seems to have employed men to dredge out the silt or ballast, as it is called (*KAY, J.*).

It is agreed that a *cul de sac* may be a highway. That is so in a street in a town into which houses open & which is repaired, sewered & lighted by the public authority at the expense of the public

(KAY, J.).—*BOURKE v. DAVIS* (1880), 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167; 6 T. L. R. 87.

*Annotations*.—As to (1) *Refd.* Edwards v. Jenkins, [1896] 1 Ch. 308. As to (2) *Refd.* Moser v. Ambleside U. D. C. (1925), 89 J. P. 118. As to (3) *Refd.* A.-G. & London Property Investment Trust v. Richmond Corp'n. & Gosling (1903), 89 L. T. 700; A.-G. v. Antrobus, [1905] 2 Ch. 188; A.-G. v. Sewell (1918), 88 L. J. K. B. 425; Moser v. Ambleside U. D. C. (1925), 89 J. P. 118.

See, generally, *WATERS & WATERCOURSES*.

(d) *User must be Open and as of Right.*

**314. Unrestricted user by public.]—RUGBY CHARITY TRUSTEES v. MERRYWEATHER** (1790), 11 East, 375, n.: 103 E. R. 1049.

*Annotations*.—*Consd.* Woodyer v. Hadden (1813), 5 Taunt. 125. *Distd.* R. v. St. Benedict, (Cambridge) (1821), 4 B. & Ald. 447. *Consd.* Wood v. Veal (1822), 5 B. & Ald. 454; Bateman v. Bluck (1852), 18 Q. B. 870; Vernon v. St. James, Westminster, Vestry (1880), 16 Ch. D. 449; Kingston-upon-Hull Corp'n. v. N. E. Ry., [1915] 1 Ch. 456. *Refd.* R. v. Leake (1833), 5 B. & Ad. 469; Bourke v. Davis (1889), 44 Ch. D. 110; A.-G. & London Property Investment Trust v. Richmond Corp'n. & Gosling (1903), 89 L. T. 700; A.-G. v. Sewell (1918), 88 L. J. K. B. 425.

**315.** —.]—*MILDRED v. WEAVER*, No. 293, *ante*.

**316.** —.]—(1) A footpath, partly along the side of cliffs by the sea-shore, led from one highway to another highway. A public sewer, constructed about 1893, lay under it throughout its length, & its course was ascertained by walls & other artificial features. The path had never been repaired at the public expense, & at certain points in it there had been occasional obstructions. A pier co., which ceased to carry on business in 1907, had obtained an Act of Parliament under which the public had a right of access to a harbour, on payment of tolls, & the principal means of access to the harbour was over the path:—*Held*: on the evidence, the public had been allowed without discrimination to pass freely over the path, & the path must be deemed to have been permitted to become a public highway.

(2) Obstruction of an alleged public highway by acts which are not done for the purpose of asserting the right to obstruct are not obstructions for the purpose of impeding the public highway.—*A.-G. v. HEMINGWAY* (1916), 81 J. P. 112; 15 L. G. R. 161.

**317. Must be as of right.]—**Where a road was set out by comrs. under a local Act, & certain persons only were by the Act to use it, but in fact it had been used by the public for many years:—*Held*: this was not sufficient evidence of a dedication to the public, & if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair.—*R. v. ST. BENEDICT, CAMBRIDGE (INHABITANTS)* (1821), 4 B. & Ald. 447; 106 E. R. 1001.

*Annotations*.—*Expld.* R. v. Bradfield (1874), L. R. 9 Q. B. 552. *Refd.* R. v. Lyon (1825), 5 Dow. & Ry. K. B. 497; R. v. Mellor (1830), 8 L. J. O. S. M. C. 109; R. v. Cumberworth (1832), 3 B. & Ad. 108; R. v. Leake (1833), 5 B. & Ad. 469; R. v. Edge Lane (1836), 6 Nev. & M. K. B. 81; Grand Surrey Canal Co. v. Hall (1840), 1 Man. & G. 392; R. v. Thomas (1857), 3 Jur. N. S. 713; Wallington v. White (1861), 10 C. B. N. S. 128; R. v. Haute (1886), 17 Q. B. D. 773; R. v. Southampton County (1886), 17 Q. B. D. 424. *Mentd.* R. v. Newbold (1869), 17 W. R. 295.

**318.** —.]—*GRAND SURREY CANAL CO. v. HALL*, No. 203, *ante*.

**319.** —.]—*PASSANT v. ATCHAM DISTRICT COUNCIL* (1902), 66 J. P. 506.

**320.** —.]—*Intention to commit trespass.]—KIRBY v. PAIGNTON URBAN COUNCIL*, No. 286, *ante*.

**321.** —.]—*FOLKESTONE CORPN. v. BROCKMAN*, No. 189, *ante*.

**322.** —.]—*User referable to licence.]—*An action was brought in the first instance by a landowner & another against three persons residing in a neighbouring village for an injunction to restrain them from trespassing on his property. They relied on a public right of way. The matter having come to the knowledge of the district council they passed a resolution to defend the action. Pltfs. then took out a summons to add the council as defts., which was allowed by the master. On motion that they might be struck out pltfs. obtained leave to amend the pleadings by alleging that the council threatened & intended to use the said alleged right, & on this the motion was refused. The council then put in a defence in which they neither asserted nor denied the right of way. Pltfs. moved to strike this out as embarrassing, but it was allowed. On the action coming on for trial after hearing the evidence & the arguments on behalf of defts.:—*Held*: there was no sufficient evidence of the right of way claimed; the user which had been shown was, if anything, referable to licence; there had been no dedication by the owners, & pltfs. were entitled to succeed.

A declaration was made against all defts. that there was no public right of way, & an injunction was granted against defts. other than the council.—*THORNHILL v. WEEKS* (1914), as reported in 78 J. P. 154; 12 L. G. R. 597.

**323. What constitutes user as of right—Intended limitation by owners to certain class—Limitation not made known to users.]—**(1) In an indictment for stopping up a highway, removed by *certiorari* into the Ct. of Q. B., & tried at the Assizes, the counsel for deft. may sum up his evidence at the close of his case as in a civil action.

(2) If a particular class of persons use a pathway, & the owner does not interrupt the user for some private reason not communicated to the persons using the path, a public right of way is gained by the user after a lapse of twenty years.—*R. v. BROKE* (1859), 1 F. & F. 514.

**324. Must be known to owner & acquiesced in.]—HARPER v. CHARLESWORTH, No. 217, *ante*.**

**325.** — — —.]—*MANN v. BRODIE*, No. 177, *ante*.

**326.** — — —.]—*LECKHAMPTON QUARRIES CO., LTD. v. BALLENGER & CHELTENHAM RURAL DISTRICT COUNCIL* (1901), 68 J. P. 461; 20 T. L. R. 559; *subsequent proceedings* (1905), 93 L. T. 93, C. A.

*Annotation*.—*Mentd.* I. B. Comrs. v. Lonsdale's S. E. Trustees, [1919] 2 K. B. 183.

**327.** — — —.]—*WEBB v. BALDWIN*, No. 191, *ante*.

**328.** — — —.]—*OPENSHAW v. PICKERING*, No. 278, *ante*.

**329.** — — —.]—*FOLKESTONE CORPN. v. BROCKMAN*, No. 189, *ante*.

**330. Evidence of acquiescence—Neglect to take proceedings when obstruction removed.]—KENSINGTON SURVEYORS v. WHYTE** (1837), 1 J. P. 157.

**331.** —.]—*Public using accommodation bridge.]—GRAND SURREY CANAL CO. v. HALL*, No. 203, *ante*.

**332.** —.]—*Trespassers warned off all other property.]—COATS v. HEREFORDSHIRE COUNTY COUNCIL*, No. 230, *ante*.



**Sect. 2.—Highways by dedication and acceptance:**  
*Sub-sect. 4, B. (d) & (e), C. & D.]*

¶ 333. — **Public allowed to use bridge over railway line.**—Near a station on defts.' railway line, & passing over the line from north to south there was a level crossing, with gates for carriage traffic, which formed part of the highway, but which defts. were bound by statute to maintain. Defts. had voluntarily constructed close to the station & to the level crossing & parallel to the latter a foot-bridge, with staircases. The bridge stood entirely on defts.' land, & had been maintained by them, but the footway over it at each end communicated directly with the highway, & only indirectly by means of the highway with defts.' station premises. Defts. had never closed the footway or taken any steps to prevent the public from using it, & the public in fact used it without hindrance. Pltf. was crossing over the bridge from north to south with a view of catching a train at the south platform of defts.' station. On the morning of that day there had been a blizzard, & snow had fallen on the footway of the bridge, which in consequence of the traffic had become caked on the steps, rendering them slippery. As pltf. was descending the stair on the south side she warned her young daughter who accompanied her to be careful, & she herself made use of the handrail. She nevertheless slipped on a mass of frozen snow & fell, & was hurt. Pltf. brought an action against defts. for damages for personal injuries. It was found that there had been no contributory negligence on her part:—*Held*: the facts showed that the footway over the bridge had been dedicated by defts. & accepted by the public as a highway, & that defts. were under no duty to persons using the footway to maintain or cleanse it, & therefore were not liable to pltf.—*BRACKLEY v. MIDLAND RY. CO.* (1916), 85 L. J. K. B. 1598; 114 L. T. 1150; 80 J. P. 369; 14 L. G. R. 632, C. A.

*See, also, No. 336, post.*

*(c) Interruption of User.*

334. **Question of degree.**—*YOUNG v. CUTHBERTSON*, No. 43, *ante*.

335. **Must be with intention to exclude.**—*A.-G. v. HEMINGWAY*, No. 316, *ante*.

336. **By gate—Though disused for twelve years.**—Trespass for entering pltf.'s close, & pulling down a gate. Plea, that there was a public footway over the *locus in quo*, & because the gate was wrongfully erected across the same, deft. pulled it down. It appeared in evidence that the gate in question had been recently put up in a place where a similar gate had formerly stood, but where for the last twelve years there had been none. It was thereupon contended for deft. that from suffering the gate to be down so long & permitting the public to use the way without obstruction for so many years, pltf. & those under whom he claimed must be considered as having completely dedicated the way to the public & that the gate could not be replaced:—*Held*: verdict for pltf.—*LETHBRIDGE v. WINTER* (1808), 1 Camp 263, n.

*Annotation*:—*Reid. Healey v. Batley Corpn.* (1875), L. R. 19 Eq. 375.

337. — **Closed at night.**—By 5 & 6 Will. 4, c. xviii., for paving, lighting, etc., among other places, the liberty of Saffron Hill, Hatton Garden, & Ely Rents, in Middlesex, the inhabitants of the liberty entitled to meet in vestry or other public

meetings were empowered to elect comrs. who were to have the sole superintendence of the paving, lighting, & preventing nuisances & obstructions in "the several squares, streets, lanes, courts, ways, footways, carriageways, passages, & places" within the liberty: the comrs. were empowered to pave & repair all the "squares, streets," etc., "& places," within the liberty; power was given them to light the squares, etc., & places, & to set up lamps & other works for lighting, but not to affix them to any private premises without leave: the comrs. were authorised to rate every holder & occupier of land, etc., in the liberty for the purposes of the Act: & they were enabled, at their option, to act under the powers conferred by this Act, or those given by 57 Geo. 3, c. xxix. Ely Place, Holborn, was within the liberty; its site was formerly that of the Bishop of Ely's palace, but became vested in the Crown, & was afterwards, in 1776, conveyed, by the Lords of the Treasury, under an Act of Parliament, to a private person in fee; & houses were built upon the site, with a carriageway & footways between them. The footpaths were paved & the carriageway gravelled, by the inhabitants, voluntarily & at their own expense, & were so from the time when the houses were built. The ways were never repaired by the public, nor in any manner dedicated to the public use. Ely Place communicated with public thoroughfares by gateways, formerly entrances to the palace; the inhabitants closed the gates at night, & at other times when they thought fit; & porters employed by them kept out objectionable persons. The gates were generally open in the daytime; & the public passed in & out, but had no right of way. The inhabitants paid poor rate, for the liberty, & sewers' rate:—*Held*: Ely Place was not a "square, street," etc., or "place," which the comrs. for the liberty could assume jurisdiction to pave, under the above statutes.—*PAUL v. JAMES* (1841), 1 Q. B. 832; 1 Gal. & Dav. 316; 10 L. J. Q. B. 246; 113 E. R. 1350.

338. **Obstruction across street—Knocked down & not replaced.**—*ROBERTS v. KARR* (1808), 1 Camp. 262, n.; *subsequent proceedings* (1809), 1 Taunt. 495.

*Annotations*:—*Reid. Healey v. Batley Corpn.* (1875), L. R. 19 Eq. 375; *Brockman v. Folkestone Corpn.* (1912), 10 L. G. R. 856.

339. — *Healey v. Batley Corpn.*, No. 183, *ante*.

340. **Interruption acquiesced in—For five years.**—*BARRACLOUGH v. JOHNSON*, No. 193, *ante*.

341. — **For twenty-two years.**—*YOUNG v. CUTHBERTSON*, No. 43, *ante*.

342. **Weight of evidence.**—*CHINNOCK v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, *FIGGESS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, *PHILLIPS v. HARTLEY WINTNEY RURAL DISTRICT COUNCIL*, No. 195, *ante*.

343. **By railway line—Presumption against evidence to dedicate.**—In an action against a local authority by the landowners on each side of a lane claiming a declaration that the lane was not a public right of way, it appeared that the lane originally formed part of the waste of a manor, & was in 1817 set out as a private occupation road by the award of comrs. under a private Inclosure Act, that in 1855 a railway was constructed across the lane, since when the railway line had been permanently fenced on both sides & that there was some evidence of user of the lane

by the public for all purposes prior to 1855, & since that date as a footway:—*Held*: (1) the user prior to 1855 was insufficient to raise the presumption of dedication to the public; (2) the construction of the railway line across the lane was strong evidence against any intention to dedicate; (3) the subsequent user was immaterial, & therefore the landowners were entitled to the declaration & to an injunction restraining the local authority from trespassing on the lane.—*HOLLOWAY v. EGHAM URBAN DISTRICT COUNCIL* (1908), 72 J. P. 433; 6 L. G. R. 929.

*Annotation*:—*As to* (1) *Consd.* Fuller v. Clippenham R. D. C. (1914), 79 J. P. 4.

**344.** — Evidence supporting dedication before interruption.]—*SOUTH EASTERN RY. CO. v. WARR*, No. 232, *ante*.

**345.** Users occasionally turned back.]—Pltf. claimed an injunction to restrain defts., their servants, & agents, from trespassing upon a farm of his. Defts., by their defence, acting under Local Govt. Act, 1894 (c. 73), s. 26, claimed that there was a public right of way, & that formerly there was a stile at one end thereof, which was placed there & maintained by pltf. & his predecessors in title, & they counterclaimed for a declaration of a public right of way. The question turned on whether there was, or must be deemed to have been, dedication of a public footway along the track shown on the pleadings prior to 1822. At that time the farm was leased to one G. & remained in his occupation or that of his family until 1889. It was then occupied by other tenants until 1910, when it became vacant until 1912, & the present tenant entered, & placed the obstruction which gave rise to the action. Evidence of reputation was given as to user by the public ever since 1822, & several witnesses proved user by the public, but the evidence also showed that G. had been in the habit of turning people back from time to time. The evidence, however, further showed that G. had practically recognised the path or admitted to others that it existed & that he was unable to stop the user thereof. In the case of the later tenancies there would have been apparently no desire to stop people had it not been for the opening of rifle ranges, which brought a number of soldiers & others to the place, many of whom used the path. In these circumstances:—*Held*: a dedication prior to 1822 must be presumed, & pltf.'s claim accordingly failed, & defts. were entitled to a declaration as asked by the counterclaim subject to the rights of ploughing & sowing.—*SHEARBURN v. CHIERTSEY RURAL DISTRICT COUNCIL* (1914), 78 J. P. 289; 12 L. G. R. 622.

#### C. Limited Dedication.

*See* Sub-sect. 6, G., *post*.

#### D. Admissibility of Evidence.

*See, generally*, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

**346.** Reputation.]—In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived,

being connected with the subject in question, appears to affect the value, & not the admissibility of the evidence (*PARKE, B.*).—*CREASE v. BARRETT* (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353.

*Annotations*:—*Refd.* R. v. Norfolk County Council (1910), 26 T. L. R. 269. *Mentd.* De Ruitzen v. Farr (1835), 4 Ad. & El. 53; Doe d. Tatham v. Wright (1836), 1 Har. & W. 729; Evans v. Taylor (1838), 7 Ad. & El. 617; Ward v. Suffield (1839), 5 Bing. N. C. 351; Mortimer v. McCallan (1840), 6 M. & W. 58; Gerish v. Chartier (1845), 1 C. B. 13; Hughes v. Hughes (1846), 15 M. & W. 701; Doe d. Welsh v. Langfield (1847), 16 M. & W. 497; Beaufort v. Smith (1849), 4 Exch. 450; Harcastle v. Denison (1861), 10 C. B. N. S. 606; Quilter v. Jorss (1863), 14 C. B. N. S. 747; Carmarthen & Cardigan Rly. v. Manchester & Milford Rly. (1873), L. R. 8 C. P. 685; Morse-Le-Blanch v. Wilson (1873), L. R. 8 C. P. 227; Evans v. Merthyr Tydvil U. D. C. (1898), 79 L. T. 578.

*See, generally*, EVIDENCE, Vol. XXII., pp. 123 *et seq.*

**347.** Map—General rule.]—*A.-G. v. HORNER* (No. 2), No. 356, *post*.

**348.** — Taken by direction of parish overseer.]—A copper-plate map taken by the direction of the overseers of a parish is no evidence on an issue whether a particular spot of ground is a highway or not.—*POLLARD v. SCOTT* (1790), Peake, 26, N. P.

**349.** — Evidence of existence of road & of highway distinguished.]—In an action of trespass *quare clausum fregit*, deft., in order to prove that there was a public highway across the *locus in quo*, put in evidence a copy of a map made by order of a former lord of the manor of which the land in question formed part. The map had been used, for more than thirty years, by deceased & present stewards of the manor, for the purpose of defining the copyholds. The map set out a road across the *locus in quo*, but did not describe it as a highway; & it was proved that other roads, similarly set out, were only occupation roads:—*Held*: the map was not admissible as amounting to a declaration by a deceased person as to public right, inasmuch as, first, the map, if a declaration at all, was a declaration only as to the matter in respect of which it had been used, viz. the defining of the copyholds, & secondly, the map itself did not describe the road as a highway.—*PIPE v. FULCHER* (1858), 1 E. & E. 111; 28 L. J. Q. B. 12; 32 L. T. O. S. 105; 5 Jur. N. S. 146; 7 W. R. 10; 120 E. R. 850.

*Annotations*:—*Expld.* Vyner v. Wirral R. D. C. (1909), 73 J. P. 242. *Consd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 110. *Refd.* Powke v. Berrington, [1911] 4 Ch. 308.

**350.** — —.]—*MILDRED v. WEAVER*, No. 293, *ante*.

**351.** — Made by persons having knowledge of facts.]—On an appeal against an order of justices refusing to alter a provisional apportionment made under Private Street Works Act, 1892 (c. 57), quarter sessions refused to admit certain old maps which were tendered as evidence to show that the road in question was a highway repairable by the inhabitants at large:—*Held*: the maps were admissible if they tended to show that the road in question was a highway repairable by the inhabitants at large & if there was evidence that they were made by persons who had competent means of knowledge as to the facts.—*VYNER v. WIRRAL RURAL DISTRICT COUNCIL* (1909), 73 J. P. 242; 7 L. G. R. 628.

*Annotations*:—*Consd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. *Mentd.* Cababé v. Walton-upon-Thames U. D. C. (1912), 107 L. T. 159.

*See, also*, No. 356, *post*.

**PART III. SECT. 2, SUB-SECT. 4.—D.**  
t. *Parol evidence*.]—Where the question was, in which of two townships

there was an allowance for road, & the grants from the Crown were not explicit:—*Held*: parol evidence was

admissible.—*MILLER v. PALMER & CARR* (1834), 3 O. S. 425.—*CAN.*

a. *Plan of township* — Showing



*Sect. 2.—Highways by dedication and acceptance:***352. — Made by map maker of repute.]—**

(1) The county being *prima facie* liable for the repair of a public bridge cannot, on an indictment for non-repair, without special plea, escape liability by casting the burden upon some other body.

On an indictment for the non-repair of a bridge the ct. admitted in evidence an ancient map purporting to have been made by one C. a person of repute in connection with maps & surveys, proof being given of the custody from which it came:—*Semble*: the map would have been admissible even without proof of the custody from which it came.

(3) The ct. also admitted two maps purporting to have been made by the King's Geographer, without proof of the custody from which they came; but refused to admit a copy of an old minute-book which came from the custody of the bridge-reeves of another bridge in the same neighbourhood as the bridge in question.—*R. v. NORFOLK COUNTY COUNCIL* (1910), 20 T. L. R. 269; *subsequent proceedings*, 74 J. P. Jo. 113, D. C.

**353. — Purporting to be made by King's geographer.]—***R. v. NORFOLK COUNTY COUNCIL*, No. 352, *ante*.

**354. — Tithe map.]—***A.-G. v. ANTROBUS*, No. 285, *ante*.

**355. — —.]—**A tithe map certified by the Tithe Comrs. as a first-class map is not admissible as evidence of the extent of a public right, though it may be evidence that at the date the map was made certain land was not enclosed from a road, or was tithable.—*COPESTAKE v. WEST SUSSEX COUNTY COUNCIL*, [1911] 2 Ch. 331; 80 L. J. Ch. 673; 105 L. T. 208; 75 J. P. 465; 9 L. G. R. 905.

**356. — From British Museum or Guildhall Library.]—**Ancient maps produced from the custody of the British Museum & Guildhall Library, there being no evidence that the map makers were competent or had any special duty to perform in making the maps or that the maps had been received & acted on by the public, are not admissible as evidence of reputation of public highways.—*A.-G. v. HORNER* (No. 2), [1913] 2 Ch. 140; 82 L. J. Ch. 330; 108 L. T. 609; 77 J. P. 257; 29 T. L. R. 451; 57 Sol. Jo. 498; 11 L. G. R. 781, C. A.

*Annotations:—*Consd. Fowke v. Berrington, [1911] 2 Ch. 308. *Reid*, Gloder v. L. C. C., [1914] 3 K. B. 552. *Mentd.* Dyssart v. Hamerton, [1911] 1 Ch. 822; London Corp'n. v. Horner (1914), 111 L. T. 512; Maskell v. Horner, [1915] 3 K. B. 106.

**357. — Ordinance survey.]—**(1) In an action against the owner & tenant of two farms claiming that a roadway through the farms was a public highway & that it was obstructed by four gates erected thereon, it was found as a fact that three of the four gates were reasonably necessary for farm purposes, that the roadway was a public highway & that the fourth gate was an obstruction of it:—*Held*: there might be a dedication by a landowner with liberty to retain gates for the convenience of his farming operations & a declaration would be made that the roadway was a public highway subject to the right of the owner to retain for farm purposes the three gates unlocked.

(2) A map issued by the Ordnance Survey in 1811 was admitted as evidence of what physical

features were or were not seen by those who made the survey.—*A.-G. v. MEYRICK & JONES* (1915), 79 J. P. 515.

*See, generally*, BOUNDARIES, Vol. VII., pp. 315 *et seq.*; EVIDENCE, Vol. XXII., pp. 326 *et seq.*, 381 *et seq.*

**358. Leases of adjoining property—Purporting to grant private way.]—**(1) If the owner of land has granted to an individual the easement of an occupation way over it, then the subsequent absolute dedication by him of a footway to the public, in the same place, cannot be presumed, without also presuming or proving in fact a release of the easement by the individual; for without the release the owner can only be supposed to have given what he himself had, a right of user not inconsistent with the easement.

Where, on the trial of an indictment for driving a carriage along, & thereby obstructing, a public footway through a narrow lane, the question was, whether deft.'s private right of carriageway, preceding the public user, & inconsistent therewith, had been released or abandoned, & the jury were directed that no interruption by the public for a less period than twenty years could destroy the private right, a new trial, for misdirection, was granted, after verdict for deft.

(2) In order to prove a grant of an occupation way through a lane to deft.'s premises, he offered two deeds, which purported to be grants by the owners of the soil of an occupation way through the lane, to tenants of premises situated on the opposite side of the lane from deft.'s premises:—*Held*: the deeds were wrongly admitted for that purpose.—*R. v. CHORLEY* (1848), 12 Q. B. 515; 12 L. T. O. S. 371; 13 J. P. 136; 12 Jur. 822; 3 Cox, C. C. 262; 116 E. R. 960.

*Annotations:—*As to (1) *Reid*, Swan v. Sinclair, [1925] A. C. 227. *Generally*, *Mentd.* *R. v. Cricklade* (1849), 12 L. T. O. S. 348; *R. v. Russell* (1854), 3 E. & B. 942; *R. v. Johnson* (1860), 6 Jur. N. S. 553; *Crossley v. Lightowler* (1867), 2 Ch. App. 478; *Scrutton v. Stone* (1893), 9 T. L. R. 478; *Harris v. Flower* (1901), 90 L. T. 669.

**359. Indictment—For non-repair—Submitted to or prosecuted to conviction.]—**(1) Indictment against a township for not repairing an ancient highway. Plea, not guilty. On the trial a record of an indictment against an adjoining township for non-repair of a part of the same line of road, & to which that township had submitted, was received in evidence:—*Held*: it was properly received as evidence that the whole highway was ancient.

(2) By a Navigation Act, the proprietors of the navigation were required to keep the above road in repair, & were declared to be liable to indictment if it was out of repair:—*Held*: this enactment did not relieve the township from their common law liability to repair the road.—*R. v. BRIGHTSIDE BIERLOW (INHABITANTS)*, *R. v. ATTERCLIFFE CUM DARNAL (INHABITANTS)*, *R. v. TINSLEY (INHABITANTS)* (1849), 13 Q. B. 933; 3 New Mag. Cas. 230; 4 New Sess. Cas. 47; 19 L. J. M. C. 50; 14 L. T. O. S. 103; 13 J. P. 716; 14 Jur. 171; 116 E. R. 1520.

*Annotation:—*As to (2) *Consd.* Macclesfield Corp'n. v. G. C. Ry., [1911] 2 K. B. 528.

**360. — For obstruction—Subsequent proceedings brought by former defendant.]—**A verdict of guilty, & judgment thereon, in an indictment for obstructing a public highway, cannot be pleaded as an estoppel in an action brought

*allowance for road.* A copy of the original plan of a township showing an allowance for a road, certified by

the surveyor-general, is admissible to prove such allowance, although it does not appear by whom, nor from what

materials, the plan was compiled.—*HADGLEY v. BENDER* (1834), 3 O. S.

by the party convicted against a third person for using the way.

No doubt the judgment in the indictment may be given in evidence upon the trial of the issue as to whether the *locus in quo* is a public highway; but it cannot be pleaded as an estoppel (ALDERSON, B.).—PETRIE v. NUTTALL (1856), 11 Exch. 569; 25 L. J. Ex. 200; 26 L. T. O. S. 204; 20 J. P. 439; 4 W. R. 234; 156 E. R. 957.

*Annotation*.—Mentid. Caine v. Palace Steam Shipping Co., (1907) 1 K. B. 670.

See, further, ESTOPPEL, Vol. XXI., pp. 159 *et seq.*; EVIDENCE, Vol. XXII., pp. 280 *et seq.*

**361. Report & estimate of deceased surveyor—In course of duty.**—About the year 1835, under the powers of a local Turnpike Act, a new turnpike road was constructed & was carried over a canal, now owned by plffs.' by a bridge erected by the road trustees. This road ceased to be a turnpike road in 1875. The bridge, which was situate in a county borough, of which defts. were the highway authority, replaced an accommodation bridge erected by plffs.' predecessors in title. Owing to mining operations the bridge & the canal subsided, & plffs., acting reasonably for the protection of the canal, raised the banks, with the result that the level of the water came so near to the under-surface of the bridge that the latter became an obstruction to the navigation; the bridge was also dangerous to traffic passing over it. In an action by plffs. in effect to compel defts. to abate the nuisance, it was agreed between the parties that the bridge should be reconstructed at its original level, the cost of the work to be ultimately borne by the parties according to their respective legal liabilities:—*Held*: (1) inasmuch as the obligation to reconstruct did not authorise defts. to create a nuisance, they were liable for the cost of raising the bridge to its original level as well as for the cost of reconstruction; (2) a report & an estimate prepared by the then surveyor of the road trustees with reference to the construction of the turnpike road were in the circumstances admissible in evidence as entries made by a deceased official in the discharge of his duty.—NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN. (1909), 73 J. P. 177; 26 T. L. R. 20; 8 L. G. R. 375, C. A.

See, generally, EVIDENCE, Vol. XXII., pp. 110 *et seq.*

**362. Evidence of user of adjoining land.**—COATS v. HEREFORDSHIRE COUNTY COUNCIL, No. 230, *ante*.

See, generally, EVIDENCE, Vol. XXII., pp. 71 *et seq.*

#### SUB-SECT. 5.—DEDICATION OF ROADS ALREADY IN EXISTENCE.

**363. Occupation road—User by public—Does not affect private rights.**—(1) One who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last twelve years.

(2) The *terminus ad quem* being laid to be a public highway is proved by evidence of a public footway, though such description of the *terminus* might have been bad on special demurrer, as not being sufficiently certain.—ALLEN v. ORMOND (1806), 8 East, 4; 103 E. R. 245.

*Annotations*.—As to (1) *Reid*. Duncan v. Louch (1841), 3 L. T. O. S. 50. As to (2) *Reid*. R. v. St. Leonard's (1834), 6 C. & P. 582.

J.—VOL. XXVI.

**364.** ————]—(1) In 1838, the occupier of a field called the Hall Close, took down the old fence & added to the field a strip of land adjoining a public road. In an action for a trespass committed upon the strip of land about a year after it had been taken in, the declaration described the *locus in quo* as the Hall Close:—*Held*: it was properly described.

(2) There may be both an occupation way & a public highway over the same road, for it does not, on becoming a highway, cease to be an occupation way.—BROWNLOW v. TOMLINSON (1810), 1 Man. & G. 484; 8 Dowl. 827; 1 Scott, N. R. 420; 133 E. R. 423.

**365.** ———— **No formal adoption.**—An award under an inclosure Act in 1816 set out certain public roads & private occupation roads. One of the occupation roads was a soft road, it had no gate at either end, & the public used it without any interference. On two occasions the inhabitants had repaired it by subscription:—*Held*: there had been sufficient dedication & user to render the parish liable to repair, although they had never adopted the road in question.—R. v. HORLEY (INHABITANTS) (1863), 8 L. T. 382; 27 J. P. 771; 11 W. R. 433.

**366.** ———— **Whether capable of dedication.**—R. v. BRADFELD (INHABITANTS), No. 265, *ante*.

**367.** ———— **Granted in consideration of rent-charge—Effect of dedication—Whether rentcharge extinguished.**—A rentcharge issuing from lands adjoining certain roads, & granted at a time when the roads were private occupation roads, in respect of the use of such roads & the use of a sewer laid down in one of them, is not determined by the roads becoming highways repairable by the inhabitants at large, & the sewer becoming vested in, & discontinued by, the local authority; & it matters not that the grantor of the rentcharge had covenanted in the grant to keep the roads & sewer in repair.—MEURETT v. BRIDGES (1883), 47 J. P. 775.

**368. Road made pursuant to Act of Parliament—Limitation to certain persons—Effect of user by public.**—R. v. ST. BENEDICT, CAMBRIDGE (INHABITANTS), No. 317, *ante*.

**369.** ————]—GRAND SURREY CANAL CO. v. HALL, No. 203, *ante*.

**370.** ———— **For limited period—Performance of statutory obligations by inhabitants—Whether amounting to adoption.**—R. v. MELLOR, No. 865, *post*.

**371.** ———— **Road laid out as private road—Adoption question of fact.**—R. v. WRIGHT, No. 186, *ante*.

**372. Private right of way—Partial dedication—Whether private rights affected.**—Case for obstructing a right of way between two specified *termini* over a close. The way was claimed as appurtenant to a messuage in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement proved was a right to pass forwards & backwards over every part of the close, & not merely between the *termini* specified in the declaration; & it was shown that the easement was enjoyed under a grant thereof to D., his heirs, tenants & assigns, & to certain other persons. The easement was granted in 1675; there was evidence that, for ten years next before the commencement of the action, part of the way claimed had become public:—*Held*: not necessary to state in the declaration that such part had become public.

The cases show that the acquiring a right of way by the public does not destroy a previously

**Sect. 2.—Highways by dedication and acceptance:**  
*Sub-sects. 5 & 6, A., B., C., D., E., F. & G.]*

existing right of way over the same line; but the private right of way must be previously existing (PATTERSON, J.).—DUNCAN v. LOUCH (1845), 6 Q. B. 901; 14 L. J. Q. B. 185; 4 L. T. O. S. 356; 9 Jur. 346; 115 E. R. 341.

**373. — Interruption of user by railway—Presumption.]**—HOLLOWAY v. EGHAM URBAN DISTRICT COUNCIL, No. 343, *ante*.

**374. Footpath set out under Inclosure Act—Whether capable of dedication as roadway—Effect of user.]**—A lane in the seaside town of S., which ran from the High Street to the top of the cliff, & varied from six feet to four feet four inches in width, had in 1811 been set out under an award by the Inclosure Comrs. under the S. Inclosure Act, 1809, as a public footpath. In 1903 the S. Urban District Council erected in the centre of the footpath an iron post to prevent the lane being used for wheeled vehicles. Deft. having overthrown the post, the district council brought an action against him in respect of the alleged trespass, claiming damages & an injunction; & claiming further a declaration that the lane was a public footpath vested in the council & under the council's control, & that it was not a carriage-way. Deft. contended that the land was a public highway for all persons to go & return on foot, & with all manner of beasts & vehicles, & alleged that since the award of the comrs. there had been a dedication of the way as a cart road. Alternatively, he contended that before or since the award there had been a private right for the class consisting of the owners & occupiers of S. to use the way for carts. The evidence showed, on the one hand, that when carts were driven through the land the foot-passengers were obstructed, & had to wait until the carts had completed their passage, & on the other hand, that for more than forty years past barrow carts, sometimes drawn by donkeys or ponies, had been continuously used in the lane:—*Held*: (1) the action, being in substance one for damages for interference with plffs.' property, could be maintained without the A.-G. being made a party; (2) the user for wheeled traffic was in its inception & all along a public nuisance, & no length of time could legalise it, & as regards dedication, no one had the power to dedicate even with the consent of the local authority.—SHIRINGHAM URBAN DISTRICT COUNCIL v. HOLSEY (1901), 91 L. T. 225; 68 J. P. 395; 20 T. L. R. 402; 48 Sol. Jo. 416; 2 L. G. R. 744.

*Annotation:—As to (1) Held. A.-G. & Spalding R. C. v. Garner, [1907] 2 K. B. 480.*

**SUB-SECT. 6.—RESTRICTED OR CONDITIONAL DEDICATION.**

**A. Restrictions as to Mode of User.**

**375. Whether possible.]**—As there may be a dedication of a way to the public for a limited purpose though there cannot be a dedication to a limited part of the public, there may be a dedication of water, by a local board of health or water

co., whose property the same is, to the public for a limited purpose, as for instance, to the use of cattle & horses during stated hours & on specified days.—HILDRETH v. ADAMSON (1860), 8 C. B. N. S. 587; 30 L. J. M. C. 204; 2 L. T. 359; 25 J. P. 645; 8 W. R. 470; 141 E. R. 1296.

**376. Towing path.]**—PIERSE v. FATCONBERG (LORD) (1757), 1 Burr. 292; 97 E. R. 320.

*Annotations:—Held. Ball v. Herbert (1789), 3 Term Rep. 253. Mentd. Mathews v. Warner (1798), 4 Ves. 186.*

**377. — On banks of navigable river.]**—WINCH v. THAMES CONSERVATORS, No. 35, *ante*.

**378. — Dedication as public footpath—Land vested in company for statutory purposes.]**—GRAND JUNCTION CANAL CO. v. PETTY, No. 226, *ante*.

Power of corporate bodies to dedicate, *see, generally*, Sect. 2, sub-sect. 3, E., *ante*.

— **Whether a highway.]**—*See* Nos. 34, 35, *ante*.

**379. Dedication as public footway—Subject to existing private carriageway.]**—R. v. CHORLEY, No. 358, *ante*.

**380. Effect of limited dedication—Whether dedication for all purposes.]**—A pier was built on the wastes of a manor by funds supplied by voluntary subscriptions, the lords assisting in the erection. By their Act of Parliament a co. was authorised to make a railway on & over the pier, & the devisees in trust of the manor were authorised to grant a lease of the pier to the co., subject to the sanction of the Ct. of Ch., but upon an application to the ct. for that purpose, the ct. refused to sanction the lease, as not being beneficial to the *cestuis que trust*. The co. then, without proceeding in the ordinary way, under Lands Clauses Consolidation Act, 1845 (c. 18), to take possession upon paying compensation, or otherwise, entered on & took possession of the pier & proceeded to make a railway thereon. The trustees then filed their bill, & by motion sought an injunction to restrain the co. from taking such possession & constructing such a railway:—*Held*: the lord of the wastes of a manor did not, by dedicating it to the public for special purposes as a way, constitute it a highway for all purposes, & the railway co. had no authority to enter on the land so dedicated for the purposes of their line, without proceeding regularly under Lands Clauses & Railway Clauses Consolidation Acts, & an injunction was granted on that ground to restrain the co. from continuing in possession of the land without taking the steps required by above Acts, & making compensation.—THOMPSON v. WEST SOMERSET MINERAL RY. CO. (1857), 29 L. T. O. S. 7; 21 J. P. 278; 5 W. R. 296.

**381. New road substituted for old churchway—Whether limited dedication of new road possible.]**—FARQUHAR v. NEWBURY RURAL COUNCIL, No. 224, *ante*.

**B. Restrictions as to Time of User.**

**382. Dedication for limited period—Whether possible.]**—DAWES v. HAWKINS, No. 270, *ante*.

**383. — — —.]**—CORSELLIS v. LONDON COUNTY COUNCIL, No. 222, *ante*.

**384. Bridge—Public user confined to times when road dangerous.]**—(1) Upon not guilty to

**PART III. SECT. 2, SUB-SECT. 6.—A.**

**375 i. Whether possible.]**—Where a piece of land has been dedicated to the public for use as a highway & the public has accepted it, it must be used subject to such restrictions & limitations as the donor has placed upon it.—GROUNDWATER v. WATERMAN (1913),

13 E. L. R. 317; 42 N. B. R. 396.—CAN.

**b. Road used for passage of horses, cattle, & passengers—Whether carts & carriages may use road.]**—A public road which has been used from time immemorial for all purposes useful to the public, though it has only

been used for the passage of horses, cattle & passengers, may, on the introduction of carts & carriages into the district, be used as a public road for carts, etc., provided it be capable of being so used from one end to the other.—MACHENZIE v. BANKS (1866), 6 Meaph. (Ct. of Sess.) 936; 40 Sc. Jur. 535.—SCOT.

an indictment against the inhabitants of a county for not repairing a public bridge, it is competent to defts. to give evidence of the bridge having been repaired by private individuals.

(2) A bridge may be a public bridge, which is used by the public at all such times as are dangerous to pass through the river.—*R. v. NORTHAMPTON (INHABITANTS)* (1814), 2 M. & S. 262; 105 E. R. 379.

*Annotation*:—*As to* (2) *Refd.* *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26.

**385. — Public user confined to times of flood—Evidence of restriction.**—A bar across a public bridge kept locked except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times, & if an indictment for not keeping it in repair, states that it is used by the King's subjects, "at their free will & pleasure," the variance is fatal.—*R. v. BUCKINGHAM (MARQUIS)* (1815), 4 Camp. 189, N. P.

*Annotation*:—*Refd.* *R. v. Lyon* (1825), 5 Dow. & Ry. K. B. 497.

**386. Road impassable in winter.**—*R. v. BRAITSFORD (INHABITANTS)* (1860), 2 L. T. 508.

#### C. Restrictions as to Persons Using.

**387. Dedication to public—Subject to certain exceptions—Persons carrying coal.**—Where a landowner suffered the public to use, for several years, a road through his estate for all purposes except that of carrying coals:—*Held*: this was either a limited dedication of the road to the public or no dedication at all, but only a licence revocable, & a person carrying coals along the road after notice not to do so, was a trespasser.

*Semble*: there may be a limited dedication of a highway to the public.—*STAFFORD (MARQUIS) v. COXNEY* (1827), 7 B. & C. 257; 5 L. J. O. S. K. B. 285; 108 E. R. 719.

*Annotations*:—*Refd.* *Le Neve v. Mile-End Old Town Vestry* (1858), 4 Jur. N. S. 660; *Dawes v. Hawkins* (1860), 7 Jur. N. S. 262; *Hildreth v. Adamson* (1860), 8 C. B. N. S. 587; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**388. Dedication to limited portion of public—Inhabitants of parish—Effect of attempted limitation.**—*POOLE v. HUSKINSON*, No. 194, *ante*.

**389. — — —**—The dedication by the owner of the soil of a right of way from continuous user can only be presumed in favour of the public, not of the inhabitants of a particular parish.—*BERMONDSEY VESTRY v. BROWN* (1865), L. R. 1 Eq. 204; 35 Beav. 226; 13 L. T. 571; 30 J. P. 118; 11 Jur. N. S. 1031; 14 W. R. 213; 55 E. R. 882.

*Annotations*:—*Refd.* *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449; *Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225. *Mentd.* *Nuneaton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *A.-G. v. Biphosphated Guano Co.* (1879), 11 Ch. D. 327; *Wallasey L. B. v. Gracey* (1887), 36 Ch. D. 593.

**390. — — —**—*HILDRETH v. ADAMSON*, No. 375, *ante*.

**— Persons going to church.**—*See* No. 221, *ante*.

#### D. Dedication Subject to Rights of Owners.

**391. Right to cross pavement—With heavy loads—Injury to pavement.**—*ST. MARY, NEWINGTON, VESTRY v. JACOBS*, No. 587, *post*.

**392. Right to improve & alter—Dedication by local authority.**—*ARNOTT v. WHITBY URBAN DISTRICT COUNCIL*, No. 654, *post*.

**393. Right to support building—Exposed party wall.**—*Pltfs. & defts.* were the owners of two adjoining houses in London. The houses were very old & had been built together so as to be mutually dependent upon one another for support.

They were separated by a party wall. *Defts.*, having resolved to rebuild their house, served upon *pltfs.* a party wall notice under London Building Act, 1894 (c. cexiii), & the parties, in accordance with the provisions of sect. 91 of that Act, appointed their respective surveyors. The house was pulled down & rebuilt thirteen feet further back from the street, & *defts.* conveyed the vacant thirteen feet strip to the County Council, who dedicated it to the public. The effect of setting the house back was that the party wall was left exposed to a depth of thirteen feet & rendered unsafe by the withdrawal of the support of *deft's* house. Subsequently to the dedication the surveyors made an award ordering *defts.* to erect on the edge of the strip so dedicated a pier for the support of the exposed portion of the party wall. In an action brought to enforce the award, & also to recover damages at common law for the withdrawal of the support afforded by the building pulled down:—*Held*: the award, in ordering the building of a pier on the vacant strip of land, was not bad, either by reason of the fact that the site had been dedicated to the public as a highway, or that, subject to the rights of the public it was the property of third persons, for the public by the dedication, & the County Council by the conveyance, took subject to the statutory rights of *pltfs.* under the above Act. — *SELBY v. WHITTHREAD & CO.*, [1917] 1 K. B. 736; 86 L. J. K. B. 971; 116 L. T. 690; 81 J. P. 165; 33 T. L. R. 214; 15 L. G. R. 279.

**Right to obstruct or maintain existing obstructions.**—*See* Part IX., Sect. 2, sub-sect. 6, *post*.

**Limitation on capacity of statutory authorities to dedicate.**—*See* Sect. 2, sub-sect. 3, *E., ante*.

#### E. Dedication Subject to Toll.

**394. When presumed.**—If a person claiming a toll for passing over an highway, can show that the liberty of passing over the soil, & the taking of toll for such passage, are both immemorial, & that the soil & the tolls were before the time of legal memory in the same hands, though severed since, it shall be presumed that the soil was originally granted to the public in consideration of the tolls; & such original grant is a good consideration to support the demand.—*PETHAM (LORD) v. PICKERSGILL* (1787), 1 Term Rep. 660; 99 E. R. 1306.

*Annotations*:—*Refd.* *Rickards v. Bennett* (1823), 1 B. & C. 223; *Henly v. Lyne Corp.* (1825), 5 Bing. 91; *Jenkins v. Harvey* (1835), 2 Cr. M. & R. 393; *Beaufort v. Smith* (1819), 4 Exch. 450; *Westover v. Perkins* (1859), 5 Jur. N. S. 1352; *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555; *Dalton v. Angus* (1881), 6 App. Cas. 710; *A.-G. v. Simpson*, [1901] 2 Ch. 671.

**395. Right to dedicate—Subject to toll traverse.**—*BRETT v. BEALES* (1830), 10 B. & C. 508; *Mood. & M.* 416; 5 Man. & Ry. K. B. 433; 8 L. J. O. S. K. B. 141; 109 E. R. 539.

*Annotations*:—*Refd.* *Brecon Markets Co. v. Neath & Brecon Ry.* (1872), L. R. 7 C. P. 555. *Mentd.* *Beaumont v. Mountain* (1834), 10 Bing. 404; *Woodward v. Cotton* (1834), 1 Cr. M. & R. 41; *Plm v. Currell* (1840), 6 M. & W. 231; *Beaufort v. Smith* (1839), 4 Exch. 450; *York & North Midland Ry. v. R.* (1853), 22 L. J. Q. B. 225.

**396. — Apart from statutory authority.**—*AUSTERBERRY v. OLDHAM CORPN.*, No. 71, *ante*. Highway tolls generally, *see* Part V., Sect. 5, sub-sect. 1, *post*.

#### F. Dedication Subject to Market Rights.

*See* Nos. 1591–1593, *post*.

#### G. Proof of Limited Dedication.

**397. Necessity for proof.**—*WHITTAKER v. RHODES*, No. 1598, *post*.

**Sect. 2.—Highways by dedication and acceptance:**  
*Sub-sect. 6, G.; sub-sects. 7, 8 & 9, A., B. & C.]*

**398. Onus of proof.]—***II.*, a shopkeeper, was charged, under Town Police Clauses Act, 1847 (c. 89), s. 28, with unlawfully exposing for sale articles of furniture on the pavement of the street. Evidence was given that previous occupiers had not exercised any such claim or right to put goods there, except on a few late occasions. *II.* claimed the right to put goods there, & the justices thought, as this claim was *bond fide*, they were bound to hold their hands, & dismissed the summons:—*Held*: the justices were wrong, & no claim of right was admissible unless & until *II.* proved that the pavement had been dedicated subject to his claim.—*LEICESTER URBAN SANITARY AUTHORITY v. HOLLAND* (1888), 57 L. J. M. C. 75; 52 J. P. 788, D. C.

*Annotation:—***Reid.** *Openshaw v. Pickering* (1912), 11 L. G. R. 112.

**399. Sufficiency of proof.]—***S.* was occupier of a stable situated in a metropolitan mews, the folding doors of which opened outwards, & had dung pits with walls built outside, & he & his predecessors had since 1790 been in the habit of cleaning carriages while these stood in the mews. There was no pavement on the side of the mews, & the dung pits & folding doors extended one-third across the mews. *S.* was charged with not removing carriages from the street or mews when requested by the vestry:—*Held*: the statutes [Metropolitan Management Acts] did not apply to mews which were not streets, but passages dedicated by the owners subject to the uses which were made by *S.* of the passage.

It may be very true that vestries have the powers of surveyors of highways, but all such powers refer to highways including streets which are dedicated absolutely to the public, & not as taking away the rights of those who have dedicated their lands to the use of the highway subject to certain uses. The best proof of the terms of the dedication is the usage which has prevailed in the use of this street (*COCKBURN, C.J.*).

There had been only a dedication by the owners of this land as mews, & subject to the uses which are made by those who have stables in the mews (*LOSH, J.*).—*CHILSEA VESTRY v. STODDARD* (1879), 43 J. P. 782, D. C.

#### SUB-SECT. 7.—REBUTAL OF EVIDENCE OF DEDICATION.

**400. Absence of evidence of repair by inhabitants.]—***DAVIES v. STEPHENS*, No. 219, *ante*.

**401. —.]—***A.-G. v. WATFORD RURAL COUNCIL*, No. 192, *ante*.

**402. Acts of ownership—Collection of tolls—Locks on partly navigable river.]—***SIMPSON v. A.-G.*, No. 198, *ante*.

**403. —.]—***A.-G. v. LINDSAY-HOGG*, No. 263, *ante*.

**404. Non-user by public.]—***YOUNG v. CUTHBERTSON*, No. 43, *ante*.

**405. Obstruction.]—***YOUNG v. CUTHBERTSON*, No. 43, *ante*.

Interruption of user generally, *see, generally*, Sub-sect. 4, B. (e), *ante*.

#### PART III. SECT. 2, SUB-SECT. 7.

**a. Proof of origin of road.]—***R. v. GREAT WESTERN RY. CO.* (1872), 32 U. C. R. 506.—*CAN.*

**d. Proof of impossibility of dedi-**

**cation.]—**Open user by the public of a way as of right raises a presumption of the public right, & when such user is proved the *onus* lies on the person who seeks to deny the inference from such user to show that the state of the title

**Dedication subject to obstruction.]—***See* Part IX., Sect. 2, sub-sect. 6, *post*.

**Intention to dedicate.]—***See, generally*, Sub-sect. 2, *ante*.

#### SUB-SECT. 8.—EXTENT OF DEDICATION.

**403. As to subjacent soil.]—***SCHWEDER v. WORTHING GAS LIGHT & COKE CO.* (No. 2), No. 598, *post*.

Rights of owner in subjacent soil, *see, generally*, Part V., Sect. 2, sub-sect. 2, *post*.

**407. As to surface of road—Road on building estate—Half only of road made up.]—***Deft.* in the action, now applt., laid out & developed his property as a building estate in accordance with a plan approved by plffs., the local authority. The plan showed a proposed road bounded on the north by the boundary fence of a park belonging to plffs., & having, on either side of it, dotted lines indicating intended footpaths forming part of the road, which, in accordance with the by-laws, was of the total width of forty feet. *Deft.* built houses on the southern side of the road overlooking plff.'s boundary fence & made up & metalled the road for one half of its width next to the houses. The further or northern half of the road next to plff.'s fence was left unmetalled & untouched. The evidence showed that for some three years before action brought the road, which connected two public highways, had been uninterruptedly used as a thoroughfare by pedestrians, cyclists, & carts, the metalled part being used in preference to the unmetalled part. Plffs. had recently opened a gate in their boundary fence & were carting building materials across the unmetalled portion of the road & the part intended to be appropriated for a footpath. *Deft.* objected on the ground that the unmetalled portion was not subject to any public right of way & that, even if it were, plffs. were not entitled to take their carts over the path appropriated solely for the purposes of a footpath. The judge found as a fact that there had been a dedication of the whole width of the road as a highway, & held that plffs., as adjoining owners, were entitled at reasonable times & to a reasonable extent to cross on foot or with vehicles the portion of the highway appropriated as a footpath, & the Ct. of Appeal affirmed his decision:—*Held*: as regards dedication, there was no sufficient ground for disturbing the decisions of the Cts. below upon a question of fact, & plffs. as adjoining owners were entitled to the access which they claimed.—*ROWLEY v. TOTTENHAM URBAN DISTRICT COUNCIL*, [1911] A. C. 95; 83 L. J. Ch. 411; 110 L. T. 510; 78 J. P. 97; 30 T. L. R. 168; 58 Sol. Jo. 233; 12 L. G. R. 90, H. L.; *affg.* S. C. *sub nom.* *TOTTENHAM URBAN DISTRICT COUNCIL v. ROWLEY*, [1912] 2 Ch. 633, C. A.

*Annotation:—***Reid.** *Porter v. Tottenham U. D. C.*, [1914] 1 K. B. 663.

#### SUB-SECT. 9.—ACCEPTANCE.

**A. Under Highway Act, 1835, s. 23.**

As a condition precedent to highway being repairable by public at large, *see* Part VI., Sect. 6, sub-sect. 4, C., *post*.

was such that dedication was impossible, & that no one capable of dedicating existed.—*SURVEYOR GENERAL v. KRAN* (1892), 7 Nfld. L. R. 683.—*NFLD.*

*B. By Public User.*

**408. Necessity for acceptance.]—***R. v. MELLOR*, No. 865, *post*.

**409. —.]—***FISHER v. PROWSE, COOPER v. WALKER*, No. 66, *ante*.

**410. —.]—***CUBITT v. MAXSE (LADY CAROLINE)*, No. 181, *ante*.

**411. —.]—***MACKETT v. HERNE BAY COMRS.*, No. 182, *ante*.

**412. Evidence of acceptance—Whether formal adoption necessary.]—***R. v. LEAKE (INHABITANTS)*, No. 225, *ante*.

**413. —.]—***Application of Highways Act, 1835 (c. 50), s. 23.]—ROBERTS v. HUNT*, No. 879, *post*.

**414. —.]—***User by public.]—CUBITT v. MAXSE (LADY CAROLINE)*, No. 181, *ante*.

**415. —.]—***Repair by inhabitants at large.]—*(1) The inhabitants of a parish are not bound to the repair of a way, used by the public & repaired by the parish for more than twenty years, if there be no owner who could dedicate the way to the public, & the repairs by the parish be shown to have been begun & continued under a mistaken notion of the liability of the inhabitants to repair.

(2) The inhabitants are bound by such repairs, if made with full knowledge of the facts, & with the intention of taking upon themselves the public duty.

(3) *Semble*: roads set out under an inclosure Act do not by presumption of law belong to the adjoining owners. —*R. v. EDMONTON (INHABITANTS)* (1831), 1 Mood. & R. 21, N. P.

*Annotations*: —. *As to* (1) & (2) *Refd.* *R. v. Blakemore* (1852), 2 Den. 110. *As to* (3) *Refd.* *Central London Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467.

**416. Loss of right to adopt—Roads authorised under private Act of Parliament.]—***MACKETT v. HERNE BAY COMRS.*, No. 182, *ante*.

*C. By Acts of Highway Authority.*

**417. Repairs by local authority.]—**Where deft. has been acquitted on an indictment for not repairing a road, the ct. will not grant a new trial; yet they will, under very special circumstances, suspend the entry of judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment.

There is evidence both of the user of it as a highway in the instances of gravel carried over it for the repair of other highways in the parish, & of repairs by the parish (*LOLD ELLENBOROUGH, C.J.*). — *R. v. WANDSWORTH (INHABITANTS)* (1817), 1 B. & Ald. 63; 106 E. R. 23.

*Annotations*: — *Mentd.* *Ranstou v. Efferidge* (1818), 2 Chit. 273; *R. v. Sutton* (1833), 5 B. & Ad. 52; *A. G. v. Rogers* (1843), 11 M. & W. 670; *R. v. Chelkade* (1849), 13 Jur. 33; *R. v. Southampton County* (1887), 19 Q. B. D. 590; *R. v. N. E. Ry.* (1901), 70 L. J. K. B. 548.

**418. —.]—***R. v. LEAKE (INHABITANTS)*, No. 225, *ante*.

## PART III. SECT. 2, SUB-SECT. 9. — B.

**408 i. Necessity for acceptance.]—***HASTINGS v. ST. CATHARINES' (CITY) CORPN.* (1878), 43 U. C. R. 134.—*CAN.*

**408 ii. —.]—**A street laid out upon a registered plan of a township lot, where, although houses are clustered, there is not an incorporated village, continues to be a private street until the public by travelling upon it has accepted the dedication offered by the proprietor.—*SKLITZKY v. CRANSTON* (1892), 22 O. R. 590.—*CAN.*

**408 iii. —.]—**Under Public Works Acts, 1862, neither user nor any other unequivocal act of acceptance or acquiescence on the part of the public

is necessary to complete a dedication of a road or street by a private owner. — *ASSETS REALISATION BOARD v. AUCKLAND DISTRICT LAND REGISTRAR* (1906), 26 N. Z. L. R. 473.—*N.Z.*

**414 i. Evidence of acceptance—User by public.]—***PEDLOW v. KENFREW TOWN* (1900), 27 A. R. 611.—*CAN.*

**414 ii. —.]—**Evidence was given of use by the public of a street down to the edge of a marsh:—*Held*: the use of such portion was applicable to the whole dedicated road down to the river, & the evidence of user was sufficient to show an acceptance by the public of the highway.—*GRAND TRUNK RY. CO. OF CANADA v. TORONTO (CITY)*

(1900), 37 S. C. R. 210.—*CAN.*

**419. —.]—***R. v. THOMAS*, No. 871, *post*.

**420. —.]—**A field belonging to B. was laid out for buildings & a street formed in 1836, which had ever since been used as a public thoroughfare. B. had never formally dedicated it to the public, & in 1848, granted a licence to W. to lay down gas pipes, for which, & for preventing others interfering, B. had received a small rent of £6 from W. annually. Since 1853 the Board of Health had repaired the street, & in 1858 they put up notices under Public Health Act, 1818 (c. 63), s. 70, to make it a highway. W. having been summoned for wilfully injuring the street, being a highway:—*Held*: there was ample evidence from which the justices might infer that the street had been dedicated to the public by B., & was now a highway.—*THOMAS v. WILLIAMS* (1860), 24 J. P. 821.

**421. —.]—***EYRE v. NEW FOREST HIGHWAY BOARD*, No. 5, *ante*.

**422. —.]—***Road substituted for former highway.]—**R.* being summoned for obstructing a highway, it appeared that at the spot in question a highway had existed for thirty-five years, & had latterly been repaired by the parish, but that prior to that the road had been part of a field, that a highway formerly existed near the spot in another direction, & that it had been stopped up by a tenant of the Crown, the new one being over Crown property & the present highway substituted for it, & used ever since, but no other evidence was given of any formal proceedings as to either of the roads:—*Held*: the justices were justified in presuming that there had been a dedication of the present road as a highway. —*RADCLIFFE v. PATTINSON* (1869), 33 J. P. 822.

**423. —.]—***Whether conclusive.]—*A road led from a highway to the gates of a park; through the park there was a bridle-way, terminating at another highway, but carriages could not proceed through the park without the permission of the owner, the gates being occasionally locked. The parish had repaired this road from time immemorial, taking stones from the park for that purpose, but it did not appear that there had been any user of it by the public except for the purpose of seeking admission to the park:—*Held*: the above evidence did not show a sufficient dedication to the public & user by them, & the road was not a public highway which the parish was bound to repair.

*Qu.*: whether the old doctrine that a highway must lead from one public place to another can always be supported. —*R. v. HAWKHURST (INHABITANTS)* (1862), 1 New Rep 18; 7 L. T. 268; 27 J. P. 202; 11 W. R. 9; *subsequent proceedings*, 1 New Rep. 88.

*Annotation*: — *Refd.* *R. v. Barney* (1875), 31 L. T. 828.

**424. —.]—***Repair capable of explanation.]—**R. v. EDMONTON (INHABITANTS)*, No. 415, *ante*.

**425. —.]—**Deft., at *nisi prius*, to prove a public right of way over pltf.'s land, showed acts of repair done in a certain year by C., the township surveyor. Pltf. offered to prove in answer

(1900), 37 S. C. R. 210.—*CAN.*

**414 iii. —.]—**In the absence of acceptance by the municipality of streets, & of evidence of a user of the streets by the public, the streets do not become highways.—*MARSHAN v. GRAND TRUNK PACIFIC RY. CO.* (1909), 2 Alta. L. R. 43; 10 W. L. R. 465; 9 Can. Ry. Cas. 311.—*CAN.*

## PART III. SECT. 2, SUB-SECT. 9. — C.

**408. Acceptance under corporation seal—Consent of corporation to registration of plan.]—**A memorandum under the corp'n. seal stated "The consent of the Toronto Corp'n. is hereby given to the registration of this plan, showing

**Sect. 2.—Highways by dedication and acceptance:**  
*Sub-sect. 9. (C. Sect. 3.)*

an agreement made in that year, between C. & the steward of pltf.'s predecessor, that C., in consideration of repayment by the steward, should repair a road, which, according to pltf.'s case, was the road now in question. Deft.'s counsel objected, because it did not appear that the steward, in that character, had authority to make such agreement. The judge received the evidence, which was not further objected to; & pltf. had a verdict. On motion for a new trial, on account of the improper reception of evidence, the former objection was renewed, & it was urged also that the evidence, when given, did not show that the road to which the agreement related was the same as that now in question:—*Held*: (1) assuming the roads to be identified, the agreement, even if the steward had no sufficient authority, was evidence to explain the fact of repair, & was properly admitted; (2) if the evidence failed to identify the roads, that objection should have been made at *nisi prius*, when the defect appeared, & the judge should have been requested to strike the evidence out of his notes, & the point could not now be raised.—*FERRAND v. MILLIGAN* (1845), 7 Q. B. 730; 15 L. J. Q. B. 103; 10 Jur. 6; 115 E. R. 604.

**426. Notices put up under Public Health Act, 1848 (c. 63), s. 70.**—*THOMAS v. WILLIAMS*, No. 420, *ante*.

**427. Cul de sac—Lighted, paved & cleaned by local authority.**—(1) A mews in London being a *cul de sac*, having been freely used by the public, & having been lighted, paved & cleansed by the local vestry for seventy years without opposition or protest from any quarter:—*Held*: to be dedicated to the public as a highway.

(2) The intended erection by a vestry, acting under the powers given by Metropolis Management Act, 1855 (c. 120), s. 88, of a urinal in a mews, which, in the opinion of the ct., was a highway within sect. 96 of that Act, at a distance of eight feet from the back door of pltf. A., & the cellar entrance of pltf. B., & quite close to a narrow passage down which several young females had to pass daily on their way to the show-rooms of pltf. C.:—*Held*: to be such a nuisance as to afford ground for a perpetual injunction.—*VERNON v. ST. JAMES, WESTMINSTER, VESTRY* (1880), 16 (Ch.) D. 449; 50 L. J. Ch. 81; 41 L. T. 220; 29 W. R. 222, C. A.

**Annotations.**—*As to* (1) *Reid*. A. G. & London Property Investment Trust v. Richmond Corp., & Gosling (1903), 89 L. T. 700. *As to* (2) *Consid.* Gas Light & Coke Co. v. St. Mary Abbots, Kensington, Vestry (1881), Cab. & El. 368; *Graham v. Newcastle-upon-Tyne Corp.* (1892), 67 L. T. 260. *Reid*. Sellers v. Matlock Bath L. B. (1885), 14 Q. B. D. 928; *Pethick v. Plymouth Corp.* (1894), 70 L. T. 304; *Parish v. City of London Corp.* (1901), 67 J. P. 55; *East Frimantle Corp. v. Annals* (1902) A. C. 213; *Mayo v. Seaton U. D. C.* (1903), 2 L. J. G. R. 127; *A. G. v. Dorchester Corp.* (1906), 4 L. G. R. 675; *Mudge v. Ponce U. D. C.* (1916), 115 L. T. 679. *Generally, Mend.* Roberts v. Hopwood, [1925] A. C. 578.

**428. Scavenged by local authority—Expenses of making up recovered from frontagers.**—In 1898 a passage, intended as a means of access to the backs of houses which had just been built, for the removal of house refuse, etc., was constructed in pursuance of the by-laws of the local authority. It was a *cul de sac* six feet wide. The local authority kept it scavenged, but had

never adopted it as a highway, though they had made it & charged the expenses on the frontagers. It was used by some thirty or forty people a day, but there was no evidence of user of it by any member of the public as such:—*Held*: the public had no right of way over the passage.—*VINE v. WENHAM* (1915), 84 L. J. Ch. 913; 79 J. P. 423; 14 L. G. R. 180.

*Compare* Nos. 45–48, 51, 289, 313, *ante*.

**429. Draw-up in front of public-house—Occasional repairs by local authority—Frequent repairs by tenants.**—The proprietor of a public-house with a “draw-up” in front of it which also belonged to him offered by letter to the corp. of the borough to permit such draw-up to be thrown into the public road on condition that his signpost was allowed to continue at a convenient spot on the widened highway, & that certain front gardens belonging to other frontagers were also thrown into the road. The corp. did not reply to this letter, but subsequently it did throw the said gardens & the draw-up into the public road. The proprietor of the public-house thereupon erected his signpost in the highway some forty-five feet from the site of the draw-up. The corp. threatened to have it removed:—*Held*: the proprietor was entitled to restrain such removal, as the facts constituted an agreement between him & the corp. in the terms of his letter, & such agreement was part performed by the action of the corp. & was not an illegal agreement as sanctioning the erection of an obstruction in the highway, but was within the powers conferred on the corp. by Metropolis Management Act, 1855 (c. 120), s. 144.

The first question that arises is whether the draw-up was dedicated to the public as a highway or whether it continued the private property of pltf. There was evidence that on two occasions the public authority had placed stone on it, & that on one of those occasions the steam-roller had gone over it. On the other hand there was evidence which showed that repairs to the draw-up had been repeatedly done by the tenants. I find, as a fact, that taking the position of the draw-up in question & the manner in which it was used, it never formed part of the highway & was never dedicated to the use of the public (*LAWRENCE, J.*).—*HOARE & CO., LTD. v. LEWISHAM CORPN.* (1901), 85 L. T. 281; 67 J. P. 20; 17 T. L. R. 774; *affid.* (1902), 87 L. T. 404, C. A.

**430. Ditch piped & filled in—By consent of owner.**—In pursuance of an Inclosure Act allotments were made to the predecessors in title of pltf., & the allottees were directed to make & for ever maintain a sufficient fence & ditch on the south side thereof. The inclosure award set out a public highway on the south side of the allotments of the breadth of forty feet between & exclusive of the ditches & fences. Pltf. purchased the allotments in 1889, & upon several occasions he cleaned out the ditch. From time to time houses were built on portions of the allotments alongside the said highway, & the ditch in front thereof was filled in & enclosed. In 1901 the remaining length of the ditch was piped in & filled up by defts. with the assent of pltf. The road had a seven feet wide pavement alongside the site of the ditch, & inclusive of the footpaths, was about forty-seven feet wide. Many persons, however walked over the site of the ditch, & it was used for purposes of passage without protest for nearly four years,

S. avenue as having a width throughout of 59 feet; & the avenue is accepted as a public highway:—*Held*: the memorandum executed by the city

corp. amounted to an assumption by the city corp. of the avenue for public use, & the corp. had thereby, in the most formal way, accepted the avenue

as a public highway.—*Re CITY OF TORONTO PLAN M. 188* (1913), 28 O. L. R. 41; 4 O. W. N. 663; 11 D. L. R. 424.—*CAN.*



when plff. enclosed the site of the ditch with a temporary paling fence. The council objected to this fence, but it remained until 1907 when it was replaced by a wall, which defts. pulled down:—*Held*: the site of the ditch belonged to plaintiff, & there had been no dedication thereof as a highway.—*WALMSLEY v. FEATHERSTONE URBAN DISTRICT COUNCIL* (1909), 73 J. P. 322; 7 L. G. R. 806.

### SECT. 3.—HIGHWAYS BY STATUTE.

**431. Creation—Public way interfering with private rights—Must be express.**—Great Yarmouth Haven Act, 1835, s. 76, subjects to a penalty any person who shall place on any space of ground immediately adjoining to the Haven, & within ten feet from high water mark, any goods, materials, or articles so as to obstruct the free & commodious passage through or over the same, or who shall break down or remove any quay head or river bank next adjoining such Haven, for the purpose of forming a dock, without making & maintaining a foot bridge over the same. By Great Yarmouth Haven Improvement Act, s. 18, the Comrs. of the Act shall, twice in the year, inspect the public right or rights of way in & along both shores of the Haven, & shall take all necessary proceedings to abate or remove every encroachment made on such right or rights of way. Upon appeal against a conviction under the former enactment, a case for the opinion of this Ct. stated that applt., who occupied a boat building yard which sloped down to the Haven, placed three boats on the part of the yard immediately adjoining the Haven, & within the space of ten feet from high water mark, so as to obstruct the free & commodious passage over the same. There was no public right of passage there:—*Held*: a right of way was not given by Great Yarmouth Haven Act, 1835, s. 76, & the sect. only applied where a right of way existed, & therefore applt. was not properly convicted.

But it is a canon of construction of Acts of Parliament that the rights of individuals are not interfered with unless there is an express enactment to that effect, & compensation is given to them. It would militate against that canon & seriously interfere with private rights, if we held that the enactment in sect. 76 carried into it by implication a right by the public to pass over the space in question (*COCKBURN, C.J.*).—*HARROD v. WORSHIP* (1861), 1 B. & S. 381; 30 L. J. M. C. 105; 25 J. P. 581; 8 Jur. N. S. 153; 9 W. R. 865; 121 E. R. 757.

*Annotation*:—*Folld. A.-G. & Great Yarmouth Port & Haven Comrs. v. Harrison* (1920), 85 J. P. 54.

**432.—Strip along wharf-edge to be kept clear.**—Plff. comrs. were empowered under Great Yarmouth Port & Haven Act, 1866 (c. cxxvii), to conserve & regulate the port & haven. By sect. 72 of the Act no person might make any building or erection on any wharf within ten feet of the head of the wharf or on any land adjoining the haven, within ten feet of high water mark, so as to break down or damage any wharf or bank within the haven. Any offence under the sect. was subject to a penalty, & the comrs. had power to remove any building or erection which contravened the provisions of the Act. Deft. owned & occupied a wharf on the banks of a river within the haven. It was separated from an adjoining wharf by a

fence coming down to the head of the wharf which had been erected by deft.'s predecessors in title by leave of the comrs. & subject to the payment of a nominal rent. Deft. having refused to pay the nominal rent or to remove the fence, the comrs. took proceedings against him for an injunction & consequential relief:—*Held*: (1) the fence in question was not a "building or erection" within the sect., which was intended to prohibit the placing on the wharf or adjoining land of any permanent structure calculated to break down or damage the wharf or river banks within the defined limit if ten feet; (2) the Act did not operate to create a statutory right of public passage along the space of ten feet in front of the wharves & banks of the haven where no such right had previously existed.—*A.-G. & GREAT YARMOUTH PORT & HAVEN COMRS. v. HARRISON* (1920), 80 L. J. Ch. 607; 85 J. P. 54; 18 L. G. R. 740, C. A.

**433. — Way recognised as highway by statute—Whether formal adoption necessary.**—*R. v. LYON*, No. 59, ante.

**434. Compliance with statutory requirements—As condition to public liability for repairs—Completion of whole system.**—Where by an Act of Parliament trustees are authorised to make a [turnpike] road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public; & therefore, where trustees empowered by Act of Parliament to make a road from A. to B., being in length twelve miles, had completed eleven miles & a half of such road to a point where it intersected a public highway:—*Held*: the district in which the part so completed lay, was not bound to repair it. *R. v. CUMBERWORTH (INHABITANTS)* (1832), 3 B. & Ad. 108; 1 L. J. M. C. 86; 110 E. R. 40; *subsequent proceedings* (1836), 4 Ad. & El. 731.

*Innotations.*—*Apld. R. v. Cumberworth* (1836), 4 Ad. & El. 731; *R. v. Edge Lane* (1836), 4 Ad. & El. 723; *R. v. Bury* (1814), 2 L. T. O. S. 309. *Consd. R. v. Westhoo Highways Overseers* (1816), 6 L. T. O. S. 371; *Gawthorne v. Stockport, Disley & Whaley-bridge Ry.* (1857), 29 L. T. O. S. 308. *Apld. Cubitt v. Maxse* (1873), L. R. 8 C. P. 704. *Overd. R. v. French* (1879), 4 Q. B. D. 507. *Held. R. v. West Riding, Yorkshire, J.J.* (1834), 3 Nev. & M. K. B. 86; *Lee v. Milner* (1837), 2 M. & W. 824; *R. v. Eastern Counties Ry.* (1839), 10 Ad. & El. 531; *R. v. Rochdale & Halifax Turnpike Road Trustees* (1848), 12 Q. B. 448; *Roberts v. Roberts* (1862), 3 B. & S. 183; *R. v. Newbold* (1869), 17 W. R. 295; *Swansea Improvements & Tram. Co. v. Swansea & Mumbles Ry.* (1880), 3 Ry. & Can. Tr. Cas. 339.

**435. — — — — — J.—4 Geo. 4, c. 95, s. 87,** gives an appeal to the sessions to any person who shall think himself aggrieved by any thing done by any two justices in pursuance of that Act, or any local turnpike Act; & declares, that the determination of the sessions shall be final & conclusive, & that no proceeding to be had in pursuance of that Act shall be removed by *certiorari*. The sessions on appeal against a certificate of two justices, that a turnpike road, made under a local Act, had been completed, & was fit to be travelled upon, having decided that the certificate was void in point of law, & having refused to go into the merits of the appeal in point of fact, this Ct. refused to grant a *mandamus* to them to hear the appeal on the ground that their decision was contrary to the local Act. A local turnpike Act recited, "That the making & maintaining a new turnpike road from Leeds to join the Wakefield & Halifax turnpike road, at a certain point, &

### PART III. SECT. 3.

**1. Creation—Way recognised as highway by statute.**—*SAANICH CORPN. v. McFADDEN*, [1923] 3 D. L. R. 171; 32 B. C. R. 221; [1923] 2 W. W. R. 429.—*CAN.*



*Sect. 3.—Highways by statute. Part IV. Sects. 1 & 2: Sub-sects. 1 & 2.]*

several branch roads, from & out of the said main turnpike road, would be an advantage to the inhabitants of Leeds & Halifax, & to the public in general"; & it authorised the making of the said several roads, & enacted, "That the said new roads should not be respectively opened to the public, or become public roads, until two justices should have certified that the said roads respectively, & the works thereon respectively, were completely made & fit to be travelled upon throughout the whole length of such roads respectively":—*Semble*: the making of all the branch roads was not a condition precedent to the main road becoming a public road as soon as it was completed & fit to be travelled on, but the main road, when so completed, & certified so to be by two justices, became a public road, although the branch roads were still unfinished.—*R. v. WEST RIDING OF YORKSHIRE JJ., LEEDS & WHITEHALL ROADS CASE* (1834), 5 B. & Ad. 1003; 3 Nev. & M. K. B. 56; 2 Nev. & M. M. C. 71; 3 L. J. M. C. 51; 110 E. R. 1062.

*Annotation:—Apld. R. v. Bury* (1844), 2 L. T. O. S. 309.

436. ————]—*R. v. EDGE LANE (INHABITANTS)*, No. 858, *post*.

437. ————]—Where trustees under

a turnpike Act are empowered to make a road from A. to B., & a branch from that road to C., the public are not compellable to repair the main road, though complete in its whole extent, till the branch is finished.—*R. v. CUMBERWORTH (INHABITANTS)* (1838), 4 Ad. & El. 731; 2 Har. & W. 439; 1 Nev. & P. K. B. 197; 6 L. J. M. C. 21; 111 E. R. 903.

*Annotations:—Apld. R. v. Bury* (1844), 2 L. T. O. S. 309. *Consd. R. v. Westhoe Highways Overseers* (1846), 6 L. T. O. S. 371. *Apld. Cubitt v. Maxse* (1873), L. R. 8 C. P. 704. *Overd. R. v. French* (1879), 4 Q. B. D. 507. *Refd. Lee v. Milner* (1837), 2 M. & W. 824; *R. v. Eastern Counties Ry.* (1839), 10 Ad. & El. 531; *R. v. Rochdale & Halifax Turnpike Road Trustees* (1848), 12 Q. B. 448; *Swansea Improvements & Tram. Co. v. Swansea & Mumbles Ry.* (1880), 3 Ry. & Can. Tr. Cas. 339.

438. ————]—*R. v. BURY* (1844), 2 L. T. O. S. 309; 8 J. P. 54.

439. ————]—*R. v. FRENCH*, No. 78, *ante*.

440. ————]—*Road not of statutory width—Insufficiently fenced.*]—*R. v. LORDSMERE (INHABITANTS)*, No. 863, *post*.

441. ————]—*No public user—Road set out under Inclosure Act.*]—*CUBITT v. MAXSE (LADY CAROLINE)*, No. 181, *ante*.

Roads set out under inclosure Acts, *see, generally*, *COMMONS*, Vol. XI., pp. 78 *et seq.*

Repair of highways generally, *see* Part VI., *post*.

## Part IV.—Width of Highways.

### SECT. 1. —DUTY TO WIDEN HIGHWAYS.

*See* Part VIII., Sect. 1, sub-sect. 2.

### SECT. 2. —EXTENT OF SPACE SUBJECT TO PUBLIC RIGHT OF PASSAGE.

#### SUB-SECT. 1. —IN GENERAL.

442. *General rule.—Right extends over whole road.*]—A private right of way over waste land, or a line between two points, is not necessarily a right over every part of the land, & the owner of the soil may enclose on each side of it, leaving a convenient way.

It is a question of law, whether, if there is a private right of way over any land the owners of the land can define or confine it within reasonable limits. There is this distinction between a private & public right of way, that the former is not necessarily, as the latter is, over every part of the land, across or along which there is the right of way (*COCKBURN, C.J.*).—*HUTTON v. HAMBORE* (1860), 2 F. & F. 218, N. P.

443. ————]—The owner of a building estate granted to the purchaser of one of the lots the right for himself, his heirs & assigns, & his & their families, tenants, servants, & workpeople & others, by his, their, or any of their authority, in common with all others entitled thereto, with or without horses, cattle, carts, & carriages, to pass over the several roads made or to be made through the estate, in the same manner & as fully as if the same roads were public roads. Two of the roads were forty feet in width, of which twenty feet in the middle was gravelled for cart & carriage traffic,

& there was a strip of grass land ten feet wide on either side. *Pltf.*, who was an assign from the original purchaser, was accustomed to walk along these grass strips to & from his house. The owner of the estate caused the grass strips to be intersected by ditches, called "grips" made at right angles to the road, for the purpose, as he alleged, of draining the road, but really, as the ct. held upon the evidence, for the purpose of preventing persons from passing along the sward. The grips were about fifteen inches wide & ten inches deep, in addition to the height of the earth taken out of them & stacked upon their edges; & the owner of the road claimed the right to make such grips, though admitting that the earth ought to be spread over the grass, & not stacked upon the edges. In support of this alleged right he produced evidence showing that on rural roads in the same neighbourhood it was usual to make such grips for the purpose of drainage:—*Held*: *pltf.'s* right was to have the use of the whole road, & not merely the part which had been used as the *via trita*, for the purposes mentioned in the deed; this right was subject only to the owner's right to make such grips & trenches as might be necessary for the drainage of the roads, & not dangerous to the persons using them; the custom attempted to be set up was unreasonable; & the grips amounted to an obstruction.—*NICOL v. BEAUMONT* (1883), 53 L. J. Ch. 853; 50 L. T. 112.

*See, also*, Sub-sects. 2, 3, *post*.

444. *Application of rule.—Private road.*]—*NICOL v. BEAUMONT*, No. 443, *ante*.

445. ————]—*Private carriageway alongside public footway.*]—*A.-G. v. ESHER LINOLEUM CO., LTD.*, No. 178, *ante*.

**PART IV. SECT. 2, SUB-SECT. 1.**  
442. *General rule.—Right extends over whole road.*]—Every piece of land which is subject to the public right of passage is a "highway" or part of a

highway.—*RIDEOUT v. HOWLETT* (1913), 12 E. L. R. 527; 13 D. L. R. 293; 42 N. B. R. 200.—*CAN. g. — Unmetalled portions.*]—All ground over which the public have

a right of way is part of the road; the mere fact that part of the road may be metalled for convenience of traffic will not render the unmetalled portion on each side any the less a public road.—

**446. — Land adjoining towing path.]—**THAMES CONSERVATORS *v.* DENNIS (1902), *Times*, Nov. 1.

**447. Whether width limited to thirty feet.]—**The common notice that owners of land on the sides of a highway may encroach or enclose up to within 15 feet of the centre is an error, & the question will always be as to the extent of the highway by user.—*R. v. JOHNSON* (1859), 1 F. & F. 657; *subsequent proceedings* (1860), 2 E. & E. 613.

**448. Width depends on user.]—***R. v. JOHNSON*, No. 417, *ante*.

**449. Presumption rebuttable.]—**A.-G. *v.* ESHER LIMEUM CO., LTD., No. 178, *ante*.

**450. Banks from accumulated road scrapings—Included in width.]—**A local authority, for the purpose of repairing the surface of a highway, cut away part of a bank at the side of a road, the bank representing the accumulated road scrapings of many previous years. The yearly tenant of an adjoining small cottage & garden brought an action against the local authority, alleging that the wall of his garden had been rendered unsafe through the partial removal of the bank:—*Held*: the bank was within the boundaries of the original highway, & the cutting away of a portion of it had not materially affected the support of pltf.'s wall.—WEBSTER *v.* BAKEWELL RURAL DISTRICT COUNCIL (1916), 86 L. J. (Ch. 89); 115 L. T. 678; 80 J. P. 437; 14 L. G. R. 1109.

#### SUB-SECT. 2.—WHERE FENCES EXIST

**451. General rule—Right to use whole space.]—**A footpath by the roadside, included within the hedge or fence of the road, is as much part of a public highway as that which is travelled over by carriages (TAUNTON, J.).—LOVERIDGE *v.* HODSOIL (1831), 2 B. & Ad. 602; 109 E. R. 1267.

*Annotation:—**Reid*, Derby County Council *v.* Matlock Bath & Scarthill Nick Urban District, [1896] A. C. 315.

**452. ———.]—**(1) Where an ordinary highway runs between fences, one on each side, the right of passage which the public have along it extends *primâ facie*, & unless there be evidence to the contrary, over the whole space between the fences. The public are entitled to the use of the entire space.

(2) A permanent obstruction erected upon a highway without lawful authority, & which renders the way less commodious than before to the public, is an unlawful act, & a public nuisance at common law. What is a permanent obstruction placed on a highway, rendering the way less commodious than before, & so amounting to a public nuisance, is a question of fact for the jury.

Where therefore defts., for the purposes of profit to themselves, placed telegraph posts upon a highway, with the object & intention of keeping them there permanently, & did permanently keep them there, such posts being of such sizes & dimensions & solidity as to obstruct & prevent the passage of carriages & horses or foot passengers:—*Held*: defts. were liable to be found guilty upon an indictment for a nuisance; if the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or if sufficient space was left for the public traffic, defts. were still liable to conviction.—

AGRA MUNICIPAL BOARD *v.* SUDARSHAN DAS SHASTRI (1914), 1 L. R. 37 All. 9.  
—IND.

*h. Expenditure of public money—*

*Road thirty feet wide.]—*The expenditure of public money on a road laid out thirty feet wide, can only make it a public highway to that extent, & will

*R. v. UNITED KINGDOM ELECTRIC TELEGRAPH CO., LTD.* (1862), 2 B. & S. 617, n.; 3 F. & F. 73; 31 L. J. M. C. 166; 6 L. T. 378; 26 J. P. 390; 8 Jur. N. S. 1153; 10 W. R. 538; 9 Cox, C. C. 174; 121 E. R. 1212.

*Annotations:—*Is to (1) *Apld.* Vesey *v.* Hoskins, Harris *v.* Hoskins (1865), 34 L. J. M. C. 145. *Conad.* Nicol *v.* Beaumont (1883), 53 L. J. Ch. 853. *Apld.* Locke-King *v.* Woking U. D. C. (1897), 77 L. T. 790. *Conad.* Neeld *v.* Hendon U. D. C. (1899), 81 L. T. 405. *Apld.* Offin *v.* Rochford It. C. (1906) 1 Ch. 312. *Reid*, R. *v.* Maybury (1864), 4 F. & F. 90; Tutill *v.* West Ham L. B. of Health (1873), L. R. 8 C. P. 447; Harvey *v.* Truro It. C. (1903) 2 Ch. 638; Chorley Corp'n. *v.* Nightingale, [1906] 2 K. B. 612. As to (2) *Conad.* A.-G. *v.* Barker (1900), 83 L. T. 215; Petley *v.* Parsons, [1911] 2 Ch. 653. *Reid*, R. *v.* Train (1862), 2 B. & S. 640; A.-G. *v.* Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282; Turner *v.* Ringwood Highway Board (1870), L. R. 9 Eq. 418; Cubitt *v.* Maxse (1873), L. R. 8 C. P. 704; R. *v.* Burnage (1875), 31 L. T. 828; Sheringham U. D. C. *v.* Hulsey (1901), 68 J. P. 395; Wednesbury Corp'n. *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78; R. *v.* Bartholmeu, [1908] 1 K. B. 554; A.-G. *v.* Smith (1910), 8 L. G. R. 679.

**453. ———.]—**LOCKE-KING *v.* WOKING URBAN DISTRICT COUNCIL, No. 459, *post*.

**454. ———.]—**In the case of an ordinary highway running between fences, although the space between them may be of a varying & unequal width the right of passage or way *primâ facie*, & unless there be evidence to the contrary, extends to the whole of the ground between the fences, & the public are not confined to the metalled portion. All the space between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption, & the owner of the adjoining lands is not entitled to inclose any portion of it.

Mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it. The mere consent of a highway authority to an obstruction or encroachment upon the highway is ineffectual for the purposes of legalising that obstruction or encroachment.—HARVEY *v.* TRURO RURAL COUNCIL, [1903] 2 Ch. 638; 72 L. J. Ch. 705; 89 L. T. 90; 68 J. P. 51; 52 W. R. 262; 19 T. L. R. 576; 1 L. G. R. 758.

*Annotation:—**Reid*, Chippendale *v.* Pontefract R. D. C. (1907), 71 J. P. 231.

**455. ———.]—**Fences by the side of a highway are *primâ facie* the boundaries of the highway so as to raise a presumption that the public right of way extends over the whole space of ground between the fences. But the mere existence of fences on either side of a highway is not conclusive. In order to raise the presumption it must be proved that there is nothing to show that they were not put up as boundaries of the highway. Pltf. claimed that a triangular piece of land abutting on & not fenced off from a highway belonged to him:—*Held*: in the absence of anything to show the contrary, it must be assumed from the nature & position of the fence surrounding the land that it had been put up as a boundary of the highway; the presumption therefore arose that the land formed part of the highway; &, on the evidence, there was nothing to rebut that presumption.

Pltf. erected a fence round the piece of land. The local authority pulled down the fence & afterwards wrote a letter asserting their claim to the land. More than six months after this letter pltf. brought an action against them for a declaration that the land belonged to him & an injunction to restrain them from trespassing on it. By his statement of claim he alleged that defts. had pulled

not have the effect of making it a highway four rods wide.—HASTRACH *v.* ATKINSON (1852), 7 N. B. R. (2 All.) 439.—CAN.

*Sect. 2.—Extent of space subject to public right of passage: Sub-sects. 2, 3 & 4.]*

down his fence; that they claimed that the land formed part of the highway, & that this claim prevented him from selling the land:—*Held*: the assertion of defts.' claim to the land gave plff. no cause of action, & therefore, he could not take advantage of the power given to the ct. by R. S. C., Ord. 25, r. 5, to make a merely declaratory judgment; the only act of defts. which gave him any cause of action was the pulling down of the fence; Public Authorities Protection Act, 1893, applied; the action was brought too late, & must be dismissed with costs as between solr. & client.—*OFFIN v. ROCHFORD RURAL COUNCIL*, [1906] 1 Ch. 342; 75 L. J. Ch. 348; 94 L. T. 609; 70 J. P. 97; 54 W. R. 244; 50 Sol. Jo. 157; 4 L. G. R. 595.

*Annotations*:—*Consd.* A.-G. & Croydon R. D. C. v. Moorsom-Roberts (1907), 72 J. P. 123. *Refd.* Chippendale v. Pontefract R. D. C. (1907), 71 J. P. 231. *Mentd.* Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

**456.** ————*J*.—A highway ran through the lands of the manor of 11. for a distance of a mile & a half. Upon its north side was a strip of land in width varying from 12 ft. to 33 ft., which was separated from the main land of the manor by an ancient fence. At one point, cottages had been built in 1901, facing the strip, & the cottagers had used the strip for the purpose of reaching the road. Moreover for forty years the public had used the strip as part of the highway, & had worn a footpath along it. On the other hand, the lord of the manor had between 1866 & 1910 exercised various acts of ownership in connection with the strip. Disputes arose in 1892 between the council & the lord of the manor as to the rights of the council over the strip, but the council then made an admission which led plff. to believe that they admitted that it belonged to the lord of the manor. In 1904 the council acting as the highway authority made up the path & gravelled it, & in 1910, without any intimation to plff. they began to make up & gravel the whole strip. The lord of the manor then took proceedings to establish his rights of ownership:—*Held*: there was a presumption that the highway extended to the fence on the north side which the acts of ownership alleged by the lord of the manor were not sufficient to rebut.—*EAST v. BERKSHIRE COUNTY COUNCIL* (1911), 106 L. T. 65; 76 J. P. 35.

**457.** Whether presumption conclusive—Fences must be referable to highway.]—*OFFIN v. ROCHFORD RURAL COUNCIL*, No. 455, *ante*.

**458.** ————*J*.—A.-G. & CROYDON RURAL DISTRICT COUNCIL v. MOORSOM-ROBERTS, No. 468, *post*.

**459.** Rebuttal of presumption—Roadside land described as manor waste—In Act of Parliament.]—Where there are strips of land adjacent to an ordinary highway, the public, unless there is evidence to the contrary, have the right to the whole space from fence to fence; & a special Act of Parliament empowering a co. to purchase & sell the strips of land, the strips being described in the schedule to the Act as waste or common land, is not evidence that the strips of land were, in fact, part of the waste, so as to make an exception to the rule.—*LOCKE-KING v. WOKING URBAN DISTRICT COUNCIL* (1897), 77 L. T. 790; 62 J. P. 167; 14 T. L. R. 32.

*Annotation*:—*Refd.* Neeld v. Hendon U. D. C. (1899), 81 L. T. 405.

**460.** ————*J*.—In court rolls.]—The presumption of dedication from public user of greens along the side of a highway between the fences, may be

rebutted by evidence of an entry in the ct. rolls of the manor that these greens were waste belonging to the manor, also that they were dealt with subsequent to the entry, as being private property.—*FRIERN BARNET URBAN DISTRICT COUNCIL v. RICHARDSON* (1898), 62 J. P. 547, C. A.

*Annotation*:—*Consd.* Neeld v. Hendon U. D. C. (1899), 81 L. T. 405.

**461.** ————*J*.—Acts of ownership—Acquiesced in for years.]—On one side of a metalled road, which was a public highway, was an irregular shaped piece of land, formerly part of the waste of the manor, beyond which was an ancient hedge inclosing private property. On the other side of the road was another ancient hedge. In 1864, by the licence of the lord of the manor, one of the copyholders dug up & carried away several cartloads of soil from the surface of this piece of land. In 1872 in accordance with the customs of the manor, the lord granted a licence to inclose the land & admitted the licensee as copyholder thereof. In 1874 the copyholder inclosed the land by erecting a fence by the side of the metalled road at a distance of 15 ft. from the centre of the road, the surveyor of the highway board assisting in setting out the line. In 1884 the fence, being decayed, was restored. In 1880 the lord of the manor enfranchised the land. No objection was made by any one to any of these acts until in 1897 defts. threw down the fence alleging that it was an obstruction to the highway:—*Held*: assuming that there was a *prima facie* presumption that the whole space of land between the two ancient hedges was part of the highway, such presumption was rebutted by the evidence before the ct., & therefore the land inclosed in 1874 was not part of the highway.—*NEELD v. HENDON URBAN DISTRICT COUNCIL* (1899), 81 L. T. 405; 63 J. P. 724; 16 T. L. R. 50, C. A.

*Annotations*:—*Appl.* Belmore v. Kent County Council, [1901] 1 Ch. 873. *Consd.* Ford v. Harrow U. D. C. (1903), 88 L. T. 394. *Distd.* Harvey v. Truro R. C. (1903) 2 Ch. 638. *Expld.* Offin v. Rochford R. C. (1906) 1 Ch. 342. *Refd.* Plumley v. Lock (1902), 1 L. G. R. 54; Thames Conservators v. Dennis (1902), *Times*, Nov. 1; Chippendale v. Pontefract R. D. C. (1907), 71 J. P. 231.

**462.** ————*J*.—BELMORE (COUNTS) v. KENT COUNTY COUNCIL, No. 466, *post*.

**463.** ————*J*.—EAST v. BERKSHIRE COUNTY COUNCIL, No. 456, *ante*.

**464.** ————*J*.—Nature of district.]—BELMORE (COUNTS) v. KENT COUNTY COUNCIL, No. 466, *post*.

**465.** ————*J*.—Nature of ground.]—HARVEY v. TRURO RURAL COUNCIL, No. 454, *ante*.

**466.** ————*J*.—Width & level of margins.]—Where there are uninclosed spaces by the sides of a metalled highway there is no invariable presumption that the highway extends to the fence on either side. The nature of the district, the width & level of the margins, & the regularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication.

Willow & grass had been cut by the owner of an adjoining space, & by her tenants, & gipsies warned off & cattle turned away:—*Held*: there was no presumption that all the space between hedges had been dedicated to the public & even if there was such a presumption it was rebutted by circumstances.—*BELMORE (COUNTS) v. KENT COUNTY COUNCIL*, [1901] 1 Ch. 873; 70 L. J. Ch. 501; 84 L. T. 523; 65 J. P. 456; 49 W. R. 459; 17 T. L. R. 360.

*Annotations*:—*Consd.* Ford v. Harrow U. D. C. (1903), 88 L. T. 394. *Distd.* Harvey v. Truro R. C. (1903) 2 Ch. 638. *Offin v. Rochford R. C.* (1906) 1 Ch. 342. *Refd.* Chippendale v. Pontefract R. D. C. (1907), 71 J. P. 231; Coats v. Herefordshire County Council, [1909] 2 Ch. 579; A.-G. v. Lindsey-Hogg (1912), 76 J. P. 450.

467. — **Regularity of fences.**—BELMORE (COUNTRESS) v. KENT COUNTY COUNCIL, No. 466, *ante*.

468. — **Fence not put up with reference to highway.**—A strip of open waste land lay between the metalled part of a public highway & the adjoining lateral fence to the east of the highway. Pltfs. claimed this strip as part of the highway:—*Held*: the fence was not put up in reference to the highway, but was an original boundary of a close of land through which the highway had been made & the presumption that the lateral fence of a highway is its boundary was therefore rebutted; & the acts of user proved did not amount to a dedication to the public, & pltfs.' claim failed.—A. G. & CROYDON RURAL DISTRICT COUNCIL v. MOORSOM-ROBERTS (1908), 72 J. P. 123; 6 L. G. R. 470.

469. **Application of rule—Whether to public footpath through private occupation road—Depends on circumstances of each case.**—Where a public footpath passes through a lane of irregular shape containing a private occupation road & of a varying breadth between the fences, there is no presumption, as there is in the case of an ordinary public highway bounded by fences, that the public right extends to the whole space between the fences. The question how far in such cases the public right extends depends upon the evidence in each particular case, & the mere fact that the public in passing through the lane have been accustomed, without exception, to walk upon the greensward or strips of grass land between the fences, does not show that any such presumption exists, or that the public right extends to the fences.—FORD v. HARROW URBAN DISTRICT COUNCIL (1903), 88 L. T. 394; 67 J. P. 248; 1 L. G. R. 256.

470. — **Fence along one side only.**—A road across the edge of a waste of a manor was separated on one side by a fence from the adjoining land, & on the other side was open to the waste. Between the metalled road & the fence there was a narrow strip of grass land:—*Held*: there was a presumption that the lord of the manor had dedicated the land up to the fence as part of the highway.—EVELYN v. MIRRIELES (1900), 17 T. L. R. 152, C. A.

#### SUB-SECT. 3.—WHERE THERE IS A DITCH.

471. **Whether ditch part of highway.**—A ditch by the side of a highway or roadside waste is not necessarily part of the highway or waste. It may belong to & be the private property of the adjoining owner & he may lawfully enclose it.—CHIPPENDALE v. PONTEFRAC T RURAL DISTRICT COUNCIL (1907), 71 J. P. 231.

472. — **Where property adjoins a highway, & is separated from the roadway by a fence, & a ditch on the highway side of the fence, the presumption is that the ditch is not part of the highway, but it is not impossible in point of law that the ditch should be part of the highway even though it may from its nature be incapable of being used as part of the road for purposes of passage. In a case of the kind where a county ct. judge had held that the ditch did form part of the highway:—*Held*: on the facts, there was evidence on which he could come to that conclusion.—CHORLEY CORPN. v. NIGHTINGALE, [1907] 2 K. B. 637; 76 L. J. K. B. 1003; 97 L. T.**

465; 71 J. P. 441; 23 T. L. R. 651; 51 Sol. Jo. 625; 5 L. G. R. 1114, C. A.

*Annotation*:—*Ditch*. Chippendale v. Pontefract R. D. C. (1907), 71 J. P. 231.

473. — **Highway recently laid out—Specified width apart from ditch.**—Where a highway of specified width has been recently laid out there is no presumption that an adjoining ditch & hedge form part of the highway, if the highway is of the specified width without the ditch or hedge.—SIMCOX v. YARDLEY RURAL DISTRICT COUNCIL (1905), 69 J. P. 66; 3 L. G. R. 1350.

*Annotation*:—*Refd*. Collis v. Amphlett, [1918] 1 Ch. 232.

474. — **Ditch filled in with owner's consent for public safety—User by public as footway.**—WALMSLEY v. FEATHERSTONE URBAN DISTRICT COUNCIL, No. 430, *ante*.

#### SUB-SECT. 4.—HIGHWAYS SET OUT UNDER LOCAL STATUTES.

475. **General rule—Right to whole width set out.**—R. v. WRIGHT, No. 186, *ante*.

476. — **—**—In 1811, a public road was set out across L. common by the R. Inclosure Comrs. of a width of fifty feet, & allotments, of the land on either side of the road, were at the same time made. About twenty-five feet only of the fifty feet allotted by the comrs. had been used as the actual road; the sides which were left uninclosed having become covered with furze & heath, & fir trees had been allowed during the last twenty-five years to come up through the furze. In 1808, the Highway Board commenced cutting down, & advertised a sale of some of these fir trees growing within the fifty feet allotted by the comrs. in 1811 for the public highway. On bill by the owner of the adjoining land to restrain such cutting: *Held*: the right of the public was to have the whole width of the road, & not merely that part which had been used as the *via trita*, preserved free from obstructions; & such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years.

*Semble*: the Highway Board were only entitled to remove the trees which were an obstruction to the road, & not as against the owner of the soil to sell the timber of the trees when cut.—TURNER v. RINGWOOD HIGHWAY BOARD (1870), L. R. 9 Eq. 418; 21 L. T. 745; 18 W. R. 424.

*Annotations*:—*Apd*. Cubitt v. Maxse (1873), L. R. 8 C. P. 704; Nicol v. Beaumont (1883), 53 L. J. Ch. 853. *Refd*. Bagshaw v. Buxton L. B. of Health (1875), 34 L. T. 112; Harrison v. Rutland, [1893] 1 Q. B. 112; Harris v. Northamptonshire County Council (1897), 61 J. P. 569; Harvey v. Truro R. D. C. (1903), 89 L. T. 90.

477. **Application of rule—Public footway used also as private carriage way.**—A public bridle road & footway, fifteen feet wide, had been set out by an award which provided that the same should also be used as a private carriage & drift way by the owners of certain adjoining allotments. Pltfs., owners of these allotments, placed a bar across eleven & a half feet of the width of the way in order to preserve their exclusive right to the use of the way as a carriage & drift way, & brought an action for injunction against the surveyor of highways who had removed the barrier for the purpose of repairing the way:—*Held*: the public had the right to the use of the whole length & breadth of the way as

#### PART IV. SECT. 2, SUB-SECT. 4.

k. *Width greater than allowed by law—Evidence admissible to prove excess*—13 *Vict. c. 4.*—DOWNING v. GAULT (1853), 2 All. 569.—CAN.

*Sect. 2.—Extent of space subject to public right of passage: Sub-sect. 4. Sect. 3. Part V. Sect. 1: Sub-sect. 1 & 2.]*

a bridle road & footway. Action dismissed.—*PULLIN v. DEFFEL* (1891), 64 L. T. 134.

**478. — Width delineated on plan—Public entitled to width shown.**—A local Act, after reciting that certain roads were “intended to be made in the courses & directions as shown” on a certain plan, enacted that the said roads should be made & constructed “as shown or laid down on the said plan.” The width of the roads was delineated on the plan, but in the Act nothing was said regarding the width:—*Held*: the roads must be made of the width as shown on the plan; & also an indictment would lie in respect of their being made of a less width when such width was tendered as sufficient, although the time for completion of the roads under the Act had not expired.

*R. v. LIVERPOOL CORPN.* (1857), 29 L. T. O. S. 75; 5 W. R. 503; 21 J. P. Jo. 275.

**479. Roads of less width than width allotted Duty of commissioners to widen.**—Where, by a

local Act, inclosure comrs. are to set out, ascertain, & appoint public highways in the parish, in, over, & through lands & old inclosures, of the breadth they should think necessary, so that all such roads should be of the width of 60 feet at least:—*Held*: this clause imposed upon the comrs. the duty of setting out, to the width of 60 feet, all ancient highways existing at the time of the Act, & which might then be of less width than 60 feet.—*R. v. PEGG* (1856), 4 W. R. 256; 20 J. P. Jo. 99.  
*Annotation*:—*Mentd.* *R. v. Johnson* (1860), 29 L. J. M. C. 133.

**480. Limitation of right—Whether by non-user—Trees allowed to grow.**—*TURNER v. RINGWOOD HIGHWAY BOARD*, No. 478, *ante*.

Roads set out under Inclosure Acts generally, See COMMONS, Vol. XI., pp. 78 *et seq.*

### SECT. 3. —STATUTORY PROVISIONS AS TO WIDTH OF VIA TRITA.

**Power of highway authority to widen road.**—See Part VIII., Sect. 1, sub-sect. 2.

## Part V.—Rights in Connection with Highways.

### SECT. 1. RIGHTS OF PUBLIC.

#### SUB-SECT. 1.—IN GENERAL.

**481. Right to walk in carriage-way.**—A foot-passenger, though he may be infirm from disease, has a right to walk in the carriage-way, & is entitled to the exercise of reasonable care on the part of persons driving carriages along it.—*BOSS v. LITTON* (1832), 5 C. & P. 407, N. P.

#### SUB-SECT. 2. RIGHT OF PASSAGE.

**482. General rule.**—In the King's highway, the King has only the right of passage for him & his people, but the freehold & all the profits such as trees are in the lord of the soil (*per C.R.*).—*ANON.* (1108), Y. B. 8 Edw. 1, fo. 9, pl. 7.

**483. —**—*ANON.* (undated), No. 1, *ante*.

**484. —**—With regard to a public highway . . . all His Majesty's subjects have a right to use that way for all purposes, & at all times (*WILSON, J.*).—*ROUSE v. BARDIN* (1790), 1 Hy. Bl. 351; 126 E. R. 206.

*Annotation*:—*Mentd.* *Simpson v. Lewthwaite* (1832), 3 B. & Ad. 226.

**485. —**—*ANON.*—A man having a right of way over my field cannot say that I shall not have the power to put swing gates across his path so as to inconvenience him in walking along it. I cannot put gates to shut up the path in such a way as would interfere with his exercising his right, but if I do not interfere with that, it cannot be said that I shall not put up gates (*LORD HATHERLEY*).—*ORR EWING v. COLQUHOUN* (1877), 2 App. Cas. 839, 11 L.

*Annotations*:—*Reid.* *Smith v. Andrews*, [1891] 2 Ch. 678.  
*Mentd.* *Sutherland v. Ross* (1878), 3 App. Cas. 736;  
*Kensil v. G. E. Ry.* (1883), 23 Ch. D. 366; *Ormerod v.*

*Todmorden Mill Co.* (1883), 11 Q. B. D. 155; *Bourke v. Davis* (1889), 41 Ch. D. 110; *Ambler v. Bradford Corpn.* (1902), 87 L. T. 217; *Gerrard v. Crowe*, [1921] 1 A. C. 395.

**486. Whether an easement.**—A plea in bar of an advowry for taking cattle damage-feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defect of fences, must show that they were passing on the highway when they escaped; it is not sufficient to state that being in the highway they escaped.

The law is . . . that if cattle of one man escape into the land of another, it is no excuse that the fences were out of repair, if they were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way; for the property is in the owner of the soil, subject to an easement for the benefit of the public (*HEATH, J.*).—*DOVASTON v. PAYNE* (1795), 2 Hy. Bl. 527; 126 E. R. 681.

*Annotations*:—*Expld.* *Rangeley v. Mid. Ry.* (1868), 3 Ch. App. 306. *Consd.* *St. Mary, Newington v. Jacobs* (1871), 11 L. T. Q. B. 457; *Hawkins v. Rutter*, [1892] 1 Q. B. 668; *Hickman v. Maisey*, [1900] 1 Q. B. 752. *Reid.* *Fawcett v. York & North Midland Ry.* (1851), 16 Q. B. 610; *Dawes v. Hawkins* (1860), 8 C. B. N. S. 818; *R. v. Rathmines & Rathgar Improvement Comrs.* (1864), 11 L. T. 281; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26; *Arnold v. Holbrook* (1873), 12 L. J. Q. B. 80; *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704; *Harrison v. Rutland*, [1893] 1 Q. B. 142. *Mentd.* *Ricketts v. East & West India Docks & Birmingham Junction Ry.* (1852), 12 C. B. 160; *M. S. & L. Ry. v. Wallis* (1851), 14 C. B. 213; *R. v. Pratt* (1855), 4 E. & B. 860; *Dickinson v. L. & N. W. Ry.* (1866), Har. & Ruth. 399; *Haigh & Baxter v. West* (1893), 68 L. T. 531.

**487. —**—It is true that in the well-known case of *Dovaston v. Payne*, No. 486, *ante*, *HEATH, J.*, is reported to have said with regard to a public highway that the freehold continued in the owner of the adjoining land subject to an easement in

#### PART IV. SECT. 3.

*1. Statutory width four roads Act of Assembly.*—*PERLEY v. DIBBLEK* (1842), 1 Kerr, 514.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 1.

*m. Right to use highways in lawful manner.*—Every member of the public

has a right to use the public highway in a lawful manner & it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege.—*BABLINGAITA PARAPPA v. DHANMAPIA BASAPPA* (1910), 1 L. R. 34 Bom. 571.—*IND.*

#### PART V. SECT. 1, SUB-SECT. 2.

*n. What right includes.*—*Whether confined to strict right of passage.*—*Moving buildings.*—While the moving of a building along a highway may be a lawful use of that highway it does not necessarily follow that the moving of a building comes within the words

favour of the public, & that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing & repassing, the public generally taking upon themselves, through the parochial authorities or otherwise, the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement (LORD CAIRNS, L.J.).—*RANGELEY v. MIDLAND RY. CO.* (1868), 3 Ch. App. 306; 37 L. J. Ch. 313; 18 L. T. 69; 16 W. R. 547, L. J.J.

*Annotations:—**Consd.* A. G. v. Copeland, [1901] 2 K. B. 101. *Refd.* Simpson v. Godmanchester Corpn. (1895), 64 L. J. Ch. 837; Schweder v. Worthing Gas Light & Coke Co. (No. 2), [1913] 1 Ch. 118. *Mentd.* Beauchamp v. G. W. Ry. (1868), 3 Ch. App. 745; Dowling v. Pontypool, Caerleon, & Newport Rys. (1871), L. R. 18 Eq. 711; Pugh v. Golden Valley Rys. (1879), 41 L. T. 30; Loosemore v. Tiverton & North Devon Rys. (1882), 22 Ch. D. 25; Wilkinson v. Hull, Barnsley & West Riding Junction Rys. & Dock Co. (1882), 46 L. T. 455; Maiche v. Callander & Oban Rys., [1898] A. C. 270.

Nature of Easements generally, *See* EASEMENTS, Vol. XIX., pp. 7 *et seq.*

**488.** What right includes—Whether confined to strict right of passage.]—*FRITZ v. HOBSON*, No. 664, *post*.

**489.** ———.]—*R. v. CUNNINGHAME GRAHAM & BURNS*, No. 499, *post*.

**490.** ———.]—*CHAPLIN (W. H.) & CO., LTD. v. WESTMINSTER CORPN.*, No 649, *post*.

*Compare* Sect. 2, sub-sect. 2, *post*.

**491.** ———.]—Pltf. lingered on a highway which passed over deft.'s grouse moor for the sole & express purpose of interfering with deft.'s right of shooting over the moor:—*Held:* pltf. being upon the highway for purposes other than its use as a highway, was a trespasser, & the ct. should make a declaration to that effect. —*HARRISON v. RUTLAND (DUKE)*, [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; 68 L. T. 35; 57 J. P. 278; 41 W. R. 322; 9 T. L. R. 115; 4 R. 155, C. A.

*Annotations:—**Consd.* Luscombe v. G. W. Ry., [1899] 2 Q. B. 313. *Appld.* Hickman v. Maisey, [1900] 1 Q. B. 752. *Consd.* London City Land Tax Commrs. v. C. L. Rys., [1913] A. C. 361. *Refd.* Allen v. Flood, [1898] A. C. 1; Fitzhardinge v. Purcell, [1908] 2 Ch. 139.

**492.** ———.]—Pltf. was possessed of land which was crossed by a highway. A trainer of race-horses had agreed with pltf. for the use of some of his land for the training & trial of race-horses. A view of the land so used was obtainable from the highway on pltf.'s land. Deft was one of the proprietors of a publication which gave accounts of the doings of race-horses in training. On the occasion in respect of which the action was brought, deft. walked backwards & forwards on a portion of the highway on pltf.'s land, about fifteen yards in length, for a period of about an hour & a half, watching & taking notes of the trials of the race-horses on pltf.'s land. Pltf. having brought an action of trespass against him in respect of his user of the highway as aforesaid, & the jury having found for pltf.:—*Held:* deft.'s acts had

exceeded the ordinary & reasonable user of a highway as such to which the public are entitled, he therefore was guilty of a trespass on pltf.'s land.

The right of the public to pass & repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous & highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage (COLLINS, L.J.).—*HICKMAN v. MAISEY*, [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; 82 L. T. 321; 48 W. R. 385; 44 Sol. Jo. 326; *sub nom.* *HICKMAN v. MAISEY*, *HICKMAN v. MATTHEWS*, 10 T. L. R. 271, C. A.

*Annotation:—**Refd.* Fitzhardinge v. Purcell, [1908] 2 Ch. 139.

**493.** ——— “Being in.”]—*DOVASTON v. PAYNE*, No 480, *ante*.

**494.** ——— In search of game.]—P. was in the day time on a public road carrying a gun & accompanied by a dog. The land on both sides of the road was the property of B., who was also lord of the manor; & on one side of the road was a cover in the actual occupation of B. P. waved his hand to the dog, which entered the cover; a pheasant flew out across the road; & P. being on the road, fired at it, & missed it:—*Held:* the road was land in the occupation of B., subject to the right of way in the public; & there was evidence that P. was not on the road in exercise of the right of way, but for another purpose, namely, in search of game, & so was a trespasser. —*R. v. PRATT* (1855), 4 E. & B. 860; Dears. C. C. 502; 3 C. L. R. 686; 24 L. J. M. C. 113; 25 L. T. O. S. 65; 19 J. P. 578; 1 Jur. N. S. 681; 3 W. R. 372; 119 E. R. 319, C. C. R.

*Annotations:—**Expld.* Morden v. Porter (1860), 7 C. B. N. S. 641; Brown v. Turner (1862), 13 C. B. N. S. 485; Mayhew v. Wardley (1863), 14 C. B. N. S. 550. *Consd.* St. Mary, Newington v. Jacobs (1871), L. R. 7 Q. B. 47. *Expld.* Harrison v. Rutland, [1893] 1 Q. B. 142. *Consd.* Pratt v. Martin, [1911] 2 K. B. 50. *Refd.* Morant v. Chamberlain (1861), 30 L. J. Ex. 299; Read v. Edwards (1864), 17 C. B. N. S. 245; Kenson v. Hart (1865), 6 B. & S. 249; Allen v. Flood, [1898] A. C. 1; Hickman v. Maisey, [1900] 1 Q. B. 752. *Mentd.* Ibbotson v. Peat (1865), 12 L. T. 313.

**495.** ———.]—Where applt. & another man were seen standing on a highway & looking through a hole in the hedge, no one else being near, & a gun was heard to be fired, & a dead partridge recently killed was found in the adjoining field within eighteen yards of the fence:—*Held:* the magistrates were right in convicting him for unlawfully committing a trespass on the highway in pursuit of game. —*MAYHEW v. WARDLEY* (1863), 14 C. B. N. S. 550; 2 New Rep. 325; 8 L. T. 504; 143 E. R. 561.

*Annotations:—**Refd.* R. v. Littlechild, R. v. Heslop (1871), L. R. 6 Q. B. 293; Pratt v. Martin (1911), 27 T. L. R. 877.

**496.** ——— To witness horse-racing.]—To a declaration in trespass for breaking & entering certain lands of pltf., deft. pleaded that at the time of the alleged trespasses there was a common & public highway over & along the said land for all persons to go & return at such times of the year as horse-races were holden on the said land at their free will & pleasure for the purpose of witnessing the said races, & that the alleged trespasses were a use by deft. of the said highway for the purposes

“the exercise of the public right of travel,” in Public Utilities Act, s. 31.—*WINNIEG ELECTRIC RY. CO. v. DELISLE*, [1921] 3 W. W. R. 815; 31 Man. L. R. 355.—*CAN.*

*o.* ——— *Processions generally.*]—*VELAN PAKKIRI TARAGAN v. SUB-*

*BIYAN SAMBAN* (1919), 1 L. R. 42 Mad. 271.—*IND.*

*p.* ——— *Religious processions.*]—The right to conduct religious processions through the public streets is a right inherent in every person, provided he does not thereby

invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, & subject to directions or prohibitions for the prevention of obstructions to thoroughfares or breaches of the peace. —

*Sect. 1.—Rights of public: Sub-sects. 2 & 3. Sect. 2: Sub-sect. 1, A.]*

*aforesaid, deft. by other pleas alleged a common right for all persons to go & remain for a reasonable time for the purpose of witnessing the said horse-races:—Held: the pleas were bad.—COVENTRY (KARL) v. WILLES (1803), 3 New Rep. 119; 9 L. T. 384; 28 J. P. 453; 12 W. R. 127.*

*Annotations:—Refd. Bourke v. Davis (1889), 44 Ch. D. 110; Edwards v. Jenkins, [1896] 1 Ch. 308.*

*Compare No. 492, ante.*

*497. — Interfering with right of shooting.—HARRISON v. RUTLAND (DUKE), No. 491, ante.*

*498. — Racing.—A right of highway does not include a right to race; & a person who had been party to a "hurdle race" :—Held: jointly liable for the putting the hurdles on the ground, although he did not take part in that particular act.—SOWERBY v. WADSWORTH (1863), 3 F. & F. 734, N. P.; subsequent proceedings, 2 H. & C. 701.*

*499. — Public meeting.]—The law recognises no right of public meeting in any public thoroughfare, a public thoroughfare being dedicated to the public for no other purpose than that of providing a means for the public of passing & repassing along it. A place of public resort is analogous to a public thoroughfare, & although the public may often have held meetings in a place of public resort, without interruption by those who have the control of such place, yet the public have no right to hold meetings there for the purpose of discussing any question, whether social, political, or religious. R. v. CUNNINGHAME (GRAHAM & BURNS (1888), 4 T. L. R. 212; 16 Cox, C. C. 420.*

*Annotations:—Refd. Burden v. Rugler (1910), 27 T. L. R. 110. Mentd. R. v. Lewis (1888), 21 Q. B. D. 191; Field v. Metropolitan Police Receiver, [1907] 2 K. B. 853.*

*500. — — — — —.]—Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence the High Ct. has no jurisdiction to review his decision. *Semble:* there is no right on part of public to occupy Trafalgar Square for holding public meetings, but the Comrs. of Works & Public Buildings in whose care the control & management of squares is vested have power to prohibit the holding of such meetings there.*

*The only "dedication" in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a "right for all her Majesty's subjects at all seasons of the year freely & at their will to pass & repass without let or hindrance."*

*A claim on the part of persons so minded to assemble in any numbers, & for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, & there is, so far as we have been able to ascertain, no authority whatever in favour of it. It was urged that the right of public meeting, & the right of occupying any unoccupied land or highway that might seem appropriate to those of her Majesty's subjects who wish to meet there, were, if not synonymous, at least correlative. We fail to appreciate the argument, nor are we at all impressed with the serious consequences which*

*it was said would follow from a contrary view. There has been no difficulty experienced in the past, & we anticipate none in the future, when the only & legitimate object is public discussion, & no ulterior & injurious results are likely to happen. Things are done every day, in every part of the kingdom, without let or hindrance, which there is not & cannot be a legal right to do, & not infrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right (WILLS, J.).—Exp. LEWIS (1888), 21 Q. B. D. 191; 57 L. J. M. C. 108; 59 L. T. 338; 52 J. P. 773; 37 W. R. 13; 4 T. L. R. 649; 16 Cox, C. C. 449, D. C. *Annotations:—Refd. Burden v. Rugler (1910), 27 T. L. R. 140. Mentd. R. v. Bridge (1889), 5 T. L. R. 687; R. v. Byrde & Pontypool Gas Co., Exp. Williams (1890), 60 L. J. M. C. 17; R. v. Kennedy (1902), 86 L. T. 753.**

*501. — — — — —.]—SHIREBROOK COLLIERY CO., LTD. v. BURKE (1898), 42 Sol. Jo. 764.*

*502. — — — — —.]—Whether meeting necessarily illegal.—Exp. LEWIS, No. 500, ante.*

*503. — — — — —.]—The fact that a public meeting is held upon a highway does not necessarily make the meeting unlawful. Whether it is unlawful or not depends upon the circumstances in which it is held, e.g., whether or not an obstruction is caused.—BURDEN v. RUGLER, [1911] 1 K. B. 337; 89 L. J. K. B. 100; 103 L. T. 758; 75 J. P. 36; 27 T. L. R. 140; 9 L. G. R. 71, D. C.*

*Public meeting on roadway not dedicated, see TRESPASS.*

*504. — Passing & repassing—On small portion of highway—Watching racehorse trials.—HICKMAN v. MAISEY, No. 492, ante.*

*Compare No. 496, ante.*

*505. — Catching moths.]—An injunction to restrain defts. from trespassing on a public highway by using it for the purpose of catching moths by means of lamps & other appliances, & from trespassing on the adjoining land, refused, the trespasses being merely technical & defts. never threatening or intending to infringe any rights of property & desisting from doing so when requested.—FIELDEN v. COX (1906), 22 T. L. R. 411; 70 J. P. Jo. 161.*

*506. Alternative route provided—Public way ploughed up.]—HORN v. WIDLAKE (1908), 1 Brownl. 212; Noy, 128; Yelv. 141; 123 E. R. 761.*

*Annotations:—Distd. Reynolds v. Edwards (1741), Wills, 282. Apled. Deacon v. S. E. Ry (1889), 61 L. T. 377.*

#### SUB-SECT. 3.—RIGHT TO DEVIATE.

*507. Way impassable—Neglect of duty to repair.]—If a man do inclose, where he may by law, he is bound to leave a good way, & also to keep it in continual repair at his own charge, & the country ought not to be contributory thereto.—HFN'S CASE (1633), W. Jo. 296; 82 E. R. 157. *Annotation:—Refd. Arnold v. Holbrook (1873), L. R. 8 Q. B. 96.**

*508. — Obstruction caused by action of elements—Overflow of river.]—YOUNG v. — (1898), 1 Ld. Raym. 725; 91 E. R. 1384. *Annotations:—Distd. Ball v. Herbert (1789), 3 Term Rep. 253. Refd. Blundell v. Catterall (1821), 5 B. & Ald. 268; Arnold v. Holbrook (1873), L. R. 8 Q. B. 96.**

[1914] S. C. 633.—SCOT.

#### PART V. SECT. 1, SUB-SECT. 3.

*507.1. Way impassable—Neglect of duty to repair.]—CARRICK v. JOHNSTON (1866), 26 U. C. R. 65.—CAN.*

*508.1. — Obstruction caused by action of elements—Overflow of river.]—Where a road which runs along the*

*SADAGOPA CHARIAR v. RAMA RAO (1909), 1 L. R. 26 Mad. 376.—IND.*

*9. — — — — —.]—SADAGOPA CHARIAR v. KRISHNAMOOTHI RAO (1907), 23 T. L. R. 403.—IND.*

*10. — — — — —.]—MANNADA MUDALI v. NALLAYA (GOUNDEK) (1909), 1 L. R. 32 Mad. 527.—IND.*

*11. — — — — —.]—KANDASAMI MUDALI v. SUBROYA MUDALI (1909), 1 L. R. 32 Mad. 478.—IND.*

*12. — — — — —.]—Use of portion of highway as access to private land.]—The right of the public to use a public right of way is not confined to end-to-end user, but may be exercised over any portion of it.—M'ROBERT v. REID,*



**509.** ———.]—If there is a public way over a man's field & he puts an obstruction upon it, it is different to the case of a private way. If there is a public way over a man's field & he puts an obstruction upon it, then the public, besides being entitled to indict him & take down the obstruction, if they cannot pass without doing so, are entitled to go round a reasonable distance into his field by the side of the way & use that as a temporary way until he removes the obstruction. But if the obstruction is caused by the action of the elements, then no such right accrues to the public; they are obliged to remain without the way across that place until they repair it for themselves (WILLES, J.).—*R. v. OLDREEVE* (1808), 32 J. P. Jo. 271.

**510.** ——— **Obstruction by owner of adjacent soil.**—If a highway be foundrous, a passenger may go over the next adjoining land.

Deft. pleaded that there was a highway, that pltf. stopped the same so that he could not pass & therefore he went over pltf.'s close, doing as little harm as possible. On demurrer:—*Held*: the plea was good.—*ABSOR v. FRENCH* (1678), 2 Show. 28; 89 E. R. 772.

*Annotations*:—*Distd.* *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 96. *Refd.* *Dawes v. Hawkins* (1860), 5 C. B. N. S. 818.

**511.** ———.]—*DAWES v. HAWKINS*, No. 270, *ante*.

**512.** ———.]—*R. v. OLDREEVE*, No. 509, *ante*.

**513.** ———.]—(1) The presumption is, that the waste land which adjoins to a road, belongs to the owner of the adjoining freehold, & not to the lord of the manor.

(2) In ancient times . . . the public where the road was out of repair might pass along the land by the side of the road. If the owner inclosed on one side only, the other being left open, he was bound to repair to the middle of the road (*ABBOTT, C.J.*).—*STERL v. PRICKETT* (1819), 2 Stark. 463, N. P.

*Annotations*:—*As to* (1) *Refd.* *Doe d. Molesworth v. Sleoman* (1846), 1 New Pract. Cas. 434; *Slumpson v. Dendy* (1860), 6 Jur. N. S. 1197. *As to* (2) *Refd.* *R. v. Brightside Bierlow, R. v. Althercliffe, R. v. Tinsley* (1849), 13 Q. B. 933; *Harvey v. Truro R. Co.*, (1903) 2 Ch. 638. *Generally, Mentd.* *Rushworth v. Craven* (1825), McCle. & Yo. 417; *R. v. United Kingdom Electric Telegraph Co.* (1862), 6 L. T. 378; *Harrison v. Powell* (1894), 10 T. L. R. 271.

**514.** ——— **Unenclosed road.**—*EYRE v. NEW FOREST HIGHWAY BOARD*, No. 5, *ante*.

**515. Limited dedication.—No right presumed apart from prescription.**—The public had a right to use a footpath across the field of A., but subject to the right of A. to plough it up when he ploughed the rest of the field. He did so plough it up, & having done so, did not set out or mark the line of the path, but left the public to tread it out. The public continued to walk across the field in the direction in which the path had been, but soon finding the path in a muddy & bad condition, turned out of it, & walked on either side thereof. To prevent them from doing so, A. placed hurdles on the parts upon which the public so walked, leaving a space of about six feet in width where the path had been. Resp. having thrown down the hurdles, an action was brought against him by A.:—*Held*: resp. could not claim a right to go off the line of the footpath or a right to pull down the hurdles.

bank of a river is washed, the public are entitled to a road over a corresponding portion of the adjoining land.

—*PRIET NGACHURU v. MERCER ROAD BOARD* (1887), 6 N. Z. L. R. 18.—N. Z.

a. ——— *By accident—Or intentional*

*obstruction.*—The public may diverge from a road, if it be rendered impassable, whether by accident or the intentional obstruction of the  
—*LAWSON v. WESTON* (1850), 1  
666.—*AUS.*

The right to deviate may be annexed by prescriptive enjoyment to a highway; but it cannot be presumed to exist as an incident to a limited dedication (*COCKBURN, C.J.*).—*ARNOLD v. HOLBROOK* (1873), L. R. 8 Q. B. 96; 42 L. J. Q. B. 80; 28 L. T. 23; 37 J. P. 229; 21 W. R. 330.

## SECT. 2.—RIGHTS OF OWNER OF SOIL.

### SUB-SECT. 1.—PRESUMPTION AS TO AND EVIDENCE OF OWNERSHIP OF SOIL OF HIGHWAYS.

#### A. General Presumption.

**516. General rule.—In owner of adjacent land.**—*ANON.* (undated), No. 1, *ante*.

**517.** ———.]—As to the presumption, I think the principle of the more modern authorities is rightly taken, that the presumption is in favour of the lord of the manor, even though the highway may be more ancient than the grant of the manor. If no body can say they have any argument or proof of property in them, then it belonged to the Crown, & passed with the rest of the lands. But if the roads passed through the property of others, & are so ancient that no body can say when they were made, or speak to property, the only question is, where is the first presumption upon that naked, strict, abstracted case. I think the reason of the thing is, when the naked presumption stands stripped of evidence, that it is in the owner of the land on each side. But this is only such a presumption as is not like a title. Acts of ownership against a title once clearly established, would not have been set up, so as to avail against the title. For the sake of certainty, & it does not matter here how it is determined, if there be a certainty, the presumption is in favour of the owners on each side (*LOUI MANSFIELD*).—*ANON.* (1773), 1001, 358; 98 E. R. 602.

**518.** ———.]—The G. N. Ry. Co., in 1848, purchased of pltf. certain freehold land adjoining a turnpike road to be used partly for the site of their railway & works, & partly for the purpose of diverting a portion of an existing road. Having made a substituted road, the co., with the knowledge of pltf., & of the trustees, inclosed & took possession of the portion of the old road which had ceased by the diversion to form part of the turnpike road. The soil of the road was not noticed in the conveyance, all the parties being under the impression that it was vested in the trustees. By several acts regulating the turnpike road, the trustees had power from time to time to purchase land for the widening of the road; but there was no evidence that the freehold of the diverted portion of the road had ever been acquired by them:—*Held*: the presumption that the soil of the road was in pltf. as owner of the adjoining land, was not rebutted by the local turnpike Acts, so as to cast upon pltf. the onus of showing that the soil of the road had not been purchased by the trustees.

The soil of the old road did not pass by the conveyance to the co.; & there was nothing in the General Turnpike Act, 1822 (c. 126), or in the Railways Clauses Consolidation Act, 1845 (c. 20), to place the co. in the position of trustees of the substituted road, so as to transfer to them the soil of the old road.

## PART V. SECT. 2, SUB-SECT. 1. A.

**5161. General rule In owners of adjacent land.**—*NIHAL CHAND v. AZMI ALI KHAN* (1885), L. L. R. 7 All. 362.—*IND.*



**Sect. 2.—Rights of owner of soil: Sub-sect. 1, A. & B.]**

In the ordinary case, where a man who is the owner of two pieces of land conveys them to a purchaser, if a turnpike road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, & although the particular measurement of each piece is given, & would exclude the road. The argument on the part of *pltf.* is, that there are particular circumstances in this case which require a different decision, & show that the road in question did not pass. I consider it to be perfectly clear that the road did not pass by the conveyance. Before the conveyance it is manifest that the co. themselves thought that the soil of the road was in the trustees, & not in *pltf.* The plans & book of reference required by the standing orders in Parliament, & set out in the special case, are evidently framed upon that footing; & it seems to me that the conveyance exactly carries out that view of the case. It mentions two pieces of land numbered respectively 75 & 79, & describes their exact contents, & makes no mention whatever of No. 47, either in the conveyance itself, or in the schedule or plan, which by reference are imported into it. Taking the whole together, therefore, it seems to me to be perfectly clear that the three pieces of land thus numbered & described are treated as distinct, & that the effect of the conveyance is to pass two of them only to the co. (WILLIAMS, J.).—**SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO.** (1858), 5 C. B. N. S. 174; 28 L. J. C. P. 40; 32 L. T. O. S. 175; 23 J. P. 22; 5 Jur. N. S. 70; 7 W. R. 75; 11 E. R. 69.

**Annotations:—***Conad.* Berridge v. Ward (1861), 10 C. B. N. S. 100. *Reid.* R. v. Wycombe Ry. (1867), L. R. 2 Q. B. 310; Plumstead Board of Works v. British Land Co. (1871), L. R. 10 Q. B. 16; R. v. Platts (1880), 28 W. R. 915; Landrock v. Met. Dist. Ry. (1886), 3 T. L. R. 162; Micklethwait v. Newlay Bridge Co. (1886), 33 Ch. D. 133; Pryor v. Petre, [1891] 2 Ch. 11; Melksham U. D. C. v. Gay (1902), 18 T. L. R. 358. *Mentd.* Jolly v. Wimbledon & Dorking Ry. (1861), 1 B. & S. 507; Tidswell v. Whitworth (1867), L. R. 2 C. P. 326; Devonshire v. Pattinson (1887), 20 Q. B. D. 263.

**519. — — — — — SALT UNION, LTD. v. HARVEY (J. P.) & Co., No. 595, post.**

**520. — — — — — Coupled with acts of ownership.]**  
— An Oxford college had, so far as living memory extended, maintained a hinged post in the centre of a lane, & owned the land on both sides of the lane. The college desired to erect a bridge across the lane, & the corpn. of Oxford demanded a nominal rent of £5 *per annum* as an acknowledgment that the soil belonged to the corpn.:—*Held*: the soil of the lane was vested in the college, subject only to a foot & horseway. **UNIVERSITY COLLEGE v. OXFORD CORPN.** (1901), 68 J. P. 470; 20 T. L. R. 637.

**521. — — — — — Medium filum rule.]—STEVENS v. WHISTLER, No. 610, post.**

**522. — — — — —**—Though the right of the soil in a public highway belongs to the owner of the adjoining closes, when no other proprietor appears, *usque ad filum viæ*: this is only a presumption of law in his favour, when the original dedication of the road cannot be shown by positive evidence, & if there are circumstances in the case which bring this presumption of property in

question, *pltf.*, who claims such road in an action of trespass, must give some other evidence of property beyond the mere presumption of law.—**HEADLAM v. HEDLEY** (1816), Holt, N. P. 463, N. P. *Annotation:—**Reid.* Simpson v. Dendy (1860), 6 Jur. N. S. 1197.

**523. — — — — —**—Ownership of land adjoining either side of a road, is *prima facie* evidence of a right to the soil extending to the centre of the road. A recent right founded on an inclosure under an Act of Parliament, does not make a distinction with regard to the general law.—**COOKE v. GREEN** (1823), 11 Price, 736; 147 E. R. 621.

**524. — — — — —**—**DOE d. PRING v. PEARSEY, No. 566, post.**

**525. — — — — —**—**NOYE v. REED, No. 549, post.**

**526. — — — — —**—A. was possessed of a close, the only way to which was along a green lane between two other closes, one of which belonged to A. & the other to B. In the absence of any direct evidence of ownership, the jury were told that they might presume the soil of the lane to belong in moieties to the owners of the adjoining closes, & that, in respect of the close at the end of the land, A. had a mere easement:—*Held*: a proper direction.—**SMITH v. HOWDEN** (1863), 14 C. B. N. S. 398; 2 New Rep. 30; 143 E. R. 500.

**527. — — — — —**—**BECKETT v. LEEDS CORPN., No. 555, post.**

**528. When presumption arises—Not until highway dedicated.]—LEIGH v. JACK, No. 552, post.**

**529. Whether presumption rebuttable—By acts of ownership.]—ANON. (1773), No. 517, ante.**

**530. — — — — —**—**BECKETT v. LEEDS CORPN., No. 555, post.**

**531. — — — — —**—**HEADLAM v. HEDLEY, No. 522, ante.**

**532. Application of rule—Tenure of adjoining land immaterial.]—DOE d. PRING v. PEARSEY, No. 566, post.**

**533. — — — — — To private road.]—**The presumption that the soil of a road *usque ad medium filum viæ* belongs to the owners of the adjoining lands, applies equally to a private as to a public road.—**HOLMES v. BELLINGHAM** (1859), 7 C. B. N. S. 329; 29 L. J. C. P. 132; 33 L. T. O. S. 239; 23 J. P. 503; 6 Jur. N. S. 534; 111 E. R. 813.

**Annotations:—***Conad.* Smith v. Howden (1863), 14 C. B. N. S. 398. *Reid.* Frost v. Richardson (1910), 103 L. T. 22.

**534. — — — — — To town street.]—BECKETT v. LEEDS CORPN., No. 555, post.**

**535. — — — — —**—**SALT UNION, LTD. v. HARVEY (J. P.) & Co., No. 595, post.**

**536. — — — — — One of adjoining tenements covered with water.]—**There is no authority for the presumption where a road has been laid out between two tenements, one of which is covered by water, that the soil of the road belongs solely to the tenement which is dry land.—**FROST v. RICHARDSON** (1910), 103 L. T. 22; *affd.*, 103 L. T. 416, C. A.

**— — — — — On sale of land.]—***See, generally*, Sub-sect. 1, B., *post*; **SALE OF LAND.**

**— — — — — To rivers.]—***See* **WATERS & WATERCOURSES. Owners within Public Health Act, 1875 (c. 55), s. 4—Liability to abate nuisance.]—***See* No. 1651, *post*.

**521 i. — — — — — Medium filum rule.]—**Where two properties or municipalities are divided by a highway, the limit of each is *prima facie* the centre of the highway.—*Re* **McDONOVAN** (1870), 30 U. C. R. 288.—**CAN.**

**531 i. Whether presumption rebut-**

*table.]* That the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only, which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway.—**O'CONNOR v. NOVA SCOTIA TELEPHONE**

**Co. (1893), 23 S. C. R. 276.—CAN.**

**b. — — — — — Title derived by Crown grant.]—**The presumption is rebutted where the owner of the land derives his title by Crown grant, & in the grant the road is described as bounding the land.—**TIERNY v. LORTON** (1891), 12 N. S. W. L. R. 308.—**AUS.**

*B. Presumption in case of Sale or Lease of Land.***537. General rule—Land abutting on highway.]**—*R. v. STRAND BOARD OF WORKS*, No. 988, *post*.

**538.** — — — — —.]—The rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, & by colour, & by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties. It is a presumption that not only the land described by metes & bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted (*COTTON, L.J.*).—*MICKLETHWAIT v. NEWLAY BRIDGE CO.* (1886), 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132; 2 T. L. R. 844, C. A.

*Annotations:—Distd.* *Ecroyd v. Coulthard*, [1897] 2 Ch. 554. *Apld.* *Re White's Charities, Charity Comrs. v. London Corp.*, [1898] 1 Ch. 639. *Consd.* *London City Land Tax Comrs. v. C. L. Ry.*, [1913] A. C. 361. *Refd.* *Devonshire v. Pattinson* (1857), 20 Q. B. D. 263; *Haynes v. King*, [1893] 3 Ch. 439; *Prior v. Pette*, [1891] 2 Ch. 11; *Mellor v. Walmesley*, [1905] 2 Ch. 164; *Thames Conservators v. Kent*, [1915] 2 K. B. 272.

**539.** — — — — —.]—The presumption that half the soil of the road is intended to pass to a purchaser under a conveyance of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country; & this presumption is not rebutted by the fact that the vendor is the owner of the soil beyond the *medium filum via*; in such a case the presumption is that the conveyance passes the soil of the highway so far as it is vested in the vendor. — *Re WHITE'S CHARITIES, CHARITY COMRS. v. LONDON CORPN.*, [1898] 1 Ch. 639; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R. 479; 42 Sol. Jo. 129.

*Annotations:—Dtd.* *L. & N. W. Ry. v. Westminster Corp.*, [1902] 1 Ch. 269. *Apprd.* *London City Land Tax Comrs. v. C. L. Ry.*, [1913] A. C. 361.

**540.** — — — — —.]—Where a parcel of land is described, or shown on a plan, as bounded by a highway it is to be presumed that it is intended that the parcel should go up to the actual boundary on that side, that is, ordinary circumstances, *ad medium filum viae*. Therefore, where the land tax has been redeemed on lands or houses which abut upon a public street or highway, the exoneration extends to the middle line of such street or highway, in the absence of an express statement to the contrary.—*LONDON CITY LAND TAX COMRS. v. CENTRAL LONDON RY. CO.*, [1913] A. C. 361; 82 L. J. Ch. 274; 108 L. T. 690; 77 J. P. 280; 29 T. L. R. 395; 57 Sol. Jo. 403; 11 L. G. R. 693, H. L.; *affg.* *S. C. sub nom. CENTRAL LONDON RY. CO. v. LONDON CITY LAND TAX COMRS.*, [1911] 2 Ch. 467, C. A.

*Annotations:—Consd.* *A.-G. of Southern Nigeria v. Holt* (Liverpool), [1915] A. C. 599. *Refd.* *Maclaren v. A.-G. for Quebec*, [1914] A. C. 258.

**541.** — — — — —.]—**Land adjoining highway.]**—A farm & premises was described in the lease as adjoining the turnpike road from P. to S. The landlord seized as a distress for rent, goods of the tenant

packed on a waggon, which stood, without horses, within the middle of the highway, & on that part of it next the demised premises:—*Held*: the presumption was, that the right to the soil of the moiety of the highway was vested in the tenant, this presumption was not rebutted by the terms of the demise, therefore the waggon was on the demised premises, & the goods subject to be taken as a distress.—*HODGES v. LAWRENCE* (1851), 18 J. P. 317.

*Annotation:—Refd.* *C. L. Ry. v. London City Land Tax Comrs.*, [1911] 2 Ch. 467.

**542.** — — — — —.]—*Pltf.* rented a stable from *deft.* & was in the habit of keeping his cart on a part of the road adjoining the stable, which had been paved for that purpose by *deft.*, *pltf.*'s landlord. In an action against the landlord for seizing *pltf.*'s cart while standing in the road, as a distress for rent:—*Held*: the paved part of the road was to be considered part of the demised premises, & the landlord might lawfully seize the cart there as a distress for the rent of the stable.—*GILLINGHAM v. GWYER* (1867), 16 L. T. 640.

**543.** — — — — —.]—*HAYNES v. KING*, No. 546, *post*.

**544. — — — — — Land on each side in same ownership.]**—*SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO.*, No. 518, *ante*

**545. Application of rule—To town streets.]**—*LANDROCK v. METROPOLITAN DISTRICT RY. CO.* (1880), 3 T. L. R. 102, C. A.

**546.** — — — — —.]—*Pltf.*'s were leaseholders of houses bounded by a street. Subsequently the lessors agreed to lease to *deft.* premises on the opposite side of & bounded by the street: *Held*: *pltf.*'s & *deft.*'s premises were actually contiguous, as the presumption was that in both cases the leases would include half the soil of the street. — *HAYNES v. KING*, [1893] 3 Ch. 439; 63 L. J. Ch. 21; 69 L. T. 855; 42 W. R. 56; 3 R. 715.

**547.** — — — — —.]—*Re WHITE'S CHARITIES, CHARITY COMRS. v. LONDON CORPN.*, No. 539, *ante*.

**548.** — — — — —.]—**Grantor owning land on both sides of road—Conveyance to same person.]**—*SALISBURY (MARQUIS) v. GREAT NORTHERN RY. CO.*, No. 518, *ante*.

**549.** — — — — —.]—**Lease to different tenants.]**—Where adjacent lands belong to two distinct owners, the legal presumption is, that the ditch which divides them is a part of the soil of him to whom the hedge belongs; & where a road runs between those lands, that the owner on each side has a right of soil *ad medium filum viae*.

*Semble*: such presumption will not arise where the entire property of such lands is in one landlord, who has let them out to different tenants; but it will be incumbent upon either tenant who shall bring trespass against the other to prove his right of exclusive possession of the ditch, or the half of the road next to his close, in order to sustain the action.—*NOYE v. REED* (1827), 1 Man. & Ry. K. B. 63; 6 L. J. O. S. K. B. 5.

*Annotation:—Refd.* *Collis v. Amphlett*, [1918] 1 Ch. 232.

**550.** — — — — —.]—**Whether to building estates or schemes.]**—*MAPPIN BROTHERS v. LIBERTY & CO., LTD.*, No. 559, *post*.

**551.** — — — — —.]—**Whether to Crown grants.]**—

**PART V. SECT. 2, SUB-SECT. 1.—B.**

**537 I. General rule—Land abutting on highway.]**—*DWYER v. RICH* (1871), 1 R. 6 C. L. 144.—*IR.*

**541 I. — — — — — Land adjoining highway.]**

J.—VOL. XXVI.

—*Re PRIDDLE* (1910), 16 S. R. N. S. W. 54.—*AUS.*

*e. Rebuttal of presumption—Highway excluded by conveyance.]*—A deed, granting land, did not include "a road forty feet wide," in the land

conveyed:—*Held*: the fee in the freehold of the road did not pass to the grantee, but merely an easement of the right of way over the land.—*FINCH v. WILKINSON* (1895), 27 O. R. 35.—*CAN.*

*Sect. 2.—Rights of owner of soil: Sub-sect. 1, B. & C.]*

**MAPPIN BROTHERS v. LIBERTY & Co., LTD., No. 559, post.**

**552. When presumption arises—Not until highway dedicated.]**—The presumption of law that the property in the soil of a road belongs *usque ad medium filum viae* to the adjoining proprietors, & consequently that a conveyance of an estate bounded by a road passes the land up to the middle of such road, does not arise until the road has been dedicated to the public by being used as a highway. —**LEIGH v. JACK** (1879), 5 Ex. D. 264; 49 L. J. Q. B. 220; 42 L. T. 463; 44 J. P. 488; 28 W. R. 452, C. A.

*Annotations:—***Consd.** Micklethwait v. Newlay Bridge Co. (1886), 33 Ch. D. 133; C. L. Ry. v. London City Land Tax Comrs. (1911) 2 Ch. 467. **Refd.** Solling v. Broughton, (1893) A. C. 556; Marshall v. Taylor, (1895) 1 Ch. 641; *Re* Whitte's Charities, Charity Comrs. v. London Corp'n. (1898), 46 W. R. 479; Mappin v. Liberty, (1903) 1 Ch. 118; London City Land Tax Comrs. v. C. L. Ry., (1913) A. C. 364. **Mentd.** Cunliffe v. L. & N. W. Ry., (1888), 4 T. L. R. 278; Hindson v. Ashby, (1896) 2 Ch. 1; Littledale v. Liverpool College, (1900) 1 Ch. 19; Philpot v. Bath (1905), 21 T. L. R. 634; White v. Grand Hotel Eastbourne (1912), 106 L. T. 785.

**553. Rebuttal of presumption—Conveyance of land on each side of road—Parcels treated as distinct.]**—**SALISBURY (MARQUIS) v. GREAT NORTHERN RY. Co., No. 518, ante.**

**554. — Road uncoloured on plan.]**—Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement & colouring of which would exclude it. —**BEERIDGE v. WARD** (1861), 10 C. B. N. S. 400; 30 L. J. C. P. 218; 25 J. P. 695; 7 Jur. N. S. 876; 142 E. R. 507.

*Annotations:—***Consd.** C. L. Ry. v. London City Land Tax Comrs., (1911) 2 Ch. 467. **Refd.** R. v. Strand Board of Works (1863), 4 B. & S. 526; Crossley v. Lightowler (1866), L. R. 3 Eq. 279; Tidswell v. Whitworth (1867), L. R. 2 C. P. 326; Buccleuch v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221; Landrock v. Met. Dist. Ry. (1886), 2 T. L. R. 532; Micklethwait v. Newlay Bridge Co. (1886), 33 Ch. D. 133; Haynes v. King, (1893) 3 Ch. 439; Pryor v. Petre, (1894) 2 Ch. 11.

**555. — Road adjoining single building site on estate.]**—The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viae* is founded on a presumption of law which exists only in the absence of evidence of ownership. **Qu.**: whether such presumption has any application to a street in a town:—**Held**: in a suit between the lords of the manor & the corp'n. of L., that the soil of the B., an ancient street in the borough of L., belonged to the lords of the manor, there being sufficient evidence to rebut the presumption of ownership in the owners of the adjoining houses.

I should myself, if it were necessary to determine it, be very slow to come to the conclusion that where there is a road going through an estate, & a site is granted by the road side for the erection of a cottage or house, & a cottage or house is built upon that site, the mere conveyance or grant, or demise of a piece of land as the site of & for the purpose of building a house is, in presumption of law, a grant to the middle of the highroad, the frontage of which is probably the origin of the house being built on that space. It appears to me that a great many inconveniences might arise from the notion that a mere grant or demise of such a site would of itself raise a presumption of law which deprives the owner of the estate of his possessory title or of his freehold in respect of the half of the highway (**JAMES, L.J.**).—**BECKETT**

**v. LEEDS CORPN.** (1872), 7 Ch. App. 421; 26 L. T. 375; 36 J. P. 596; 20 W. R. 454, L. J.

*Annotations:—***Refd.** Micklethwait v. Newlay Bridge Co. (1886), 33 Ch. D. 133; Landrock v. Met. Dist. Ry. (1886), 2 T. L. R. 532; Devonshire v. Pattinson (1887), 20 Q. B. D. 253; Pryor v. Petre, (1894) 2 Ch. 11; L. & N. W. Ry. v. Westminster Corp'n., (1902) 1 Ch. 269; Mappin v. Liberty, (1903) 1 Ch. 118; Mellor v. Walmesley, (1905) 2 Ch. 164; A.-G. v. Horner (No. 2), (1913) 2 Ch. 140.

**556. — Conveyance of houses by number.]**—**LANDROCK v. METROPOLITAN DISTRICT RY. Co.** (1886), 3 T. L. R. 162, C. A.

**557. — Expression of contrary intention in instrument.]**—**MICKLETHWAIT v. NEWLAY BRIDGE Co., No. 538, ante.**

**558. — Highway not included in measurements on plan.]**—In a conveyance by deft. to pltf., a wood which abutted on a highway called C. Lane was described by its acreage, which was given with great minuteness, & by reference to a map which did not include any part of the lane. The property was also described in a schedule to the deed, by reference to the numbers in the ordnance map, in which the wood & the lane were marked with different numbers. By the recitals in the deed it was stated that it was one of the conditions of the contract for sale that the trees on the land sold should be paid for as part of the consideration at a valuation, & that such valuation had been made & the amount paid by pltf. The lane was very little used as a highway, being a grassy lane with trees & underwood on the side adjoining the wood; but evidence was given showing that none of these trees were included in the valuation:—**Held**: evidence of the trees being omitted from the valuation was properly admissible as proof of the circumstances in which the conveyance was executed; & the fact of such omission, coupled with the fact that the lane was not included in the measurement or the map, was sufficient to rebut the presumption that the soil of the lane, *ad medium filum viae*, passed by the conveyance. —**PRYOR v. PETRE**, [1894] 2 Ch. 11; 63 L. J. Ch. 531; 70 L. T. 331; 42 W. R. 435; 10 T. L. R. 303; 38 Sol. Jo. 286; 7 R. 424, C. A.

**559. — Land acquired under statutory powers for street improvement.]**—The Comrs. of Woods & Forests acquired a tract of land under an Act of Parliament passed for the purpose of executing a scheme of street improvements in the metropolis. Under this Act they made Regent Street & leased the houses in the street as they were built, including a house now sub-demised to pltf. Pltf. claimed to be entitled to the soil of the moiety of the street next to his house for the residue of his interest therein by virtue of the presumption that the conveyance of a house adjoining a highway passes the soil of the highway *usque ad medium filum*. The head lease of pltf.'s house described the property by dimensions & abutments & by a map, & referred to it as abutting on a street then forming. Upon the construction of the Act it was doubtful whether the Comrs. had any power to lease the soil of the streets:—**Held**: apart from any question as to the powers of the Comrs., the presumption was rebutted by the surrounding circumstances, regard being had to the terms of the lease & the provisions of the Act. **Semble**: the presumption does not apply to building estates or schemes.

**Qu.**: whether the presumption applies to leases or to grants from the Crown.—**MAPPIN BROTHERS v. LIBERTY & Co., LTD.**, [1903] 1 Ch. 118; 72 L. J. Ch. 63; 87 L. T. 523; 67 J. P. 91; 51 W. R. 264; 19 T. L. R. 51; 47 Sol. Jo. 71; 1 L. G. R. 167.

*Annotation:—***Refd.** C. L. Ry. v. London City Land Tax Comrs., (1911) 2 Ch. 467.

## C. Roadside Waste.

**560. General rule—Property of owner of adjoining land.]—***Primâ facie* the presumption is, that a strip of land lying between a highway & the adjoining inclosure, is, as well as the soil of the highway *ad medium filum viæ*, the property of the owner of the inclosure. If the strip of land communicate with open commons or other larger portions of land, the presumption is either done away, or considerably narrowed, for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them.—*GROSE v. WEST* (1816), 7 Taunt. 39; 129 E. R. 16.

*Annotations:—***Apld.** *Plumley v. Lock* (1902), 67 J. P. 237. *Reid. Smith v. Howden* (1863), 14 C. B. N. S. 398.

**561. ———.]—***STEEL v. PRICKETT*, No. 513, *ante*.

**562. ———.]—***DOE d. PRING v. PEARSEY*, No. 566, *post*.

**563. ———.]—**Where strips of land lie between the highway & the adjoining inclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old inclosure.—*SCOOTES v. MORRELL* (1830), 1 Beav. 251; 48 E. R. 936.

*Annotations:—***Mentd.** *Grove v. Bastard* (1851), 1 De G. M. & G. 69; *Abbott v. Calton* (1853), 22 L. J. Ch. 936; *Boysse v. Rossborough* (1853), Kay, 71.

**564. ———.]—**The ordinary presumption is, that strips of land lying along a highway even though indirectly connected with parts of the waste belong to the owner of the adjacent inclosed land between which & the actual beaten road they lie & not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. Such strips of land might well pass under a conveyance of the adjacent inclosure though the deed purported to state the quantity of acres, within the fences that were therein passed, if it had the words "more or less" added.—*DENDY v. SIMPSON* (1861), 7 Jur. N. S. 1058; 9 W. R. 743, Ex. Ch.; *affg. S. C. sub nom. SIMPSON v. DENDY* (1860), 8 C. B. N. S. 433.

*Annotations:—***Reid.** *Berridge v. Ward* (1861), 10 C. B. N. S. 400; *Tidswell v. Whitworth* (1867), L. R. 2 C. P. 326; *C. L. Ry. v. London City Land Tax Comrs.*, [1911] 2 Ch. 467.

**565. ———.]—**A local board of health were empowered by a local Act, when they should think fit, to cause the ditches at the sides of, or across public roads to be filled up, & to substitute pipe or other drains, & from time to time to amend the same; & the surface of the land gained by the filling up such ditches might, if the board thought fit, be thrown into the roads & ways, etc. Pltf. was owner of a close adjoining a public highway, & between the close & the highway was a strip of land averaging nine feet in width. Upon this strip of land ran a ditch, the bank of which, on pltf.'s side, was three feet in width, & covered with grass, & the bank on the road side was one foot in width, & covered with grass. At the side of the road were posts & rails about two feet high. Pltf. & his predecessors, the owners of the adjoining land, had from time to time, & the surveyors of highways two or three times during the last forty years, repaired the posts & rails:—**Held:** this was not a ditch at the side of, or across a public road within the Act, & the local board had no power to fill it up & substitute a pipe or other drain, the presumption being that the ditch belonged

to pltf., the owner of the adjoining land.—*TUTILL v. WEST HAM LOCAL BOARD OF HEALTH* (1873), L. R. 8 C. P. 447; 28 L. T. 597; 37 J. P. 455.

**566. Application of rule—Land of any tenure.]—**The presumption is, that waste land, which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, & not to the lord of the manor.

It is a *primâ facie* presumption, that waste lands on the sides, & the soil to the middle, of a highway belong to the owner of the adjoining freehold land. The rule is founded on a presumption that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure & the middle of the road. I think that rule applies not only to freehold but to copyhold lands also (*BAYLEY, J.*).—*DOE d. PRING v. PEARSEY* (1827), 7 B. & C. 304; 9 Dow. & Ry. K. B. 908; 5 L. J. O. S. K. B. 310; 108 E. R. 737.

*Annotations:—***Apld.** *White v. Hill* (1844), 14 L. J. Q. B. 79. *Reid. R. v. Hatfield* (1835), 4 Ad. & El. 156; *Kingsmill v. Millard* (1855), 11 Exch. 313; *A.-G. v. Toulmie* (1877), 5 Ch. D. 750; *Chamber Colliery Co. v. Rochdale Canal Co.*, [1895] A. C. 564; *Re White's Charities, Charity Comrs. v. London Corp.*, [1898] 1 Ch. 659; *Mappin v. Liberty*, [1903] 1 Ch. 118; *London City Land Tax Comrs. v. C. L. Ry.*, [1913] A. C. 364; *Collis v. Amphlett*, [1918] 1 Ch. 232.

**567. — Not as between grantees of same lord of manor.]—**Where the lord of a manor has conveyed land to A., & afterwards other land to B., & it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the fact that the strip of land lies between a highway & land undisputedly comprised in the conveyance to A.—*WHITE v. HILL* (1844), 6 Q. B. 487; 2 Dow. & L. 537; 11 L. J. Q. B. 79; 9 Jur. 129; 115 E. R. 182.

*Annotation:—***Mentd.** *Nellau v. Hanny* (1840), 2 Car. & Kir. 710.

**568. — Whether waste passes in conveyance of close—Construction of parcels.]—***DENDY v. SIMPSON*, No. 564, *ante*.

**569. ———.]—**In a conveyance the land was described as "situate on the seashore."

If the boundary had been a road . . . this strip, if vested in pltf.'s predecessor in title, would *primâ facie* have passed by the conveyance, notwithstanding that the measurements of the plots would exclude it (*STORLING, L.J.*).—*MELLOR v. WALMESLEY*, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591; 49 Sol. Jo. 565, C. A.

*Annotations:—***Mentd.** *Ascheton-Smith v. Owen* (1905), 75 L. J. Ch. 181; *Meer v. Denne*, [1905] 2 Ch. 538; *Re Djamli-Sumatra, Rubber Estates* (1912), 107 L. T. 631; *Eastwood v. Ashton* (1913), 83 L. J. Ch. 263; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1; *Watcham v. East Africa Protectorate*, [1919] A. C. 533.

**570. Evidence supporting presumption—Acts of ownership.]—***DENDY v. SIMPSON*, No. 564, *ante*.

**571. ———.]—**Other similar adjoining wastes.]—Upon a question whether a piece of waste land, lying between a highway & pltf.'s inclosed land, belonged to pltf., or to the lord of the manor:—**Held:** grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself & of other persons, were admissible for the purpose of showing that the *locus in quo* was part of the waste of the manor, without showing continuity.—*DENDY v. SIMPSON* (1856), 18 C. B. 831; 27 L. T. O. S. 288; 2 Jur. N. S. 642; 139 E. R. 1599, Ex. Ch.



*E. Roads set out under Inclosure Acts.*

**Old public way.]—**See COMMONS, Vol. XI., p. 80, Nos. 1003, 1004.

**New public road.]—**See COMMONS, Vol. XI., p. 81, Nos. 1011–1013.

**New private road.]—**See COMMONS, Vol. XI., p. 81, No. 1016.

**583. Effect of limited dedication.]—**POOLE v. HUSKINSON, No. 194, *ante*.

**Right of owner to work minerals.]—**See No. 1715, *post*, & generally, COMMONS, Vol. XI., pp. 63 *et seq.*

*F. Towing Paths.*

**584. Land vested in undertakers under special Act—Whether conveyance necessary.]—**The undertakers under a private Act made a lock, canal, & towing path, with culverts & bridges, upon the lands mentioned in the inquisitions, paying full remuneration. No conveyance was ever executed. Part of the breadth of land taken for the towing-path was used as a public footway, which existed before the Act, the residue was depastured by the owners of the adjoining land, who had right of way over it for the purpose of access to the river. The path was, in general, not divided from the adjacent field. Gates, etc., were kept on it by the undertakers for the benefit of the neighbouring land-owners. The undertakers having been rated to the poor for their towing-path, canal & locks:—*Held*: the land used for those works was vested in the undertakers under the Acts, without any conveyance.—BRUCE v. WILLIS (1840), 11 Ad. & El. 463; 3 Per. & Dav. 220; 9 L. J. M. C. 43; 113 E. R. 491; *sub nom.* BATH RIVER NAVIGATION CO. v. WILLIS, 2 Ry. & Can. Cas. 7.

*Annotations:—*Reid. Badger v. South Yorkshire Ry. & River Dun Co. (1858), 1 R. & E. 359; Medland & Brown v. Paine (1858), 23 J. P. 39; Doncaster Union Assmt. Com. v. M. S. & L. Ry. (1894), 71 L. T. 585.

**Extent of interest in land acquired—Limited to interest necessary for purposes of Act.]—**See COMPULSORY PURCHASE OF LAND, Vol. XI., p. 118, Nos. 119, 120.

## SUB-SECT. 2.—OWNERS' RIGHTS NOT INCONSISTENT WITH PUBLIC RIGHTS.

*A. In General.*

**585. Soil remains vested in original owner—Subject to public right of passage.]—**By setting out a highway the owner does not part with the property of the soil.—LADE v. SHEPHERD (1735), 2 Stra. 1004; 93 E. R. 997.

*Annotations:—*Consd. Thompson v. West Somerset Mineral Ry. (1857), 29 L. T. O. S. 7; St. Mary, Newington v. Jacobs (1871), L. R. 7 Q. B. 47. *Reid.* Marshall v. Ulleswater Co. (1871), L. R. 7 Q. B. 166; Burgess v. Northwick L. B. (1880), 6 Q. B. D. 261; Harrison v. Rutland, [1893] 1 Q. B. 142.

**586. ———.]—**The owner of the soil in a common highway, being entitled to every benefit which may arise from it, consistent with the right of passage in the public, may recover the possession of it by ejectment.

The owner of the soil has right to all above &

under ground, except only the right of passage, for the king & his people (FOSTER, J.).—GOOD-TITLE d. CHESTER v. ALKER & ELMES (1757), 1 Burr. 133; 1 Keny. 427; 97 E. R. 231.

*Annotations:—*Reid. Thompson v. West Somerset Mineral Ry. (1857), 29 L. T. O. S. 7; Harrison v. Rutland, [1893] 1 Q. B. 142; London City Tax Commrs. v. C. L. Ry., [1913] A. C. 361.

**587. ———.]—**The owner, who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public, & may exercise all other rights of ownership not inconsistent with such dedication; & the appropriation, made to & adopted by the public, of a part of the street to one kind of passage & another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public; & the provisions of the Highway Act, 1835 (c. 50), & Metropolis Local Management Act, 1855 (c. 120), so far as they apply to roads & streets, are subordinate to the paramount rights reserved by the owner. Resp. was owner & occupier of premises contiguous to a public highway, several feet of the highway immediately adjoining to his premises being flagged pavement, which had been used as a footway for sixty years. Resp.'s premises consisted of a warehouse, yard, & railway arches, with a gateway opening on to the pavement; the site had formerly been occupied by shops & houses; but, owing to the erection of the railway, was now unfit for houses. Resp. used the premises for the deposit of heavy machinery, etc.; & he at first unloaded the machinery from the carriage or trolleys in the roadway, & moved it across the pavement by rollers & levers into his premises; but this took much time, & was objected to as causing a nuisance by the obstruction to the foot pavement. Resp. then applied to appts., who were the surveyors of highways under Metropolis Local Management Act, 1855 (c. 120), s. 96, & under sect. 98 were empowered from time to time to cause the streets to be paved & the ground or soil to be raised or lowered, for permission to take up the flags & make a proper paved carriage access across the footway to his premises. This they refused. Resp. then conveyed his machinery across the pavement in the carriage or trolleys; & the weight crushed & injured the flags. Upon this appts. took out a summons against resp. under Highway Act, 1835 (c. 50), s. 72, for doing damage to a highway. The magistrate dismissed the summons, finding that the "freehold premises in question could not be reasonably enjoyed without access across the existing footway, & that the rights of ownership & those of the public might be jointly exercised consistently with the general welfare"; & he stated a case for the opinion of the Queen's Bench as to whether he was bound to convict. *Held*: the magistrate was justified in dismissing the summons.—ST. MARY, NEWINGTON, VESTRY v. JACOBS (1871), L. R. 7 Q. B. 47; 41 L. J. M. C. 72; 25 L. T. 800; 36 J. P. 119; 20 W. R. 240.

*Annotations:—*Reid. Burgess v. Northwick L. B. (1880), 6 Q. B. D. 261; Harrison v. Rutland, [1893] 1 Q. B. 142; Luscombe v. G. W. Ry., [1899] 2 Q. B. 313; London City Land Tax Commrs. v. C. L. Ry., [1913] A. C. 364.

*Compare* No. 612, *post*.

## PART V. SECT. 2, SUB-SECT. 2.—A.

**585 I. Soil remains vested in original owner—Subject to public right of passage.]—**Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to exercise all

rights of ownership so as not to interfere with the right of way, which exists in the public.—MAHARAJ BAHADUR SINGH v. PARESH NATH SINGH (1904), 1 L. R. 31 Calc. 839.—IND.

**585 II. ———.]—**By the law of

Scotland, if a public highway is established by usage over the land of another, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established.—GALBREATH v. AIRMOUR (1845), 4 Bell. Sc. App. 374, 381.—SCOT.

*Secl. 2.—Rights of owner of soil: Sub-sect. 2, A. & B. (a) & (b).]*

**588. ——— No right in owner to interfere with surface.]**—(1) Where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, & not being required to establish his right at law. The facts that the soil under the highway was of no value to the owner, & that his motive for applying to the ct. was not connected with the enjoyment of his land, were held not to be reasons against the granting of the injunction.

(2) Pltf. is the owner of the soil through which these pipes have been laid. At the same time, pltf. has not the right of an unlimited owner in respect of that soil, because the upper surface is dedicated to the public for the purpose of a public highway, which is under the management of local authorities; & pltf. cannot use the soil, or deal with it by breaking it open, or in any other manner, so as to interfere with the use of it by the public for the purpose of a highway (*LORD SETHBORNE, C.*).—*GOODSON v. RICHARDSON* (1874), 9 Ch. App. 221; 43 L. J. (Ch. 790; 30 L. T. 142; 38 J. P. 436; 22 W. R. 337, L. C. & L. JJ.

*Annotations: 1a to (1) Consd. St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31. Rejd. Cooper v. Crabtree (1882), 20 Ch. D. 589. Marriott v. East Grinstead Gas & Water Co. [1909] 1 Ch. 70. Generally, Mendt. Allen v. Martin (1875), L. R. 20 Eq. 462; Wimbledon & Putney Commons Conservators v. Dixon (1875), 33 L. T. 679; Eardley v. Granville (1876), 3 Ch. D. 826; Elias v. Griffith (1878), 8 Ch. D. 521; L. & N. W. Ry. v. Westminster Corpn. [1904] 1 Ch. 759; Riley v. Halifax Corpn. (1907), 71 J. P. 428; Butterley Co. v. New Hucknall Colliery Co., [1909] 1 Ch. 37; Kennard v. Cory, [1922] 1 Ch. 265.*

**589. ———.]—BENFIELDSDALE LOCAL BOARD v. CONSETT IRON CO., No. 1715, post.**

**590. ———.]**—The owner & occupier of a house had, under Public Health Act, 1875 (c. 55), s. 21, caused his drains to empty into a sewer in a street vested, as a highway repairable by the inhabitants at large, in an urban authority, & subsequently proposed to break up the street for the purpose of constructing an inspection chamber under the street in the course of the drain. The urban authority objected, & in an action brought by the A.-G. at the relation of the authority & by the authority to restrain deft. from so breaking up the street:—*Held*: the rights of deft. under the sect. did not extend to breaking up the street for the purpose in question, & granted an injunction to restrain deft. from breaking up the street except for the purpose of the exercise of his rights under that sect.—*A.-G. v. ASHBY* (1908), 72 J. P. 449; 6 L. G. R. 1058, C. A.

**591. Benefit of restrictive covenants.]**—The benefit of restrictive covenants relating to the mode of building on an estate through which a road runs can be validly annexed to the site & soil of the road so as to run with it, even after it has been dedicated to the public; but if the road is subsequently taken over by a local authority, whether under Metropolis Management Act, 1855 (c. 120), or Public Health Act, 1875 (c. 55), a successor in title of the original owner of the road ceases to have such an interest in it as will entitle him to enforce the covenants. The surface of the road is no longer vested in him, & the restrictions do not touch or concern such interest in the road

as he retains.—*KELLY v. BARRETT*, [1924] 2 Ch. 379; 94 L. J. Ch. 1; 132 L. T. 117; 40 T. L. R. 650; 68 Sol. Jo. 664, C. A.

### *B. Right to Interfere with Subsoil.*

#### *(a) By Owner.*

**592. Right of tunnelling.]**—The trustees of a turnpike road which passed over a hill, were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road:—*Held*: the ct. had no authority to interfere, & refused the application.—*CUNLIFFE v. WHALLEY* (1851), 13 Beav. 411; 51 E. R. 158.

**593. Right to lay pipes or drains.]**—*POPULAR CORPN. v. MILLWALL DOCK CO., No. 622, post.*

*Compare Nos. 602, 603, post.*

**Right to connect private drain with public sewer.]**—*See SEWERS & DRAINS.*

#### *(b) By Other than Owner.*

**594. Owner's consent necessary.]**—*GOODSON v. RICHARDSON, No. 588, ante.*

**595. ———.]**—An ancient grant by the King of *illam villam, quicquid scilicet habemus in eadem villā* to the burgesses of a borough, in the absence of evidence in Domesday Book or elsewhere, that the streets of the borough were the property of the King, does not rebut the presumption that the soil of the streets is vested in the adjoining owners; & although under Public Health Act, 1875 (c. 55), s. 149, all streets " & the pavements, stones, & other materials thereof, & all buildings, implements, & other things provided for the purposes thereof, shall rest in & be under the control of the urban authority," a corpn. has no power to licence private individuals to lay pipes for trade purposes in the macadam or made ground of the roadway.—*SALT UNION, LTD. v. HARVEY (J. P.) & Co. (1897), 61 J. P. 375; 13 T. L. R. 297; 41 Sol. Jo. 386.*

**596. Interference under statutory authority—Lands Clauses Consolidation Act, 1845 (c. 18).]**—Trespass for breaking & entering pltf.'s close, & making a tunnel through the same. Plea, that the close was a public highway, & that defts. by an Act of Parliament, were incorporated for the purpose of making & maintaining a railway; that, before the passing of the said Act, certain plans & sections of the railway, showing the lines & levels thereof, & also books of reference containing the names of the owners of the land through which the same was intended to pass, had been deposited with clerks of the peace; that by the said Act it was enacted, that, subject to the provisions of that Act & Cos. Clauses Consolidation Act & Railway Clauses Consolidation Act, it should be lawful for defts. to make & maintain the railway in the line & upon the lands delineated & described on the said plans & in the books of reference, & to enter upon, take, & use such of the said lands as should be required for that purpose; that the said close in which, etc., was delineated & described on the said plans & in the books of reference & was & is such public highway as aforesaid, whereupon defts. at the said times, when, etc., under & by virtue of the said Acts, entered upon the close in which, etc., under the surface thereof, in order to make & did then so make, under this said highway, a tunnel, doing

### PART V. SECT. 2, SUB-SECT. 2.—B. (a).

**5921. Right of tunnelling.]**—*CONIAGAS MINES, LTD. v. CORALIT & JAMIESON MEAT CO., CONIAGAS MINES, LTD. v. JACOBSON & BLAIS* (1910), 15 O. W. R. 781; 20 O. L. R. 622.—*CAN.*



as little damage as could be, & in so doing dug, excavated, & bored the close of *pltf.* & made the tunnel in the declaration mentioned, as they lawfully might for the cause aforesaid. Replication, that the close was required to be purchased & permanently used for making & permanently maintaining the railway; that *pltf.* being the owner of the close for a term of years, subject to the user of the same as a public highway, did not at any time consent that *defts.* might enter upon or take the close, nor did *defts.* give any notice to *pltf.* to sell & convey or release the same to them, or that they required the same; nor did *defts.* pay *pltf.* or deposit in the Bank, any purchase-money or compensation for the interest of *pltf.* therein; that *defts.* did not enter on the close for the purpose of merely surveying or taking levels, etc., but for the permanent using & taking the same to their own use; & at the said time when etc., & thence hitherto, have used & now permanently use the close of *pltf.* for the permanent purpose of the railway. On demurrer to the replication:—*Held*: the plea afforded no justification, inasmuch as *defts.* were bound, under Lands Clauses Consolidation Act, 1845 (c. 18), to make compensation before entering upon the close.—*RAMSDEN v. MANCHESTER, SOUTH JUNCTION & ALTRINCHAM RY. CO.* (1848), 1 Exch. 723; 5 Ry. & Can. Cas. 552; 10 L. T. O. S. 464; 12 Jur. 293; 154 E. R. 307.

*Annotations*:—*Reid*. *Reedie v. N. W. Ry., Hobbit v. N. W. Ry.* (1849), 13 Jur. 659; *Abraham v. G. N. Ry.* (1851), 20 L. J. Q. B. 322; *Pinehu v. London & Blackwall Ry.* (1854), 1 K. & J. 34; *Souch v. East London Ry.* (1874), 22 W. R. 566; *Re Met. Dist. Ry. & Cosh* (1880), 13 Ch. D. 607.

*See, generally*, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 212, 213.

597. —[The *corp.* of a borough, being empowered by a local Act, which incorporated the Lands Clauses Acts, to erect & maintain “on, in, over, or under” any street in which their tramways were laid poles & posts for the purpose of working the tramways by mechanical power, erected a post for that purpose in the pavement forming part of a street, the post being sunk to a depth of six feet. The pavement at that point, & the soil beneath it, were the property of *pltf.* subject to a right which had been acquired by the public to use the pavement as a public footpath. The post was erected without *pltf.*’s consent, & he brought an action for trespass to his land against the *corp.*:—*Held*: the placing of the post in *pltf.*’s soils was not a taking of his land so as to make Lands Clauses Consolidation Act, 1845 (c. 18), s. 18, apply, & as *defts.* had erected the post under their statutory powers, the action could not be maintained.—*ESCOTT v. NEWPORT CORPN.*, [1904] 2 K. B. 369; 73 L. J. K. B. 693; 90 L. T. 348; 68 J. P. 135; 52 W. R. 543; 20 T. L. R. 158; 2 L. G. R. 779, D. C.

*Annotations*:—*Consd.* *Andrews v. Abertillery U. C.* (1911), 80 L. J. Ch. 721. *Reid*. *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299.

*See, generally*, TRAMWAYS & LIGHT RAILWAYS.

598. —*Gasworks Clauses Act, 1847* (c. 15).—By above Act, s. 6, the undertakers were authorised to break up the soil of streets within the limits of their special Act, & to lay down pipes & other works therein for supplying gas to the inhabitants of the district. Sect. 7 provided that nothing therein should authorise the undertakers to lay down any pipe or other works “in any land not dedicated to public use, without the consent of the owners & occupiers thereof.” *Pltf.* was the owner of land on either side of a road dedicated to public use, & had bored a tunnel thereunder

for his own purposes. In pursuance of their statutory powers, *defts.* proposed to lay gas pipes & works extending to a depth of five feet below the surface of the road on either side of the tunnel such pipes being carried up at right angles to the tunnel, & passing over it at a depth of three inches from the surface. It was agreed that eighteen inches was the thickness of soil under the road reasonably necessary for the proper maintenance of the road. The question raised in the action was whether the soil to a greater depth than eighteen inches from the surface was “land not dedicated to public use”:—*Held*: the dedication of the road to public use brought it within above Act, & no part of it could, for the purposes of gas or water undertakings, be properly held to be land “not dedicated to public use” under sect. 7. The proviso in that sect. extended only to land of which no part was dedicated to public use. Dedication, as between the owner of the soil on the one hand & the controlling authority on the other, involves not merely the occupation by the public of the surface, but also the dedication of so much of the adjacent soil as is necessary for the proper maintenance of the surface as a road or street.—*SCHWEDER v. WORTHING GAS LIGHT & COKE CO.* (No. 2), [1913] 1 Ch. 118; 82 L. J. Ch. 71; 107 L. T. 814; 77 J. P. 41; 57 Sol. Jo. 14; 11 L. G. R. 17.

*Annotation*:—*Apld.* *Porter v. Ipswich Corp.*, [1922] 2 K. B. 115.

*See, generally*, GAS, Vol. XXV., pp. 472 *et seq.*

599. —*Waterworks Clauses Act, 1847* (c. 17).—Sect. 28 of above Act merely enables a water co. to lay pipes under streets in connection with the undertaking authorised by their special Acts, & if they are being laid in connection with unauthorised works, the owner of the soil can sue the water co. in trespass, raise the question of *ultra vires*, & obtain an injunction without joining the A.-G.—*MARRIOTT v. EAST GRINSTEAD GAS & WATER CO.*, [1909] 1 Ch. 70; 78 L. J. Ch. 141; 99 L. T. 958; 72 J. P. 509; 25 T. L. R. 59; 7 L. G. R. 477.

*Annotations*:—*Reid*. *A.-G. v. Barnet District Gas & Water Co.* (1909), 74 J. P. 1; *Schweder v. Worthing Gas Light & Coke Co.* (No. 2), [1913] 1 Ch. 118.

*See, generally*, WATER SUPPLY.

600. —*Owner’s right to compensation—Before entry.*—*RAMSDEN v. MANCHESTER, SOUTH JUNCTION & ALTRINCHAM RY. CO.*, No. 596, *ante*.

601. —*Lessees of minerals under highway.*—A limited gas co., acting without any statutory authority, & without the authority of the landowner, but with the permission of the highway authority, laid pipes under the soil of the highway. Subsequently, a gas co. was constituted by a private Act which incorporated the Gasworks Clauses Acts, 1847, & 1871. The private Act of this co. provided for the dissolution of the limited co., & enacted that all the lands, gasworks, easements, mains, pipes, plant, & apparatus placed by, vested in, or which were the property of the limited co. immediately before the passing of the Act, should be similarly vested in the incorporated co., & the incorporated co. were empowered to maintain the existing gasworks, & to lay down & maintain additional mains & pipes. The Gasworks Clauses Acts, 1847, gives power to undertakers of gasworks to open the soil within their district, to lay & repair pipes therein, & to do other Acts necessary for supplying gas, making compensation for any damage done in the execution of such powers. The Gasworks Clauses Act, 1871, renders it compulsory on undertakers of gasworks to supply gas on certain conditions &



**Sect. 2.—Rights of owner of soil: Sub-sect. 2, B.**  
**(b), C., D. & E.; sub-sect. 3.]**

within certain limits. Defts., the lessees of the minerals under & adjacent to the highway under which plffs. had laid their pipes, had by working the coal thereunder let down the soil of the highway & caused injury to plffs.' pipes:—*Held*: plffs. were entitled to support for their pipes, & the landowner was entitled to compensation for the burden thus imposed upon him; plffs. could therefore recover damages by action for any injury caused to their pipes, while the owner of the minerals could recover compensation in an arbitration for the limitation thus put upon the user of his land.—*NORMANTON GAS CO. v. POPE & PEARSON, LTD.* (1883), 52 L. J. Q. B. 629; 49 L. T. 798; 32 W. R. 134, C. A.

*Annotations*:—*Reid*, *Truman v. L. B. & S. C. Ry.* (1883), 25 Ch. D. 423; *South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J. Q. B. 255; *Jordeson v. Sutton, Southcoates v. Drypool Gas Co.*, [1898] 2 Ch. 611; *Schwedeler v. Worthing Gas Light & Coke Co.* (No. 2) (1912), 77 J. P. 41.

**602. Illegal works below surface—Whether local authority may restrain—Extent of authority's ownership of road.**—The decision in *Tunbridge Wells Corpn. v. Baird*, No. 618, *post*, as to the extent to which the soil of a street is vested in a local authority, under Public Health Act, 1875 (c. 55), s. 119, applies to the similar vesting in a local authority under Metropolis Management Act, 1855 (c. 120), s. 96, so that the soil of a street is vested in a vestry only so far "as is necessary for the control, protection & maintenance of the street as a highway for public use." An electric lighting co. had illegally broken up the surface of a street within the district of a vestry in the metropolis, & placed their pipes & wires at a depth of about two feet below the surface:—*Held*: the vestry were not by virtue of sect. 96 the owners of the soil of the street at that depth, & although the co. had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the co. to remove their pipes & wires, there being no continuing trespass upon or interference with any right of the vestry.—*BATTERSEA VESTRY v. COUNTY OF LONDON & BRUSH PROVINCIAL ELECTRIC LIGHTING CO., LTD.*, [1899] 1 Ch. 474; *sub nom.* *ST. MARY, BATTERSEA, VESTRY v. COUNTY OF LONDON & BRUSH PROVINCIAL ELECTRIC LIGHTING CO.*, 68 L. J. Ch. 238; 80 L. T. 31; 15 T. L. R. 175; 63 J. P. Jo. 84, C. A.

*Annotations*:—*Reid*, *Hyde Corpn. v. Oldham, Ashton & Hyde Electric Tramway* (1900), 64 J. P. 596; *Wigham Richardson v. Walker U. D. C.*, *Walker U. D. C. v. Wigham Richardson* (1901), 46 Sol. Jo. 85; *L. & N. W. Ry. v. Westminster Corpn.*, [1904] 1 Ch. 759; *Kelly v. Barrett*, [1924] 2 Ch. 379.

**603.** —[*Defts. who were the owners of property abutting on either side of a street in plffs.' district, without the consent of plffs. as required by Public Health Act, 1875 (c. 55), s. 26, constructed a tunnel under the roadway with a concrete floor. In the middle of the floor they cut a trench throughout the length of the tunnel down to the clay, & in it laid pipes carrying electric mains for the purpose of lighting their premises on both sides of the road. At the instance of plffs. defts. removed the top of the tunnel & filled it in, leaving their electric mains in the soil of the*

roadway. In a cross action by defts.:—*Held*: they were entitled to an injunction restraining plffs. from interfering with the mains or otherwise trespassing upon defts.' land under the street.—*WALKER URBAN DISTRICT COUNCIL v. WIGHAM, RICHARDSON, & CO., LTD.*, *WIGHAM, RICHARDSON & CO., LTD. v. WALKER URBAN DISTRICT COUNCIL* (1901), 85 L. T. 579; 66 J. P. 152; 18 T. L. R. 107; 40 Sol. Jo. 85.

**C. Ownership of Trees and Herbage.**

**604. Trees—Belong to owner of soil.**—*ANON.* (undated), No. 1, *ante*.

**605.** —[*TURNER v. RINGWOOD HIGHWAY BOARD*, No. 476, *ante*.

**606. Herbage on road—Under inclosure award—May be vested in others than owner of soil.**—By an award made in 1801 under an Inclosure Act the grass & herbage growing in a private road in a parish was to be let yearly by the surveyor of highways, or by such other person as the parishioners in vestry assembled should appoint, & the money arising therefrom was to be expended in the repair of the public & private roads in the parish. Defts. caused damage to the letting value of the grass & herbage by wrongfully permitting cattle to graze in the road, & an action was brought against them by the A.-G., on the relation of the rural district council, & by the district council for an injunction & damages:—*Held*: the action failed, as regards the district council, because the right of property in the grass & herbage was vested in the parish council & not in the district council; & as regards the A.-G. because the right of property which had been injured was one enjoyed by only a limited section of the public, namely, the parishioners, & not by the public at large.—*A.-G. & SPALDING RURAL COUNCIL v. GARNER*, [1907] 2 K. B. 480; 76 L. J. K. B. 965; 97 L. T. 486; 71 J. P. 357; 23 T. L. R. 563; 5 L. G. R. 944.

—**Whether vested in county council—Local Government Act, 1888 (c. 41), s. 11.**—*See* No. 1174, *post*.

As to inclosure awards generally, *see* COMMONS, Vol. XI., pp. 68 *et seq.*

**D. Ownership of Air.**

**607. Street vested in local authority—Under Metropolis Management Act, 1855 (c. 120).**—Sect. 96 of above Act does not confer upon a vestry or a board of works, constituted under that Act, such a property in the streets situate within their district, as to entitle them to maintain an action for an injunction against the erection of a telephone wire across a street, the telephone wire being erected at a great height & causing no appreciable danger to the public or to the traffic in the street.—*WANDSWORTH BOARD OF WORKS v. UNITED TELEPHONE CO.* (1884), 13 Q. B. D. 904; 53 L. J. Q. B. 449; 51 L. T. 148; 48 J. P. 676; 32 W. R. 776, C. A.

*Annotations*:—*Consd.* *Fareham L. B. & Fareham Electric Light Co. v. Smith* (1891), 7 T. L. R. 443; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 310; *Finchley Electric Light Co. v. Finchley U. C.*, [1903] 1 Ch. 437. *Reid*, *Holmfirth L. B. v. Shore* (1895), 59 J. P. 344; *Tunbridge Wells Corpn. v. Baird* (1896), 60 J. P. 788; *St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *Westminster Corpn.*

**PART V. SECT. 2, SUB-SECT. 2.—C.**

**604 i. Trees—Belong to owner of soil.**—*DOUGLAS v. FOX* (1880), 31 C. P. 140.—*CAN.*

**604 ii.** —[*BANNATYNE v. SUBURBAN RAPID TRANSIT CO.* (1904),

15 Man. L. R. 7.—*CAN.*

d. —[*On government allowances for roads.*—*Held*: a township corp., without having passed any bye-law on the subject, could maintain trespass upon government allowances for roads.

—*BURLEIGH TOWNSHIP v. HALES* (1867), 27 U. C. R. 72.—*CAN.*

e. —[*Held*: municipal corps. are entitled to the timber & trees growing upon the original road allowance.—*BARRIE TOWNSHIP v. GILLIES* (1891), 21 C. P. 213.—*CAN.*

*v. Johnson, Westminster Corpn. v. Fuller, [1904] 2 K. B. 737; Postmaster-General v. Liverpool Corpn. (1922), 92 L. J. K. B. 382.*

*See, generally, Part XV., Sect. 2, post.*

**608. — Under Public Health Act, 1875 (c. 55).]**—Under above Act, s. 149, which provides for the vesting in the urban authority of the streets within their district, the question how much above & below the surface of the street vests in the urban authority is determined by reference to what is necessary for the user of the street *quod* street without regard to the circumstances in which the site of the street was originally acquired. Where, therefore, the site of a street which ultimately vested in defts. as the urban authority under this sect. was originally conveyed to turnpike trustees in fee simple for the purposes of making a road under the Turnpike Roads Acts:—*Held*: the property of defts. in the site of the street was not thereby enlarged, so as to entitle them to prevent electric wires being carried over the street at a height above the area required for the user of the street.

It has been decided by a long series of cases that the word “vest” means that the local authority do actually become the owners of the street to this extent: they become the owners of so much of the air above & of the soil below as is necessary to the ordinary user of the street as a street, & of no more. For example, they do not take that part of the subsoil which has to be used for the purpose of laying sewers (*COLLINS, M.R.*).—*FINCHEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN COUNCIL, [1903] 1 Ch. 437; 72 L. J. Ch. 297; 88 L. T. 215; 67 J. P. 97; 51 W. R. 375; 19 T. L. R. 238; 47 Sol. Jo. 297, C. A.*

*Annotations —Consd. Foley's Charity Trustees v. Dudley Corpn., [1910] 1 K. B. 317. Refd. L. & N. W. Ry. v. Westminster Corpn. (1901), 90 L. T. 461.*

*See, generally Part XV., Sect. 1, post.*

#### *B. Enforcement of Rights.*

**609. Action for trespass.]—LADE v. SHEPHERD (1735), 2 Stra. 1004; 93 E. R. 997.**

*Annotations —Consd. Thompson v. West Somerset Mineral Ry. (1857), 29 L. T. O. S. 7; St. Mary, Newington v. Jacobs (1871), L. R. 7 Q. B. 47. Refd. Marshall v. Ulswater Co. (1871), L. R. 7 Q. B. 166; Burgess v. Northwich L. B. (1880), 6 Q. B. D. 261; Harrison v. Rutland, [1893] 1 Q. B. 142.*

**610. — Pleading.]—**Where pltf. had lands abutting on one side of a public highway, called S. Lane, which is *prima facie* evidence that half of the lane was his soil & freehold, he may declare generally for a trespass in his close called S. Lane; & deft. must plead soil & freehold in another, in order to drive pltf. to new assign the trespass complained of in the part of the lane which was his exclusive property.—*STEVENS v. WHISTLER (1809), 11 East, 51; 103 E. R. 923.*

*Annotations —Refd. Harrison v. Rutland, [1893] 1 Q. B. 142. Mentd. Bassett v. Mitchell (1831), 2 B. & Ad. 99.*

**611. — Overloading surface of highway.]—BURGESS v. NORTHWICH LOCAL BOARD, No. 661, post.**

**612. Whether entitled to remove objects placed on land—Flagstones on stepping stones—In enlarge-**

**ment of public right.]—**Up to 1855 a footway across a brook had been by means of fourteen stepping stones. In that year the highway surveyors reduced the number of stones, increased their height, & placed flagstones on the top of them, forming thereby a kind of bridge:—*Held*: the surveyors were not justified in so doing, & the owner of the land adjoining the brook having removed the flagstones, could not be convicted of obstructing the way under Highway Act, 1835 (c. 50), s. 72.—*SUTCLIFFE v. SOWERBY HIGHWAYS SURVEYORS (1859), 1 L. T. 7; 23 J. P. 758; 8 W. R. 40.*

*Annotation:—Foldl. Radcliffe v. Marsden U. D. C. (1908), 72 J. P. 475.*

**613. — Object not justified by nature of easement of way—Though not amounting to nuisance.]—R. v. MATHIAS, No. 1611, post.**

**614. — Wider bridge substituted for old bridge—Owner not thereby injured.]—**Deft. was indicted for obstructing a footway. A bridge which spanned a small stream connected a footway which passed through deft.'s land. The bridge had been washed away, & a new one was erected, which deft. objected to, on the ground that it was much larger than the former bridge, & was calculated to give the public enlarged rights to use the footway to his detriment. Deft. had cut down the new bridge at the point at which it rested on his land. Deft. was at the trial found guilty, & he now moved for a new trial on the ground that the verdict was against the evidence:—*Held*: deft. had not been injured by the enlargement of the new bridge, & he was able to prevent, if he so wished, cattle crossing over into his land by the erection of a stile.—*R. v. BARNES (1881), 1 T. L. R. 21.*

**615. Right to restrain unauthorised traffic—Passage of cattle—Erection of stile.]—R. v. BARNES, No. 611, ante.**

#### SUB-SECT. 3. STATUTORY VESTING OF HIGHWAYS IN LOCAL AUTHORITIES.

*See Public Health Act, 1875 (c. 55); Metropolitan Management Act, 1854 (c. 120).*

**616. Extent of ownership—Sufficient for control & management as highway.]—**By an award made under an Inclosure Act, passed in 1766, two private roads, E. & H., were set out. About 1818, the road E. became a public highway. Down to 1863, the surveyors of highways for the parish of C., within which E. & H. were situate, had from time to time let the pasture upon E. & H. to various persons. A local board was formed in 1863 for the parish of C., who in 1876 let the pasture upon E. & H. to pltf.. He thereupon commenced to depasture the herbage with his cattle on the roads. Deft. interfered with pltf.'s enjoyment of the pasture. By Public Health Act, 1875 (c. 55), s. 4, a street includes any highway. By sect. 144, every local board are within their district surveyors of highways. By sect. 149, all streets shall vest in & be under the control of the

#### PART V. SECT. 2, SUB-SECT. 2.—E.

**609 i. Action for trespass.]—**Where in an original survey an allowance for road had been made between certain lots, & afterwards, before 1810, patents were issued making the allowance between other lots:—*Held*: the grants must prevail, & pltf., to whom one of the former lots belonged, could recover for a trespass on that part of his lot claimed as an allowance

for road.—*FIELD v. KEMP (1834), 3 O. S. 374.—CAN.*

**i. Action for damages—Destruction of works of improvement on road.]—**The owner of soil of a road dedicated for the use of the public, if responsible for keeping the road in order & in good repair, is entitled to institute a suit for damages & injunction against the destroyer of any work of improvement done to the road.—*MAHARAJ*

*BAHADUR SINGH v. PARKSHI NATH SINGH (1904), 1 L. R. 31 Cal. 839.—IND.*

#### PART V. SECT. 2, SUB-SECT. 3.

**616 i. Extent of ownership—Sufficient for control & management as highway.]—**The Sydney Corpn. Act, 1879, which vests public ways in the municipal council, does not so vest them in proprietary right but only for purposes

**Sec. 2.—Rights of owner of soil: Sub-sect. 3.]**

**local board:—Held:** by above enactment the property in the soil of E., being a "street," so far vested in the local board that they could demise the right of pasturage thereon to *pltf.*, who was entitled to maintain an action; the local board having no power to demise H., being a private way, *pltf.* had not sufficient exclusive possession as occupier to enable him to maintain an action.

The words of this sect. [Public Health Act, 1875 (c. 55), s. 149] vest the property in the street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street & to lay down sewers; for, at the present day, there can be no street in a town without sewers, & also for the purpose of laying down gas & water-pipes (*BRETT, L.J.*).—(*COVERDALE v. CHARLTON* (1878), 4 Q. B. D. 104; 48 L. J. Q. B. 128; 40 L. T. 88; 43 J. P. 268; 27 W. R. 257, C. A.)

**Annotations:—**Expld. *Rolls v. St. George the Martyr Southwark Vestry* (1880), 14 Ch. D. 785. **Folld.** *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 901. **Consd.** *Tunbridge Wells Corp. v. Baird*, [1896] A. C. 434. **Refd.** *Nutter v. Accrington L. B. of Health* (1878), 4 Q. B. D. 375; *Burgess v. Northwich L. B.* (1880), 6 Q. B. D. 261; *R. v. London County, Keepers of Peace & J.J.* (1890), 25 Q. B. D. 357; *Fareham L. B. & Fareham Electric Light Co. v. Smith* (1891), 7 T. L. R. 413; *Hill v. Wallasey L. B.*, [1894] 1 Ch. 133; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Bradford v. Eastbourne Corp.*, [1896] 2 Q. B. 205; *Salt Union v. Harvey* (1897), 61 J. P. 375; *St. Mary Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *Finchley Electric Light Co. v. Finchley U. C.*, [1903] 1 Ch. 437; *Westminster Corp. v. Johnson*, *Westminster Corp. v. Fuller*, [1904] 2 K. B. 737; *Penfold & Wilson v. Tucker*, [1907] 2 Ch. 191; *Wednesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78; *Foley's Charity Trustees v. Dudley Corp.*, [1910] 1 K. B. 317; *Jones v. Row* (1910), 103 L. T. 165; *Nesbitt v. Mablethorpe U. D. C.*, [1918] 2 K. B. 1.

617. — **Whether includes ownership of herbage.**—(*COVERDALE v. CHARLTON*, No. 616, *ante*.)

**Compare** Nos. 476, 606, *ante*.

618. — **How far extends to ownership of subsoil—Construction of underground lavatory.**—Public Health Act, 1875 (c. 55), which by s. 149 vests certain streets in the urban authority, does not vest the subsoil. Therefore where a local Act authorised the urban authority to erect & maintain "in any street or public place, or on land belonging to them or under their control," lavatories for the use of the public:—**Held:** the urban authority had no power to excavate the soil & erect lavatories below the surface of a street which had vested in them within 1875 Act.—**TUNBRIDGE WELLS CORPN. v. BAIRD**, [1896] A. C. 434; 65 L. J. Q. B. 451; 74 L. T. 385; 60 J. P. 788; 12 T. L. R. 372, II. L.; *affg.* S. C. *sub nom.* **BAIRD v. TUNBRIDGE WELLS CORPN.**, [1894] 2 Q. B. 867, C. A.

**Annotations:—****Folld.** *Salt Union v. Harvey* (1897), 61 J. P. 375; *Battersea Vestry v. County of London & Brush*

*woods.*—**OSBORNE v. KINGSTON (CITY) CORPN.** (1893), 23 O. L. 382.—**CAN.**

**H.** — **Whether a freehold.**—**Held:** the word "vest" does not import a vesting of the surface merely, but is wide enough to include the freehold as well.—**COTTON v. VANCOUVER** (1906), 12 B. C. R. 497.—**CAN.**

621. — **How far extends to ownership of subsoil.**—Vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the highway exists. It does not own the soil from the centre of the earth *usque ad celum*, but it has the exclusive right to manage & control

so much of the soil below as is necessary to enable it adequately to maintain the highway as a highway.—**SUN-DARAM AYYAR v. MADURA MUNICIPAL COUNCIL** (1901), 1 L. L. R. 25 Mad. 635.—**IND.**

**K.** **Vesting in Crown—Or Public Trustee.**—When a street or road becomes a public highway, the soil of the road is vested in the Crown or other a corporate body which fills the position of public trustee in trust for the public use.—**DR LA CHÉVROTIERE v. MONTREAL (CITY)** (1886), 12 App. Cas. 149.—**CAN.**

**L.** — **When land is purchased by & conveyed to a municipality**

*Provincial Electric Lighting Co.*, [1899] 1 Ch. 474; *Finchley Electric Light Co. v. Finchley U. C.*, [1903] 1 Ch. 437. **Consd.** *Poplar Corp. v. Millwall Dock Co.* (1904), 68 J. P. 339; *Wednesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78; *Porter v. Ipswich Corp.*, [1922] 2 K. B. 145. **Refd.** *Chaplin v. Westminster Corp.*, [1901] 2 Ch. 329; *Westminster Corp. v. Johnson*, *Westminster Corp. v. Fuller*, [1904] 2 K. B. 737; *Ystradgynnydd & Pontypridd Main Sewerage Board v. Bensted*, [1906] 1 K. B. 294; *S. E. Ry. v. National Telephone Co.* (1908), 77 L. J. Ch. 679; *Foley's Charity Trustees v. Dudley Corp.*, [1910] 1 K. B. 317; *C. L. Ry. v. London City Land Tax Commrs.* (1911), 105 L. T. 391; *Kelly v. Barrett*, [1924] 2 Ch. 379. **Mentd.** *White-chapel Board of Works v. Crow* (1901), 84 L. T. 595; *A.-G. for Quebec v. A.-G. for Canada*, [1921] 1 A. C. 401.

619. — **Pipes for trading purposes.**—**SALT UNION, LTD. v. HARVEY (J. P.) & Co.**, No. 595, *ante*.

620. — **Laying electric mains.**—**WALKER URBAN DISTRICT COUNCIL v. WIGHAM, RICHARDSON & Co., LTD., WIGHAM, RICHARDSON & Co., LTD. v. WALKER URBAN DISTRICT COUNCIL**, No. 603, *ante*.

621. — **FINCHLEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN COUNCIL**, No. 608, *ante*.

622. — **Land under which a co. proposed to run a pipe or drain was vested in them for the purpose of their undertaking. Under a private Act a road running over this land had been transferred to & vested in a local authority. The local authority gave no consideration for the road. On the local authority applying for an injunction to restrain the co. from laying a pipe or drain under or trespassing on the road:—Held:** the road was vested in the local authority only for the purposes of a road; they had no right to the subsoil, & consequently no injunction could be granted.—**POPULAR CORPN. v. MILLWALL DOCK CO.** (1904), 68 J. P. 339.

623. — **Remedy against illegal interference by third persons—Whether by injunction.**—**BATTERSEA VESTRY v. COUNTY OF LONDON & BRUSH PROVINCIAL ELECTRIC LIGHTING CO., LTD.**, No. 602, *ante*.

624. — **Whether extends to upper air—Electric wires—At height not inconvenient to public.**—**WANDSWORTH BOARD OF WORKS v. UNITED TELEPHONE CO.**, No. 607, *ante*.

625. — **FINCHLEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN COUNCIL**, No. 608, *ante*.

626. — **Whether includes liability to pay rentcharge—Charge formerly payable by turnpike trustees.**—**FOLEY'S CHARITY TRUSTEES v. DUDLEY CORPN.**, No. 581, *ante*.

627. **Termination of ownership—By highway ceasing to be such.**—*Pltf.* having, with the sanction of the Metropolitan Board of Works, made a new street over his land within the Metropolitan District, upon which land were two old streets, N. street & A. street, an order was made at quarter sessions for stopping up part of N. Street as unnecessary, & an order was also made for diverting

a part of A. Street, & opening the new street in lieu thereof. The vestry of the parish gave notice to pltf. that he must not convert to his own use the stopped up part of N. Street, nor stop up A. Street, or convert any part of the soil of it to his own use till he had purchased the same from the vestry:—*Held*: under Metropolis Management Act, 1855 (c. 120), s. 98, all streets being for the time being highways are vested in the vestry, but only so long as they are highways, & when they cease to be highways, by being legally stopped up or diverted, the interest of the vestry determines, therefore pltf. was entitled to convert to his own use the stopped up part of N. Street & the diverted part of A. street subject, as to A. Street, to his first obtaining a certificate, that the substituted street had been completed & put into good condition & repair.—*ROLLS v. ST. GEORGE THE MARTYR, SOUTHWARK, VESTRY* (1880), 14 Ch. D. 785; 49 L. J. Ch. 691; 43 L. T. 140; 44 J. P. 680; 28 W. R. 867, C. A.

*Annotations*:—*Consd.* Wandsworth Board of Works v. United Telephone Co. (1884), 13 Q. B. D. 901. *Apprvd.* Tunbridge Wells Corp. v. Baird (1896), 74 L. T. 385. *Consd.* Finchley Electric Light Co. v. Finchley U. C. [1902] 1 Ch. 866. *Refd.* Burgess v. Northwich L. B. (1880), 6 Q. B. D. 281; A.-G. v. Conduitt Colliery Co., [1895] 1 Q. B. 301; Bradford v. Eastbourne Corp., [1896] 2 Q. B. 205; Batterssea Vestry v. County of London & Brush Provincial Electric Lighting Co., [1899] 1 Ch. 474; Westminster Corp. v. Johnson, Westminster Corp. v. Fuller, [1904] 2 K. B. 737; Kershaw v. Smith, [1913] W. N. 107; London City Land Tax Comrs. v. C. L. Ry., [1913] A. C. 364.

### 623. Remedies for interference—Injunction—Grounds for granting—Interference trifling.]

Defts. being in the use & occupation of a railway bridge over a certain highway, & being owners of the soil on either side of the road, commenced the construction of buttresses in the road, on a line with the existing abutments, for the purpose of widening their bridge. Pltfs., in whom the soil of the road was vested under Metropolitan Local Management Act, as surveyors of the highways, filed a bill to restrain defts. from further narrowing the road, on the ground of public inconvenience:—*Held*: the alleged inconvenience was not of sufficient magnitude for the interference of the ct.—*WANDSWORTH BOARD OF WORKS v. LONDON & SOUTH WESTERN RY. CO.* (1862), 31 L. J. Ch. 854; 20 J. P. 821; 8 Jur. N. S. 691; 10 W. R. 814.

*Annotations*:—*Refd.* Wandsworth Board of Works v. United Telephone Co. (1884), 53 L. J. Q. B. 449; St. Mary Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31; Hyde Corp. v. Oldham, Ashton & Hyde Electric Tramway (1900), 64 J. P. 596.

### 629. ——— Damages.]—Surface let down by mining operations.]—A railway co. constructed a railway on the level across a highway in the district of which relators were the urban sanitary

authority. Subsequently defts. worked coal mines in a proper & usual manner beneath the highway, with the result that a gradual & uniform subsidence to the extent of about ten feet vertically took place of the highway, railway, & surrounding land. No actual damage was done to the highway thereby, nor was it rendered less convenient; but the railway co. placed ballast under the railway so as to maintain it at its original level, with the result that an embankment was formed obstructing the use of the highway. In an action against defts. for damages for the obstruction to the highway:—*Held*: (1) defts. were not liable; (2) assuming the highway to be repairable by the inhabitants at large, & therefore vested in relators under Public Health Act, 1875 (c. 55), s. 149, the subsidence of the highway having been substantial, relators, notwithstanding that they had suffered no appreciable damage by reason of such subsidence, were entitled to judgment with nominal damages for the injury to their proprietary right.—*A.-G. v. CONDUITT COLLIERY CO.*, [1895] 1 Q. B. 301; 64 L. J. Q. B. 207; 71 L. T. 771; 59 J. P. 70; 43 W. R. 386; 11 T. L. R. 57; 15 R. 267, D. C.

*Annotations*:—*As to* (2) *Consd.* Wednesbury Corp. v. Lodge Holes Colliery Co., [1905] 2 K. B. 823. *Generally*, *Mentd.* Weld-Blundell v. Stephens, [1920] A. C. 956.

630. ———.]—A mine extended under a highway which was vested under Public Health Act, 1875 (c. 55), s. 149, in the local authority. While working the mine the owners let down the surface of the highway, which the local authority in good faith & on the opinion of skilled advisers, restored to its former level at great cost. An equally commodious road might have been made at less cost:—*Held*: the local authority were not entitled to raise the road to the old level, cost what it might & whether it was more commodious to the public or not, & were only entitled to recover from the mine owners what it would have cost to make the equally commodious road.—*LODGE HOLES COLLIERY CO., LTD. v. WEDNESBURY CORPN.*, [1908] A. C. 323; 77 L. J. K. B. 817; 99 L. T. 210; 72 J. P. 417; 24 T. L. R. 771; 52 Sol. Jo. 620; 6 L. G. R. 924, H. L.; *reussg.* S. C. *sub nom.* WEDNESBURY CORPN. v. LODGE HOLES COLLIERY CO., LTD., [1907] 1 K. B. 78, C. A.

*Annotations*:—*Consd.* North Staffordshire Ry. v. Hanley Corp., [1909], 73 J. P. 477; Glasgow Corp. v. Barclay Curie (1923), 93 L. J. P. C. 1. *Refd.* Foley Charity Trustees v. Dudley Corp., [1910] 1 K. B. 317; A.-G. v. Roe, [1915] 1 Ch. 235.

### 631. ——— Measure of damages.]—LODGE HOLES COLLIERY CO., LTD. v. WEDNESBURY CORPN., No. 630, *ante*.

*See, generally*, DAMAGES, Vol. XVII., pp. 81 *et seq.*

under Municipal Act for a road, & thereafter dedicated & used as a public highway, it becomes vested in the Crown by virtue of s. 622 of the Act.—*PULKRABEK v. RUSSELL RURAL MUNICIPALITY* (1908), 8 W. L. R. 8; 18 Man. L. R. 26.—*CAN.*

m. ——— Or city corporation.]—*Held*: the registration of a plan setting aside & establishing a highway vested the highway, by Saskatchewan Land Titles Act, R. S. Sask. 1909, c. 41, s. 79 (5), in His Majesty, in the right & to the use of his Province of Saskatchewan; & that the city corporation now stood in the same position.—*Re REGINA (CITY) & CANADIAN PACIFIC RY. CO.* (1913), 26 W. L. R. 521.—*CAN.*

n. Under Municipal & Surveyors Acts.]—Under Municipal & Surveyors

Acts, by the filing of a plan, & the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done so no corporate act by which they have become liable to repair.—*ROCHE v. RYAN* (1891), 22 O. R. 107.—*CAN.*

o. Proceedings under Special Surveys Act, 1902.—*Effect of.*—Pltfs. had title to a piece of land adjoining the westerly boundary of St. Mary's road. They alleged that the road was only 66 feet wide at that point. Proceedings had been taken under Special Surveys Act, R. S. M. 1902, c. 158, & a plan of the survey, showing St. Mary's road as 99 feet wide at the point in question, had been duly approved & registered in accordance with the Act:—*Held*: these proceedings had, by virtue of that Act, the effect of

vesting the road to the width of 99 feet in the Province, with the right in the deft. municipality to exercise jurisdiction over it to the full width.—*PETERSON v. BITULITHIO & CONTRACTING CO.* (1913), 24 W. L. R. 19; 4 W. W. R. 223; 12 D. L. R. 444; 23 Man. L. R. 136.—*CAN.*

p. Municipal Act, 1913, s. 433.—*Effect of.*—Municipal Act, 1913, s. 433, vested the soil & freehold of roads & highways in the municipalities without any reservation of right:—*Held*: the purpose of sect. 433 was to do away with the confusion arising from the joint proprietorship over roads & highways to which effect can be given without causing the injustice of taking private property without compensation.—*ABELL v. YORK COUNTY* (1920), 61 S. C. R. 345.—*CAN.*

### SECT. 3.—RIGHT TO ACCESS BY OWNER OF ADJOINING PREMISES.

#### SUB-SECT. 1.—IN GENERAL.

**632. General rule.**—(1) *Pltf.* erected a street, leading out of a highway, across his own close, & terminating at the edge of *deft.*'s adjoining close, which was separated from the end of the street for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, & lighted, & both footways & half the horseway thereof paved at the expense of the inhabitants, by *deft.*'s fence:—*Held*: this street was not so dedicated to the public, that *deft.* pulling down his wall might enter it at the end adjoining to his land, & use it as a highway.

(2) No particular time is necessary for evidence of a dedication: it is not, like a grant, presumed from length of time: if the act of dedication be unequivocal, it may take place immediately: for instance, if a man builds a double row of houses opening into an ancient street at each end, making a street, & sells or lets the houses, that is instantly a highway (*CHAMBERLAIN, J.*).—*WOODYER v. HADDEN* (1813), 5 Taunt. 125; 128 E. R. 634.

*Annotations*:—*As to* (1) *Consd.* *Bateman v. Bluck* (1852), 18 Q. B. 870. *As to* (2) *Consd.* *Tottenham U. D. C. v. Rowley*, [1912] 2 Ch. 633. *Refd.* *Wood v. Veal* (1822), 5 B. & Ald. 451; *Bateman v. Bluck* (1852), 18 Q. B. 870; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449; *A.-G. & London Property Investment Trust v. Richmond Corp'n. & Gooding* (1903), 89 L. T. 700.

**633.** —.]—By a local Act, it was enacted that the expenses incurred by the town council in sewerage & flagging a street should be borne by the owner, according to the extent of their respective houses & grounds lying alongside or adjoining to the street:—*Held*: the owner of ground at the end of a street forming a *cul de sac*, was liable under this Act notwithstanding a wall divided his property from the street, which wall, however, he could, if he thought proper, remove wholly or partially, so as to obtain access from his estate to the street.—*MANCHESTER CORPN. v. CHAPMAN* (1808), 37 L. J. M. C. 173; 18 L. T. 610; 32 J. P. 582; 16 W. R. 974.

*Annotation*:—*Apld.* *Nowport Urban S. A. v. Graham* (1882), 9 Q. B. D. 183.

**634.** —.]—[Authorities recognise] a right of immediate access from private property, to a public highway, as a private right, distinct from the right of the owner of that property to use the highway itself, as one of the public (*LORD SELBORNE*).—*LYON v. FISHMONGERS' CO.* (1870), 1 App. Cas. 602; 46 L. J. Ch. 68; 35 L. T. 509; 42 J. P. 163; 25 W. R. 165, H. L.

*Annotations*:—*Consd.* *Hell v. Quebec Corp'n.* (1870), 5 App. Cas. 84; *Burgess v. Northwich L. B.* (1880), 6 Q. B. D. 284; *Hornor v. Whitechapel Board of Works* (1885), 55 L. J. Ch. 289; *North Shore Ry. v. Dion* (1889), 11 App. Cas. 612. *Expld.* *Ramuz v. Southern L. B.* (1892), 67 L. T. 169. *Consd.* *Montreal Corp'n. v. Montreal Harbour Comrs., Tetrault v. Montreal Harbour Comrs., A.-G. for Quebec v. A. G. for Canada* (1925), 42 T. L. R. 98. *Refd.* *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449; *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259; *A.-G. of Straits Settlements v. Wemyss* (1888), 13 App. Cas. 192; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Ellis v. Bedford*, [1899] 1 Ch. 494; *Chaplin v. Westminster Corp'n.*, [1901] 2 Ch. 329; *Mellor v. Walmsley*, [1905] 2 Ch. 164; *Wednesbury Corp'n. v. Lodge Holes Colliery Co.* (1906), 5 L. G. R. 43; *A.-G. of Southern Nigeria v. Holt* (Liverpool), *A.-G. of Southern Nigeria v. Maciver*, [1915] A. C. 599. *Mentd.* *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Gooden v. Thames River Conservators* (1887), 4 T. L. R. 187; *Laves v. Turner & Frore* (1892), 8 T. L. R. 584; *Thames River Conser-*

*vators v. Smeed, Dean.*, [1897] 2 Q. B. 334; *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109; *Jones v. Llancarwet U. C.*, [1911] 1 Ch. 393.

**635.** —.]—*COTTON'S TRUSTEES v. METROPOLITAN RY. CO.* (1880), *Times*, Mar. 10.

**636.** — From any part of land.]—In an action for laying obstructions on an alleged roadway in front of *pltf.*'s land, so as to prevent his access to it, except from an old gateway:—*Held*: (1) the question was whether the way was a public highway or merely a private way; for, in the former case, *pltf.* would be entitled to free access to it from any part of his land, & (2) there being strong evidence of ancient user by the public, mere temporary acts of obstruction by the owner of the adjoining land would not be material, as they would have been if the right were vested merely on modern dedication.—*BERRIDGE v. WARD* (1860), 2 F. & F. 208, N. P.; *subsequent proceedings* (1861), 10 C. B. N. S. 400.

*Annotations*:—*Generally*, *Mentd.* *R. v. Strand Board of Works* (1863), 4 B. & S. 526; *Crossley v. Lightowler* (1866), L. R. 3 Eq. 279; *Tidswell v. Whitworth* (1867), L. R. 2 C. P. 326; *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *Landrock v. Met. Dist. Ry.* (1886), 2 T. L. R. 532; *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133; *Haynes v. King*, [1893] 3 Ch. 439; *Pryor v. Petre*, [1891] 2 Ch. 11; *C. L. Ry. v. London City Land Tax Comrs.*, [1911] 2 Ch. 467.

**637.** —.]—It is well-established law that where there is a public highway the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land. They cannot, of course, pass over the soil of others without leave; & he who has dedicated the road to the public at large has no right to complain that a particular individual has come upon it at one spot rather than another (*BLACKBURN, J.*).—*MARSHALL v. ULLSWATER STEAM NAVIGATION CO.* (1871), L. R. 7 Q. B. 166; 41 L. J. Q. B. 41; 25 L. T. 793; 36 J. P. 583; 20 W. R. 144.

*Annotations*:—*Consd.* *Lyon v. Fishmongers' Co.* (1875), 10 Ch. App. 679; *Bourke v. Davis* (1889), 44 Ch. D. 110.

*Refd.* *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; *A.-G. of Southern Nigeria v. Holt* (Liverpool), *A.-G. of Southern Nigeria v. Maciver*, [1915] A. C. 599. *Mentd.* *Mitchell v. Darby Main Colliery Co.* (1884), 14 Q. B. D. 125; *A.-G. v. Emerson* (1891), 55 J. P. Jo. 709; *Hindson v. Ashby* (1896), 45 W. R. 252.

**638.** —.]—Consistent with public convenience.]—Where a local board is a highway authority, it has the power to alter for the accommodation of the public the level of any street, though some alteration may interfere with the free access of the adjoining owners to their property abutting on the street. Any remedy that the adjoining owners may have, except on the ground of unreasonable conduct on the part of the local authority, should be by way of compensation under Public Health Act, 1875 (c. 55), s. 308, & not by injunction. *Pltf.* possessed an inn & stables which stood back from the high road, & in front of them was an open space which until shortly before the action had been open to & on a level with the road. *Defts.* had made a foot-path on the road outside *pltf.*'s land with raised kerb stones, but left openings so that carriages could still go in from & out into the road, but not at every part of the boundary. *Pltf.* claimed an injunction against the local board restraining them from maintaining the kerb stones & erections as being an interference with her right to have access for all purposes to every portion of the highway adjoining the property:—*Held*: as

#### PART V. SECT. 3, SUB-SECT. 1.

**632 i.** *General rule.*—]—*WOOD v. CARLETON BRANCH RY. CO.* (1873), 1 P. & F. 244.—*CAN.*

**632 ii.** —.]—*ERIE & NIAGARA RY. CO. v. GREAT WESTERN RY. CO.* (1874),

21 Gr. 171.—*CAN.*

**632 iii.** —.]—*QUILLINANE v. CANADA SOUTHERN RY. CO.* (1884), 6 O. R. 567.—*CAN.*

**632 iv.** —.]—*WEST v. PARKDALE TOWN* (1888), 15 O. R. 319.—*CAN.*

**632 v.** —.]—*CASSIDY v. MOORE JAW (CITY)*, [1917] 1 W. W. R. 1085; 10 Sask. L. R. 51.—*CAN.*

**632 vi.** —.]—*STRACHAN v. EDINBURGH IMPROVEMENT COMRS.* (1837), 15 Sh. (Ct. of Sess.) 637; 12 Fac. Coll. 602.—*SCOT.*

Public Health Act, 1875 (c. 55), s. 149, gives power to the local authority to cause the soil of any street which is or at any time becomes a highway repairable by the inhabitants at large within any urban district to be raised, lowered, or altered as they may think fit, & to place & keep in repair fences & posts for the safety of foot passengers, defts. could not be restrained by injunction from keeping up the raised footpath for the accommodation of the public, & any remedy, except on the ground of unreasonable conduct on the part of the local authority, ought to be sought by way of compensation under Public Health Act, 1875 (c. 55), s. 308.—*SELLORS v. MATLOCK BATH LOCAL BOARD* (1885), 14 Q. B. D. 928; 52 L. T. 762.

**639. — Whether owner of soil of highway or not.**—An owner of land which runs right up to a public highway is entitled to access to that highway from his land, & that is so whether he is the presumptive owner of the soil of the highway or not. Where, therefore, a landowner, whose land adjoined a public promenade which had been also for many years used as a public highway for foot passengers, was deprived of his access to the promenade by a fence erected by a local board in whom the promenade had been vested:—*Held*: a mandatory injunction must issue to compel the removal of the fence, & an inquiry as to damages be directed.—*RAMUZ v. SOUTHEND LOCAL BOARD* (1892), 67 L. T. 169; 8 T. L. R. 700.

**640. Whether right limited to right of passage.**—In an action, in which the claim was admitted, deft. counterclaimed an injunction in the following circumstances. Pltf. & deft. were the respective owners & occupiers of two adjoining houses abutting on a street which was a public highway. The side wall of deft.'s house projected into the street a short distance beyond the front of pltf.'s house. There was no door or other opening in the side wall. Pltf. affixed boards at right angles to the front of his house & close to deft.'s side wall covering the wall to a height of twenty-two feet from the pavement. The boards did not constitute an obstruction to the street but they prevented deft. from having access to the wall from the street for the purpose of repairing it, & from exhibiting advertisements upon it:—*Held*: the right of access to a highway enjoyed as a private right by the owner of premises adjoining the highway is not limited to the right to pass from the premises to the highway & *vice versa*, but includes the right of access to a wall of the premises in which there is no door or other opening, & the right to have advertisements on the wall displayed to the uninterrupted view of the members of the public using the highway: the act of pltf. was a wrongful interference with the private right of deft.; & the deft. was entitled to an injunction restraining pltf. from maintaining the boards in the position above described.—*COBB v. SAXBY*, [1911] 3 K. B. 822; 83 L. J. K. B. 1817; 111 L. T. 814.

**641. Access over footway—Necessary for enjoyment of premises.**—*ST. MARY, NEWINGTON, VESTRY v. JACOBS*, No. 587, *ante*.

**642. —**—*ROWLEY v. TOTTENHAM URBAN DISTRICT COUNCIL*, No. 407, *ante*.

**643. Not exercisable over land of another—Private street not dedicated.**—*WOODYER v. HADDEN*, No. 632, *ante*.

**644. —**—*MARSHALL v. ULLESWATER STREAM NAVIGATION CO.*, No. 637, *ante*.

**645. New highway substituted for old.**—*YORKSHIRE, EAST RIDING COUNTY COUNCIL v. SELBY BRIDGE PROPRIETORS*, No. 2630, *post*.

**Provision of new means of access.**—*See Public Health Acts Amendment Act, 1907* (c. 53), s. 18.

#### SUB-SECT. 2.—NATURE OF RIGHT.

**616. Private right.**—*LYON v. FISHMONGERS' CO.*, No. 634, *ante*.

**647. —**—*COBB v. SAXBY*, No. 640, *ante*.

**648. — As distinct from public right of passage.**—I apprehend that the right of the owner of a private wharf or of roadside property to have access thereto, is a totally different right from the public right of passing & repassing along the highway or the river. . . . It would be the height of absurdity to say that a private right is not interfered with when a man who has been accustomed to enter his house from a highway finds his doorway made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him, whether the right of the public to pass & repass along the highway were or were not at the same time interfered with (*WOOD, V.-C.*).—*A.-G. v. THAMES CONSERVATORS, THORNTON v. SAME, CITY OF LONDON BREWERY v. SAME, CLOTHWORKERS' CO. v. SAME* (1862), 1 Hem. & M. 1; 1 New Rep. 121; 71 E. R. 1.

*Annotations:—Apld. Fritz v. Hobson* (1880), 11 Ch. D. 542. *Consd. Horner v. Whitechapel Board of Works* (1885), 50 L. J. Ch. 289. *Apld. Chaplin v. Westminster Corp.*, [1901] 2 Ch. 329. *Apld. Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; *Bell v. Quebec Corp.* (1879), 5 App. Cas. 84; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449. *Mentd. A.-G. Metropolitan Board of Works* (1863), 1 Hem. & M. 298; *Thames Conservators v. S. E. Ry.* (1871), 24 L. T. 246.

**649. —**—An owner of premises abutting on a highway enjoys as a private right the right of access from his own premises to the highway, & any interference with that access is an interference with a private right. But his right to transfer goods from vans in the public roadway across the public pavement to his premises is a right enjoyed by him as one of the public entitled to use the highway. It is an individual interest in a public right, but is not a private right which entitles him to restrain a local authority, acting *bonâ fide* under statutory powers, from obstructing the highway adjoining his premises in a manner which affects his personal convenience.

Deft., a public authority, in the exercise of the statutory obligation to light streets, erected a lamp-post on a highway in a place which it was proved was most convenient for the public. Pltfs., the owners of premises abutting on the highway, complained that the lamp-post interfered with the carrying on by them of their business:—*Held*: pltfs. had no right to restrain defts. from exercising their statutory authority to obstruct the highway by the erection of lamp-posts where they thought it necessary.—*CHAPLIN (W. H.) & CO., LTD. v. WESTMINSTER CORPN.*, [1901] 2 Ch. 329; 70 L. J. Ch. 679; 85 L. T. 88; 65 J. P. 661; 49 W. R. 580; 17 T. L. R. 576; 45 Sol. Jo. 597.

*Annotations:—Apld. Boyce v. Paddington B. Co.*, [1903] 1 Ch. 109. *Mentd. Anglo-Algerian S.S. Co. v. Houlder Line* (1907), 77 L. J. K. B. 187.

*Compare Nos. 482–506, ante.*

#### PART V. SECT. 3, SUB-SECT. 2.

**648 i. Private right.**—*As distinct from public right of passage.*—The right of

access to & egress from a public highway parting a person's land is a private right, differing not only in degree but in kind from the right of the public

to pass & repass along such highway.—*HARVEY v. BRITISH COLUMBIA BOAT & ENGINE CO.* (1908), 14 B. C. R. 121; 9 W. L. R. 415.—*CAN.*

2.   .] WHITE D.

1. ———— *Interference with right of access.*—The Crown erected a bridge or overhead crossing on a



uncultivated lands, without making satisfaction for same; & the owners of the lands, though or over any private lands tendering, or making satisfaction to the owners thereof & persons interested therein for the damage sustained thereby:—*Held*: (1) under this clause, the trustees were authorised to lower the hills & raise an action for a consequential injury resulting from an act which they had authority to do.—*BOULTON v. CROWTHER* (1824), 2 B. & C. 703; 2 L. J. O. S. K. B. 139; 107 E. R. 544; *sub nom.* *BOLTON v. CROWTHER*, 4 Dow. & Ry. K. B. 195.

*Annotations*:—As to (1) *Expld.* Dawson v. Paver (1847), 5 Hare, 415. *Refd.* Pilgrim v. Southampton & Dorchester Ry. (1849), 7 C. B. 205; Gibbs v. Liverpool Docks Trustees (1858), 31 L. T. O. S. 22; Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765. As to (2) *Consd.* Duncan v. Findlater (1839), 6 Cl. & Fin. 894. *Foll.* Bold v. Williams (1857), 28 L. T. O. S. 269. *Consd.* Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765; A.-G. v. Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146; Nutter v. Accrington L. B. of Health (1878), 4 Q. B. D. 375. *Refd.* Pilgrim v. Southampton & Dorchester Ry. (1849), 7 C. B. 205; Metcalf v. Hetherington (1855), 24 L. J. Ex. 314; Scott v. Manchester Corp'n. (1857), 29 L. T. O. S. 233; Holliday v. St. Leonard, Shoreditch, Vestry (1861), 11 C. B. N. S. 192; Coe v. Wise (1864), 5 B. & S. 440; East Fremantle Corp'n. v. Annals, [1902] A. C. 213; Dello v. Cheesham U. D. C., [1921] 3 K. B. 427. *Generally.* *Mentd.* Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works (1898), 79 L. T. 132.

**658.** — *No provision for compensation in statute—Lowering highway.*—The case of *Boulton v. Crowther*, No. 657, *ante*, is express to show, that although a private inconvenience may be sustained, it must yield to the public good, & we have no right to grant compensation for a private injury when it is not provided for by the Act of Parliament [Public Health Act, 1848 (c. 63)]. It would be better if such a provision had been made, but Parliament is omnipotent (LORD CAMPBELL, C.J.).—*BOLD v. WILLIAMS* (1857), 28 L. T. O. S. 269; 21 J. P. Jo. 81.

— *Statutory company acting under compulsory powers.*—See COMPULSORY PURCHASE, Vol. XI., pp. 136 *et seq.*

**659.** — *Under Public Health Acts—Road made up—Access to premises rendered dangerous.*—By Public Health Act, 1848 (c. 63), s. 69, the local board may by notice require the owner of premises fronting, etc., any future street, not being a highway, to sewer, level, etc., the same, & in default the board may themselves execute the works, & the expenses incurred are to be paid by the owner. By sect. 144 full compensation is to be made out of the general district rate to all persons sustaining any damage by reason of the exercise of any of the powers of the Act. *E.*, an owner of premises, having had a notice served upon him under the above sect., refused to comply therewith, whereupon the board themselves did the work, the result of which as alleged by *E.* was to obstruct the entrance to his house, & to render the access to his doorway dangerous & inconvenient, & for this he claimed compensation under sect. 144:—*Held*: he was entitled to such compensation.—*R. v. WALLASEY LOCAL BOARD OF HEALTH* (1869), L. R. 4 Q. B. 351; 10 B. & S. 428; 38 L. J. Q. B. 217; 21 L. T. 90; 33 J. P. 677; 17 W. R. 766.

*Annotation*:—*Mentd.* Pearsall v. Brierley Hill L. B. (1883), 11 Q. B. D. 735.

LOUISE RURAL MUNICIPALITY (1891), 7 Man. L. R. 231.—*CAN.*

*b.* — — — — —.]—The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district & obliged to use a substituted route which is

less convenient.—*R. v. MACARTHUR* (1904), 34 S. C. R. 570.—*CAN.*

*g.* — — — — —.]—*MOORE v. GREAT SOUTHERN & WESTERN RY. CO.* (1859), 10 I. C. L. R. 46.—*IR.*

*d.* — — — — —.]—*TUOHY v. GREAT SOUTHERN & WESTERN RY. CO.* (1859), 10 I. C. L. R. 98.—*IR.*

**660.** — *Footway repaired & levelled—Damage to adjoining premises.*—The A. local board, under the powers of the Public Health Act, 1848 (c. 63), having agreed with the trustees of a turnpike road to repair a footway, raised the level thereof, & thereby caused damage to the houses abutting on the street:—*Held*: (1) the damage caused to the houses was matter of compensation within Public Health Act, 1848 (c. 63), s. 141; (2) the fact of a road being a turnpike road does not prevent its being a street; (3) a local board may agree with turnpike road trustees to repair the footway only, & leave the carriage-way to the turnpike trustees.—*NUTTER v. ACCRINGTON LOCAL BOARD OF HEALTH* (1878), 4 Q. B. D. 375; 48 L. J. Q. B. 487; 40 L. T. 802; 43 J. P. 635, C. A.; *affd. sub nom.* *ACCRINGTON CORPN. v. NUTTER* (1880), 43 L. T. 710, H. L.

*Annotations*:—As to (2) *Consd.* Swanson Improvement & Tram. Co. v. Glamorganshire County Roads Board (1879), 41 L. T. 583. *Refd.* Huddersfield Corp'n. v. Lodge (1897), 61 J. P. 488. As to (3) *Consd.* *McCormick v. Stamford & Warrington, Payne v. Groy*, [1911] 1 Ch. 648.

**661.** — *Public authority acting as surveyor of highways—Level of subsided road raised.*—*Ptfs.* were owners of houses abutting on a highway which was vested in *defts.*, a local board acting under Public Health Act, 1875 (c. 55); & having the powers & liabilities of surveyor of highways. The abstraction of salt from a bed beneath them caused from time to time a subsidence of the ground upon which the houses & highways were situate. The houses were rebuilt in 1870 on timber, so that they might be raised by screw-jacks. In 1876 the surface of the highway in front of the houses had subsided considerably, & the houses had subsided with it. The surface of the roadway remained continuous, so that traffic could pass along it as before; but the roadway was in a curved hollow, & at the level to which it had subsided was liable to be flooded, & in fact was flooded at times, so as to render traffic impossible. *Defts.* put materials on the roadway so as to make the surface immediately above the point of the lowest subsidence about four feet three inches higher than it was at the commencement of the work. *Ptfs.*, having had notice from *defts.*, raised their houses simultaneously with the works to the roadway, & then claimed under Public Health Act, 1875 (c. 55), s. 308, & were awarded compensation for the cost of raising the houses. Having regard to the obstruction to traffic caused by floods, the raising of the road was reasonably necessary to put it in a proper state for traffic; but, excluding the consideration of floods, the raising of the road to the extent described, though a reasonable & prudent act, was not necessary to put the road into a proper state for traffic:—*Held*: as the highway was vested in *defts.*, no action of trespass could have been maintained by *ptfs.*, even if more materials had been placed on the road than a surveyor of highways could justify, & *ptfs.* had no right to have the road maintained at the level to which it accidentally & recently sank; & the works of *defts.* were not done "in exercise of any of the powers" of the Act within the terms of sect. 308, which means powers created by the Act, & not simply powers transferred by sect. 144 from the surveyor to the local board, but were done, if not

— — — — —.]—*BURT v. DOMINION IRON & STEEL CO.* (1915), 49 N. S. R. 339.—*CAN.*

*f.* *Arbitration—Grade of street lowered.*—The owner of property abutting on a street, the grade of which has been lowered by the *corpn.*, is entitled to an arbitration to determine



**Sect. 4.—Remedies for interference with rights of adjoining owners. Sect. 5: Sub-secls. 1 & 2.]**

highways, as surveyors of highways have, &, consequently, plffs. were not entitled to compensation.—**BURGESS v. NORTHWICH LOCAL BOARD** (1880), 6 Q. B. D. 264; 50 L. J. Q. B. 219; 44 L. T. 154, 45 J. P. 250; 29 W. R. 931, D. C.

**Annotations:—**Consd. **Wednesbury Corp. v. Lodge Holes Colliery Co.**, [1907] 1 K. B. 78. **Reid**, Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654. **Mentd.** **Brierley Hill L. B. v. Pearsall** (1884), 9 App. Cas. 595.

See, also, No. 655, ante.

**662. — Limited to direct structural damage.]**

—A public body, with power by Act of Parliament to stop up, alter, or use, for the purpose of the authorised works, certain specified streets, were restrained by injunction, from interfering, in excess of their powers, with the cellar of a house in one of the streets, the roadway of which was being lowered, until the amount of compensation for the whole house should have been ascertained & paid. An inquiry as to the damages sustained by plff., the owner & occupier of the house, by reason of the works commenced by defts., having been directed by the decree:—**Held**: plff. was not entitled to be compensated for the indirect injury to his trade resulting from the diversion of traffic caused by the authorised act of lowering the roadway, but only for direct structural injury occasioned by the unauthorised interference with his cellar. — **BIGG v. LONDON CORPN.** (1873), L. R. 15 Eq. 376; 28 L. T. 336; 37 J. P. 561.

**Annotation:—****Mentd.** **Taylor v. Oldham Corp.** (1876), 35 L. T. 696.

**663. — Indirect injury to trade excluded—**  
**Diversion of traffic—Alteration in level of roadway.]**

—**BIGG v. LONDON CORPN.**, No. 662, ante.

**664. — Loss of custom—By obstruction of access—Unreasonable user of highway.]—**(1) When the private right of the owner of a house adjoining a highway to access from his house to the highway is interfered with by an unreasonable user of the highway he is entitled to recover damages from the wrongdoer in respect of loss of custom in the business which he carries on in his house. He is entitled also to recover damages on the ground that he has suffered a particular injury from a public nuisance.

(2) The right of a landowner to use a public highway, *e.g.* for the purpose of bringing materials for the building of a house on his land, must be exercised reasonably. If there are several ways of access to the land there is no absolute right to use the most convenient way exclusively without regard to the convenience of neighbouring landowners.

(3) Where damages are claimed in substitution for an injunction to restrain a wrongful act commenced before the issue of the writ & continued afterwards, if the wrongful act has come to an end before the trial the ct. has jurisdiction under Chancery Amendment Act, 1857 (c. 27), s. 3, to assess the whole of the damages accrued.

(4) Plff. kept a shop, the only access to which was from a narrow passage leading from Fetter Lane to Fleur de Lis Court. There were two other narrow passages from Fleur de Lis Court, one leading

whether his property has been injuriously affected.—**NEW WESTMINSTER (RP.) v. VANCOUVER (CITY)** (1908), 14 B. C. R. 136; 9 W. L. R. 687.—**CAN.**

**g. — Title completed after damage.]—**Where a purchaser merely

holds property under an agreement for sale when damaged through the lowering of the grade of the street on which it fronts, but completes his title by a registered conveyance before commencing arbitration proceedings under the Municipal Act to recover compensation for the damage so caused,

into Fetter Lane & the other into Fleet Street. Deft. was employed to pull down & rebuild certain buildings in Fleur de Lis Court, & in the course of his operations, which lasted some months, he carried by far the greater proportion of the outgoing & incoming materials through the first-named passage, which was the most convenient passage so far as deft. was concerned, so as to practically devote such passage to the operations. In consequence of such operations being so carried on the access of the plff. & his customers to the shop was obstructed, & the takings of his business were materially lessened.—**Held**: the building operations had been unreasonably carried on, inasmuch as deft. ought to have distributed his materials & operations among the various passages.—**FRITZ v. HOBSON** (1880), 14 Ch. D. 542; 49 L. J. Ch. 321, 735; 42 L. T. 225, 677; 28 W. R. 459, 722; 24 Sol. Jo. 360.

**Annotations:—****As to** (1) **Consd.** **Lingke v. Christchurch Corp.** (1912), 10 L. G. R. 773. **Reid**, **Landrock v. Met. Dist. Ry.** (1886), 2 T. L. R. 532; **Serff v. Acton L. B.** (1886), 55 L. J. Ch. 569; **Martin v. L. C. C.** (1898), 79 L. T. 170; **Chaplin v. Westminster Corp.**, [1901] 2 Ch. 329; **Boyce v. Paddington B. C.**, [1903] 1 Ch. 109. **As to** (2) **Reid**, **Landrock v. Met. Dist. Ry.** (1886), 2 T. L. R. 532. **As to** (3) **Consd.** **Slack v. Leeds Industrial Co-op. Soc.**, [1923] 1 Ch. 431. **Reid**, **Beddall v. Maitland** (1881), 17 Ch. D. 174; **Serrao v. Noel** (1885), 15 Q. B. D. 549; **Chapman, Morsons v. Auckland Union Grdns.** (1889), 23 Q. B. D. 294; **Dreyfus v. Peruvian Guano Co.** (1889), 43 Ch. D. 316; **Leeds Industrial Co-op. Soc. v. Slack**, [1924] A. C. 851. **As to** (4) **Reid**, **Martin v. L. C. C.** (1898), 79 L. T. 170. **Generally**, **Mentd.** **Penrice v. Williams** (1883), 23 Ch. D. 353; **Barker v. Purvis** (1886), 56 L. T. 131; **Milson v. Carter**, [1893] A. C. 638; **Chessum v. Gordon**, [1901] 1 K. B. 694.

**665. Ascertainment of compensation—Whether determination of liability condition precedent.]—**

Defts. by altering a roadway under the powers of Public Health Act, 1875 (c. 55), injured the access to plff.'s house. He thereupon claimed compensation from defts., & appointed an arbitrator. Defts. did not appoint an arbitrator, & thereupon the arbitrator appointed by plff. awarded to him a certain sum as compensation for the injury done to his house. Defts. not having paid this amount, an action was brought to recover it, in which the liability of defts. to compensate plff. was established; but defts. objected that the action would not lie on the ground that the question of liability ought to have been decided before the amount of compensation was ascertained.—**Held**: the action was maintainable, & plff. was entitled to judgment.—**PEARSALL v. BRIERLEY HILL LOCAL BOARD** (1883), 11 Q. B. D. 735; 52 L. J. Q. B. 529; 49 L. T. 486; 47 J. P. 628; 32 W. R. 141, C. A.; *affd. sub nom.* **BRIERLEY HILL LOCAL BOARD v. PEARSALL** (1884), 9 App. Cas. 595, H. L.

**Annotations:—****Reid**, **St. James & Pall Mall Electric Light Co. v. R.** (1901), 73 L. J. K. B. 518; **Turner v. Mid. Ry.** (1911), 80 L. J. K. B. 516. **Mentd.** **Willesden L. B. v. Wright** (1896), 75 L. T. 13; **Walshaw v. Brighouse Corp.**, [1899] 2 Q. B. 286; **Dawson v. G. N. & City Ry.**, [1905] 1 K. B. 260; **Hobbs v. Winchester Corp.**, [1910] 2 K. B. 46.

## SECT. 5.—TOLLS.

### SUB-SECT. 1.—IN GENERAL.

**666. Definition.]—***Semble*: a toll is a payment for the right of passing along a highway, public or private.—**SIMPSON v. DENISON** (1852), 10 Hare,

he is not thereby debarred by Land Registry Act, s. 104.—**Re JACKSON & NORTH VANCOUVER CORPN.** (1914), 19 B. C. R. 147.—**CAN.**

### PART V. SECT. 5, SUB-SECT. 1.

**h. Validity of—Road out of repair—Tolls illegally imposed.]—****R. v.**

51; 7 Ry. & Can. Cas. 403; 20 L. T. O. S. 46; 16 Jur. 828; 68 E. R. 835.

**Annotations.**—*Mentd.* South Yorkshire Ry. & River Dun Co. v. G. N. Ry. (1853), 9 Exch. 53; *Hostock v. North Staffordshire Ry.* (1855), 24 L. J. Q. B. 225; *Norwich Corp'n. v. Norfolk Ry.* (1855), 4 E. & B. 397; *Russell v. Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 471.

**667. Classification—Tolls traverse & tolls thorough—Toll turn.**—*HESKETH v. WILLS* (1670), as reported in 1 Sid. 454; 82 E. R. 1214.

**Annotations.**—*Reid.* Nottingham Corp'n. v. Lambert (1738), Willes, 111. *Mentd.* Jenkins v. Harvey (1835), 2 Cr. M. & R. 393.

**668.** ————]—*WADMORE v. DEAR, WADMORE v. ARIES*, No. 685, *post*.

**669. Validity of—Reasonableness of origin.**—*WARRINGTON v. MOSELY*, No. 683, *post*.

**670.** ————]—**Imposition of new tolls—By lessee—Construction of lease.**—By a bridge Act it was enacted that tolls not exceeding the tolls specified in the schedule to that Act be demanded & taken by such person as the comrs. should appoint for each & every time of passing over the bridge; provided that tolls should only be payable once on the same day in the case of foot passengers, private carriages, not plying for hire, & carts, notwithstanding that they might pass or repass more than once on the same day. By the schedule to the Act a toll of *tid.* was payable for every horse drawing a carriage. Deft. tendered for the tolls on the footing, as he alleged, of the above provisions; & the comrs., by lease demised to deft., at an annual rent, the tolls which were or could then be demanded & taken, subject to all statutory restrictions & exemptions, & so as such tolls to be taken during the demise should not be increased beyond the tolls then levied. At the date of the lease one toll only was demanded in respect of a hackney carriage passing over the bridge with passengers & returning with the same passengers or without passengers on the same day, & no toll was demanded in respect of a hackney carriage passing without passengers. Deft. proposed to charge a toll in the case of a carriage plying for hire every time it crossed the bridge. Thereupon the comrs. brought an action claiming an injunction to restrain him from so doing. Deft. counter-claimed that the lease might be rectified on the ground that it did not give effect to the contract between the comrs. & himself by their acceptance of his tender for the tolls:—*Held*: the proposed increase of the tolls was not permissible, having regard to the terms of the lease.—*CONWAY BRIDGE COMRS. v. JONES* (1910), 102 L. T. 92; 26 T. L. R. 259, C. A.

**671. Renting tolls—Effect of—Whether confers settlement.**—Renting the tolls of a bridge vested by Act of Parliament in a co. of proprietors who are declared a corp'n., will confer a settlement although the tolls are made personal estate & the renting is not stated to be by deed. 13 Geo. 3, c. 84, which prohibits persons from gaining a

settlement by renting the tolls of turnpike roads, does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road.—*R. v. BURWITH (INHABITANTS)* (1813), 1 M. & S. 511; 105 E. R. 192.

Settlement generally, see *POOR LAW*.

**672.** ————]—**Power of lessee to compound with persons using road.**—The lessees of tolls are not prohibited by Turnpike Roads Act, 1822 (c. 120), s. 55, from making compositions with persons using the roads of the tolls of which they are lessees.—*SPOTT v. CLEGG* (1863), 13 C. B. N. S. 619; 1 New Rep. 327; 32 L. J. C. P. 102; 7 L. T. 714; 27 J. P. 152; 9 Jur. N. S. 915; 11 W. R. 366; 113 E. R. 240.

**673.** ————]—**Power of lessee to impose new tolls—Construction of lease.**—*CONWAY BRIDGE COMRS. v. JONES*, No. 670, *ante*.

**674. Powers of trustees—To regulate charges.**—By a Turnpike Act the trustees were authorised to take at each & every of the several & respective turnpike gates erected on the road the following tolls: "For every horse, mule, or other cattle drawing a carriage, *9d.*; for every horse, mule, or ass not drawing, *2d.*; for every drove of oxen, cows, etc., *1s. 6d.* per score; for every drove of hogs, sheep, etc., *1s. 1d.* per score." By another act, it was made lawful for the trustees, at a meeting to be held for that purpose, whereof notice in writing was to be affixed on all the turnpike gates erected on the road, to lessen & reduce, & again to raise & advance all or any of the tolls thereby granted, & such tolls so reduced or advanced were to be collected as the tolls thereby granted:—*Held*: under this Act, the trustees were authorised to reduce or advance any one of the four descriptions of tolls at all the gates, but not to reduce or advance them at one gate & not at another.—*R. v. BURY & STRATTON ROADS TRUSTEES* (1825), 4 B. & C. 361; 6 Dow. & Ry. K. B. 368; 3 Dow. & Ry. M. C. 238; 3 L. J. O. S. K. B. 248; 107 E. R. 1093.

**Annotation.**—*Reid.* R. v. Grand Junction Canal Co. (1837), 3 Ry. & Can. Cas. 11.

**675. Expense of Act authorising tolls—To be defrayed out of tolls—Conditions precedent to recovery.**—Where the expenses of passing an Act of Parliament are directed by the Act to be defrayed out of certain tolls to be levied under the Act, it is incumbent on the party who sues for the expense of soliciting the Act, to show that tolls have been collected sufficient to cover his demand.—*ANDREWS v. DALLY* (1828), 4 Bing. 506; 1 Moo. & P. 190; 6 L. J. O. S. C. P. 117; 130 E. R. 886.

#### SUB-SECT. 2.—ORIGIN.

**676. Grant by Crown.**—*BRECON MARKETS CO v. NEATH & BRECON RY. CO.*, No. 681, *post*.

*GREAVES* (1881), 46 U. C. R. 200.—**CAN.**

**k.** ————]—*A.-G. OF ONTARIO v. VAUGHAN ROAD CO.* (1892), 21 S. C. R. 631.—**CAN.**

**l.** ————]—*Yukon territory.*—*O'BRIEN v. ALLEN* (1900), 30 S. C. R. 340; 20 C. L. T. 295.—**CAN.**

**m.** ————]—*Compliance with statutory requirements as to boards on toll-gate—Whether condition precedent to collection.*—*HOOKE v. MORRIS* (1901), 20 N. Z. L. R. 195.—**N.Z.**

**n.** ————]—*THOMSON v. THOMSON*, [1916] N. Z. L. R. 963.—**N.Z.**

**o. Renting tolls—Neglect of authority**  
**J.—VOL. XXVI.**

*to repair road—Diminution of tolls—Loss to lessee—Whether lessor liable for loss.*—*WATSON v. SARNIA PLANK ROAD CO.* (1858), 16 U. C. R. 228.—**CAN.**

**p.** ————]—*Notification of scale.*—From April, 1891, until Mar. 31, 1901, the local body each year by resolution let the toll-gates to different persons:—

*Held*: the scale of tolls having been publicly notified in 1889, it did not require to be notified again on the occasion of each resolution.—*HOOKE v. MORRIS* (1901), 20 N. Z. L. R. 195.—**N.Z.**

**q. Transfer of road—Power of transfer to alter rates of toll increase.**—Where, pursuant to 12 Vict. c. 5, s. 12, the governor in council has transferred

to a municipal corp'n. a toll road upon which certain rates of toll are in force, with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in 12 Vict. c. 4, sched. A., & a subsequent transferee of the municipal corp'n. can exact payment of the increased rates & is not limited to a toll sufficient to keep the road in repair.—*PAYNE v. CAUGHILL* (1897), 24 A. R. 556.—**CAN.**

#### PART V. SECT. 5, SUB-SECT. 2.

**r. Resolution of local body.**—Where the matter of the establishment of toll-gates had been referred by a local body to a committee, & the

*Sect. 5.—Tolls: Sub-sects. 2, 3 & 4.]*

**677. By prescription.]—SMITH v. SHEPHERD,** No. 687, *post*.

**678. —.]—WARRINGTON v. MOSELY,** No. 683, *post*.

**679. — Not destroyed by charter exempting inhabitants from toll.]—**The corp. of T. having proved a prescriptive right to tolls:—*Held*: it was not destroyed by a charter of Elizabeth, granting & confirming, among other things, all the ancient rights of the corp., but exempting the inhabitants from toll in all places except London; this exemption applied to the tolls of all other places, except London, but not to the tolls of T.—**TRURO CORPN. v. REYNOLDS, TRURO CORPN. v. BASTIAN** (1832), 8 Bing. 275; 1 Moo. & S. 272; 1 L. J. C. P. 62; 131 E. R. 407.

**680. How far dependent on ownership of soil.]—**A wooden bridge was constructed across a river which divided the parishes of W. & A. from each other, one bank & part of the bridge being in W., the other bank & other part of the bridge in A. The bridge was supported by piles driven into the ground at the bottom of the river, & by abutments of brickwork on each bank. On the A. side of the bridge was a toll house supported on piles also driven into the soil of the river. Tolls were taken, at this house only, for carts with merchandise passing the bridge. S. was the owner of the tolls, deriving title from a grant from the Duchy of Lancaster. In a document of the reign of Edward II., & in other documents down to the time of Charles I., the tolls were called traverse; & it appeared that the tolls had passed by grants conveying likewise the manor & castle of H. of which S. & those preceding him were also owners. S., & those preceding him, had for twenty years performed the repairs of the bridge, including excavations in the soil at the bottom of the river, & the planking of the carriage way, but had not repaired the carriage way: *Held*: (1) this was *prima facie* evidence that S. had the tolls as tolls traverse, in respect of ownership of the soil on which the bridge stood; (2) this was a beneficial occupation by him of land in W. for which he was rateable in W.

The tolls were actually received by E., who paid rent for them to S., under a parol agreement by which E. contracted with S. for the receipt of the tolls at such rent: *Held*: S. was nevertheless the rateable party, since the agreement did not profess to demise the lands, & the tolls, as such, could not pass from him without deed.—**R. v. SALISBURY (MARQUIS)** (1838), 8 Ad. & El. 716; 3 Nev. & P. K. R. 476; 1 Will. Woll. & H. 444; 7 L. J. M. C. 110; 2 Jur. 658; 112 E. R. 1009.

*Annotation: Generally, Mentd. L. & N. W. Ry. v. Buckmaster* (1875), L. R. 10 Q. B. 414.

**681. —.]—**Goods carried by a railway co. upon their railway, or to their railway station, entirely upon land belonging to them, & not upon any highway or in the enjoyment of any easement or other right reserved by the former owners of the land or those under whom they claim, cannot be the subject of a claim to a toll thorough or toll traverse arising either by prescription or grant. A local Act vested in the market co. certain tolls which had been immemorially received by the corp. of Brecon for cattle, goods, & carriages passing to, through, or from the borough. A railway co., under the sanction of an Act of

Parliament passed in the same session, acquired land, not being a highway, on which they constructed a railway & station within the borough of Brecon, whence passengers, goods, & cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corp. & of the market co. were expressly reserved by the railway Act, but there was no provision either in that or in the railway Act enabling them to levy tolls on the railway:—*Held*: the Brecon Market Co. were not entitled to toll in respect of cattle, goods, or carriages passing along the railway.

*Qu.*: whether they could claim toll on cattle or goods finding their way from the railway station to the streets of the borough.

Tolls for passing upon land are granted by the Crown in respect of a consideration to be enjoyed by the persons who are to pay them; & they cannot be effectually granted without such a consideration, or so as to extend or be taken beyond the place in which such consideration arises. They consist of two sorts, toll thorough, & toll traverse. Toll thorough may be taken upon land not belonging to the grantee, & consequently no consideration can be implied for such grant. It is ordinarily taken upon a highway, & is granted to some one who undertakes some public work for the benefit of those who use the highway, as, for instance, in making the road or keeping it in order & repair for the use of the passers by; & it can only be taken in the way or ways to which such obligation applies. Therefore, if a person were entitled to a toll thorough in a town, in consideration of keeping certain streets in order, the toll would apply only to such streets; & persons using other streets could not be made subject to the toll. A toll traverse is said to differ from a toll thorough in this, that no consideration for it need be averred. This does not, however, mean that there need be no consideration for it; it merely expresses that, as there can be no toll traverse except in respect of going over the land of the grantee, the consideration of using the land is implied from the character of the toll, & need not be further averred than by stating that it is a toll traverse. The consideration is the giving up the land of the grantee. This does not make it necessary that the grantee should actually retain the soil in the land. It is enough that he should have the land at the time of the grant, & allow the use of it to the persons who are to pay the toll; & it is not necessary that he should be the lord of a manor, though such grants have usually been made to lords of manors. Whilst the grantee has the land, he is entitled to the toll in respect of the use of it. If he part with the land, he may still retain the right to the toll (**WILLES, J.**).—**BRECON MARKETS (O. v. NEATH & BRECON RY. CO.)** (1872), L. R. 7 C. P. 555; 41 L. J. C. P. 257; 27 L. T. 316; 36 J. P. 744; *affd.* (1873), L. R. 8 C. P. 157, Ex. Ch.

*Annotation:—Reid. A.-G. v. Simpson*, [1901] 2 Ch. 671.

**682. Necessity for consideration—Toll claimed by prescription.]—**In prescribing for toll, the particular kind of toll must be stated: for if it be toll thorough a consideration must be laid, but if it be toll traverse a consideration is implied.—**JAMES v. JOHNSON** (1677), 2 Mod. Rep. 143; 1 Mod. Rep. 231; 86 E. R. 989.

*Annotations:—Conqd. Nottingham Corp. v. Lambert* (1738), Willes, 111. *Reid. Rickards v. Bennett* (1823), 1 B. & C. 223.

committee brought up a report recommending their establishment & recommending a certain scale of tolls:—

*Held*: a resolution of the local body that the report be adopted amounted to a resolution establishing the toll-

gates & fixing the scale of tolls.—**HOOKE v. MORRIS** (1901), 20 N. Z. L. R. 195.—N.Z.

**683.** — — —.]—We are not satisfied with this prescription, there being no recompense for it; & every prescription to charge the subject with a duty must impart a benefit or recompense to him, or else some reason ought to be shown why a duty is claimed. But tolls may be good where they appear to have a reasonable commencement (HOLT, C.J.).—**WARRINGTON v. MOSELY** (1691), Holt, K. B. 673; 4 Mod. Rep. 319; 90 E. R. 1272; *sub nom.* **WARRINGTON v. MOSELY**, Comb. 295.

*Annotations*:—**Mentd.** Sargent v. Reed (1745), 2 Stra. 1225; Manchester Corp'n. & Citizens v. Lyons (1882), 17 L. T. 677.

**684.** — — —.]—Prescription for toll through the streets of Gainsborough in consideration of repairing divers streets there, ill, because does not say he repaired all the streets there, & p'tf. might be passing with his waggon through a street which he did not repair, for anything that appears to the contrary.—**TRUMAN v. WALGHAM** (1766), 2 Wils. 296; 95 E. R. 820.

*Annotations*:—**Consd.** Pelham v. Pickersgill (1787), 1 Term Rep. 660; Brett v. Beales (1830), 10 B. & C. 508. **Refd.** Rickards v. Bennett (1823), 1 B. & C. 223; Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 555.

**685.** — — — **Toll claimed under grant.**]—By a local Act, comrs. were appointed for building a bridge, & after compensating the proprietors of then existing ferries, a toll was granted & vested in the comrs. By another local Act, the comrs. were empowered to contract with persons to build & maintain the bridge, & to convey & assign to them in perpetuity the tolls, profits, or income to arise from or belonging to the bridge. Accordingly they contracted with thirty persons to build & maintain the bridge, & in 1729, conveyed the bridge & tolls, & all the ground & soil adjacent & belonging to the ancient ferries & bridge as they had power to convey to trustees for the thirty persons. The management of the property had become vested in a committee appointed annually by the shareholders, whose title was derived from the thirty persons. Thames Navigation Act, 1870 (c. cxlix), s. 101, vested the bridge & the lands thereunto belonging, & the tolls, etc., in the committee of management "subject to the trusts on which same were held at the passing of the Act."

The tolls for passage of this bridge, in place of the ancient ferry, must, to answer the common law description of toll, be considered as toll traverse or toll thorough. In respect of toll thorough, that is toll paid for the privilege of passing over land not in the ownership of the person claiming the toll, it is necessary that there should be some consideration for it, but here no consideration exists. In respect of toll traverse no consideration is required to be proved, because the passage over the land of the owner of it is a sufficient consideration (WILLES, J.).—**WADMORE v. DEAR**, **WADMORE v. ARIES** (1871), L. R. 7 C. P. 212; *sub nom.* **WADMORE v. DEAR**, **WADMORE v. PUTNEY OVERSEERS**, 1 Hop. & Colt. 687; 41 L. J. C. P. 49; 26 L. T. 28; 36 J. P. 328; 20 W. R. 239.

*Annotation*:—**Mentd.** Nesbitt v. Mablethorpe U. D. C., (1918) 2 K. B. 1.

**686.** — — —.]—**BRECON MARKETS. CO. v. NEATH & BRECON RY. CO.**, No. 681, *ante*.

#### PART V. SECT. 5, SUB-SECT. 3.

a. *Distress*—*Statutory remedy.*]—**HILL v. O'CONNOR** (1852), 4 Ir. Jur. 185.—**IR.**

1. *Action*—*Plea of excessive grade*—*Futility of.*]—Where deft. made use of the road, with his vehicles, for months, without objection, & the co.

had allowed the tolls to stand over for settlement periodically:—*Held:* he could not object to pay on the ground that the grade of the road was in some places above that fixed by the statute.—**BROCKVILLE & NORTH AUGUSTA PLANK ROAD CO. v. CROZIER** (1855), 14 U. C. R. 27.—**CAN.**

#### SUB-SECT. 3.—RECOVERY OF.

**687. Distress.**]—Toll traverse, toll thorough, turn toll, & toll for murage may exist by prescription, & may be distrained for *in viâ Regiâ*; but a justification without saying for distress, *nomine districtionis*, is bad.—**SMITH v. SHEPHERD** (1590), Cro. Eliz. 710; Moore, K. B. 574; 78 E. R. 945.

*Annotations*:—**Consd.** Nottingham Corp'n. v. Lambert (1738), Wilses, 111; Pelham v. Pickersgill (1787), 1 Term Rep. 660; Brett v. Beales (1830), 10 B. & C. 508. **Refd.** James v. Johnson (1875), 1 Mod. Rep. 231; Truman v. Walgham (1766), 2 Wils. 296; Rickards v. Bennett (1823), 1 B. & C. 223.

**688. Action.**]—Where the city of London brought a bill for a customary toll for going through one of their gates with a carriage, deft. demurred, because the toll was not established at law, & demurrer allowed. But the bill is founded on an express grant of the toll, though the rise of the toll cannot be known, yet the suit being brought on the grant of the toll, it is in the nature of a bill of peace.—**LONDON (CITY) v. TORN** (1737), 2 Eq. Cas. Abr. 172; 22 E. R. 147, L. C.

**689.** — — — **Though collector illegally appointed**—**Title not objected to.**]—A collector or renter of turnpike tolls though illegally appointed, without the forms prescribed by the Act of Parliament, may still recover, upon a count for an account stated, the amount of the tolls for which he had credited deft. passing through the gate; no objection being made to p'tf.'s title by the trustees or creditors of the turnpike, & p'tf. having sent to deft. an account of the tolls due, who not long after sent £5 inclosed in a letter to p'tf., in which he stated that she should have the remainder next week, is evidence of such an account stated, & a recognition of intestate's title to be accounted with for the tolls.—**PEACOCK v. HARRIS** (1808), 10 East, 104; 103 E. R. 715.

*Annotations*:—**Refd.** Stott v. Clegg (1863), 13 C. B. N. S. 619. **Mentd.** Cocking v. Ward (1815), 1 C. B. 854.

**690.** — — — **Act conferring lien only.**]—The Act of Parliament gives a right to tolls & a lien for them only, but provides no means of recovering the tolls which will put p'tfs. in possession of the money & does not exclude the right of action, & the remedy given by the statute is cumulative (*per Cur.*).—**GREAT WESTERN RY. CO. v. SHARMAN** (1892), 61 L. J. Q. B. 600; 40 W. R. 613; 36 Sol. Jo. 511, D. C.

#### SUB-SECT. 4.—OFFENCES BY TOLL-KEEPERS.

**691. Tolls illegally levied—Action for recovery**—**Notice of action—Sufficiency.**]—A notice of action under an Act of Parliament against a toll-gate keeper "for demanding & taking of mo toll for & in respect of certain matters & things particularly mentioned & exempted from the payment of toll, in & by a certain Act of Parliament intitled, etc." is too uncertain & bad.—**FREEMAN v. LINE** (1778), 2 Chit. 673.

*Annotation*:—**Mentd.** Martins v. Upcher (1842), 6 J. P. 474.

**692.** — — — **Whether necessary.**]—If a turnpike keeper levy an extra toll & upon adjudication by two magistrates, under a local Act, it is determined that the toll was not due, the money may be recovered by an action for money

#### PART V. SECT. 5, SUB-SECT. 4.

a. *Tolls illegally levied—Action for recovery.*]—*Remedy:* money paid for tolls under compulsion, in order to enjoy a road, may be recovered in an action for money had & received.—**LITTLE v. DUNDAS & WATERLOO**

Sect. 5.—Tolls: Sub-sects. 4 & 5.]

had & received & notice of action need not be given. Where a power is given to justices to determine, it is final, unless an appeal be expressly given.—*PARSONS v. BLANDY* (1810), *Wight*. 22; 145 E. R. 1100.

*Annotation*:—*Mentd.* *Parker v. G. W. Ry.* (1844), 2 L. T. O. S. 420.

693. ————]—*WATERHOUSE v. KEEN*, No. 703, *post*.

694. ———— *Venue*.]—*WATERHOUSE v. KEEN*, No. 703, *post*.

695. ———— *Conviction*—*Form of warrant for commitment*.]—*Pltfs.* collected tolls at a turnpike gate. On July 18, 1842, his son, in charge of the gate, allowed a person driving a cart to pass through the gate on payment of the sum of 4d., the sum which he ought to have charged being 6d. Proceedings were thereupon taken against *pltf.* under Turnpike Roads Act, 1823 (c. 95), s. 30, which imposes a penalty, not exceeding £5, on a collector who "shall demand & take a greater or less toll from any person than he shall be authorised to demand & take, by virtue of the powers of any Act, or of the orders & resolutions of the trustees or comrs. made in pursuance thereof." He was convicted: *Held*: words in a commitment under Turnpike Roads Act, 1823 (c. 95), s. 30, need not set out the exact words, "demand & take," but words such as "suffer & permit to pass" would suffice; & the resolution of the comrs. of tolls need not be set out.—*STAMP v. SWEETLAND* (1845), 8 Q. B. 13; 2 New Sess. Cas. 90; 11 L. J. M. C. 184; 5 L. T. O. S. 108; 9 J. P. 696; 9 Jur. 939; 115 E. R. 777.

*Annotation*: *Refd.* *Smith v. Hopper* (1847), 9 Q. B. 1005.

696. ———— *Jurisdiction of justices Construction of local Act*.] A local bridge Act authorised tolls to be levied for passing over a bridge, with power to the co. to alter the tolls. By one sect. justices had power to convict the toll-keeper for taking too great a toll. By another sect. if a toll was disputed, it was to be settled by a justice. One day C., having paid the toll, refused to pay a second toll on the return, as a return toll had not been claimed for forty years, but on protest paid the toll & summoned the toll-keeper, who was convicted by justices: *Held*: the conviction was wrong, & this being a case of disputed toll, the remedy was under the special sect. as to disputes. *DIXON v. COCKETT* (1872), 25 L. T. 826; 36 J. P. 790.

697. ———— *Costs of appeal*.]—A party convicted under Turnpike Roads Act, 1823 (c. 95), s. 87, of having taken too large a toll, and adjudged to pay a penalty of 4*ls.*, may appeal to the quarter sessions. That Statute by sect. 87 enacts, that any person thinking himself aggrieved may appeal, etc., first giving to the justices by whose act he shall think himself aggrieved, notice of his intention to appeal; & that the justices shall hear & finally determine such appeal in a summary way, & award such costs to the parties appealing or appealed against as they the justices shall think proper, to be levied by distress & sale of the goods of the person against whom such determination shall be given:—*Held*: on appeal by a party convicted the informer was the party appealed against, within the Statute; & the justices having ordered him to pay £10 for costs, the ct. granted a mandamus to

them to issue a warrant for levying same on the goods of the informer.—*R. v. HANTS JJ.* (1830), 1 B. & Ad. 654; 9 L. J. O. S. M. C. 109; 109 E. R. 930.

*Annotations*:—*Apld.* *R. v. Smith* (1860), 29 L. J. M. C. 216; *R. v. Purdey* (1864), 5 B. & S. 909; *R. v. Davidson, Nansen & Morley* (1871), 24 L. T. 22. *Refd.* *R. v. Goodall* (1874), L. R. 9 Q. B. 557; *R. v. Ashton, Ex p. Walker* (1815), 85 L. J. K. B. 27. *Mentd.* *R. v. London JJ.*, [1895] 1 Q. B. 616.

*See, generally*, *MAGISTRATES*.

## SUB-SECT. 5.—PASSING AND REPASSING.

698. *Exemption from payment for return journey—Horses & vehicle differently constituted on return*.]—A turnpike Act, imposing a toll on every carriage & on every horse passing through the gate, & exempting any person from paying more than once in a day for passing or repassing with the same carriage or horse exempts the traveller from paying a second time in the day for the passage of the same carriage, though drawn by different horses, being the same in number, & another clause providing that in all cases of carriages travelling for hire, the traveller or passenger therein shall be considered as the person paying the toll, & that such payment shall not exempt such carriages repassing with a different traveller or passenger, does not extend to stage coaches; the carriage itself not being there hired by the respective passengers, but only a conveyance by it: & therefore such stage coaches are freed of toll under the former clause by one payment in the day, although returning with different passengers & different horses, the horses being the same in number.—*WILLIAMS v. SANGAR* (1808), 10 East, 66; 103 E. R. 700.

*Annotations*:—*Apld.* *Gray v. Shilling* (1820), 2 Brod. & Bing. 30; *Norris v. Poute* (1825), 10 Moore, C. P. 293. *Distd.* *Waterhouse v. Keen* (1825), 1 B. & C. 200. *Refd.* *Fearnley v. Morley* (1826), 5 B. & C. 25; *Jackson v. Curwen* (1826), 5 B. & C. 31. *Mentd.* *Floyer v. Banks* (1863), 32 L. J. Ch. 610.

699. ————]—By a local Act, under which a turnpike gate was erected at L., the toll, when carriages passed, was imposed on the carriages, not on the horses drawing them; & persons having paid on passing, were, on their return the same day, exempt from toll. By another local Act, applying to the same turnpike, & reciting the former Act, the old tolls were repealed, & the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them: In the latter Act, all the provisions, regulations & clauses of the former were continued as fully as if they had been re-enacted:—*Held*: where the toll imposed by the latter Act had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage.—*GRAY v. SHILLING* (1820), 2 Brod. & Bing. 30; 4 Moore, C. P. 371; 129 E. R. 868.

*Annotations*:—*Apld.* *Norris v. Poute* (1825), 3 Bing. 41; *Fearnley v. Morley* (1826), 5 B. & C. 25; *Niblett v. Pottow* (1834), 1 Bing. N. C. 81. *Refd.* *Jackson v. Curwen* (1826), 5 B. & C. 31.

700. ————]—By a turnpike Act, a toll of 4*d.* was imposed upon every horse or other beast drawing any coach or other carriage, for every horse drawing singly any carriage, the same

*MACADAMISED ROAD CO.* (1851), 2 C. P. 399.—*CAN.*

b. ———— *Conviction—Demand from exempted person*.] *R. v. CAMPION* (1869), 28 C. C. R. 259.—*CAN.*

## PART V. SECT. 5, SUB-SECT. 5.

c. *Exemption from payment for return journey*.]—A person passing a toll-gate more than once on the same day, could not, under 3 Viet. c. 53, be

legally charged more than one toll.—*O'HARA v. FOLEY* (1846), 3 C. C. R. 216.—*CAN.*

d. ————]—*Held*: a stage coach which went daily from M. to W. & back

toll; for every horse drawing any waggon or other such carriage drawn by two horses or more, the sum of 3d.; for every horse laden or unladen, & not drawing, the sum of 1d. The statute then provided that no person should be liable to pay toll more than once in any one day at any toll gate for passing & repassing in any one day with the same horses & carriages through the same, but all persons having paid toll once, & producing a ticket denoting the payment of such toll, were afterwards to pass & repass with the same horses & carriages toll free during the same day. A stage coach, drawn by four horses, passed through a gate erected under this Act of Parliament, & paid the toll. In the evening of the same day, a different coach, called by the same name, belonging to the same proprietor, driven by the same coachman, & drawn by the same four horses, but carrying different passengers & different parcels for hire, passed through the same gate:—*Held*: a second toll was payable in respect of this carriage & horses.—*LOARING v. STONE* (1821), 2 B. & C. 515; 3 Dow. & Ry. K. B. 797; 2 L. J. O. S. K. B. 60; 107 E. R. 475.

*Annotations*:—*Distd.* *Norris v. Poate* (1825), 3 Bing. 41; *Waterhouse v. Keen* (1825), 4 B. & C. 200; *Chambers v. Williams* (1826), 5 B. & C. 36.

**701.** — — —.]—By the enacting clause of a turnpike Act it was provided that there should be taken of every person attending any cattle or carriage, for every horse drawing any stage coach, the sum of 6d. By an exempting clause it was added, "that if any person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to repass free with the same cattle or carriage":—*Held*: the toll having been paid by the coachman on passing, for horses drawing a stage coach, a second toll could not be demanded for the same horses repassing, though with a different coach & different coachmen, but belonging to the same proprietor.—*NORRIS v. POATE* (1825), 3 Bing. 41; 4 Dow. & Ry. M. C. 132; 10 Moore, C. P. 293; 3 L. J. O. S. C. P. 134; 130 E. R. 128.

*Annotations*:—*Distd.* *Waterhouse v. Keen* (1825), 4 B. & C. 200. *Refd.* *Fearnley v. Morley* (1826), 5 B. & C. 25.

**702.** — — —.]—*CHAMBERS v. WILLIAMS* (1826), 5 B. & C. 36; 7 Dow. & Ry. K. B. 812; 4 Dow. & Ry. M. C. 128; 4 L. J. O. S. K. B. 229; 108 E. R. 11.

**703.** — — —.]—(1) A turnpike Act imposed a toll, first upon every carriage drawn by horses; then upon every horse not drawing; & then upon every drove of oxen or cattle: with a proviso, "that no more than one toll should be taken from any person repassing on the same day with the same horses, cattle, beasts & carriages." Where a stage-coach, drawn by four horses paid the toll in the morning, & in the evening of the same day repassed with the same driver, but with different horses & passengers:—*Held*: a second toll was not payable.

(2) The same Act enacted "that no action should be commenced against any person for any thing done in pursuance of the Act, until twenty-one days' notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof made to the party aggrieved, or after six calendar months next after the fact committed; & that every such action should be brought in the county or place where the matter should arise, &

not elsewhere; & deft. should & might at his election plead specially, or the general issue, not guilty, & give evidence that the same was done in pursuance & by the authority of that Act." In *assumpsit* against a toll collector, to recover the amount of tolls improperly collected by him:—*Held*: the venue should have been laid in the county where the tolls were collected, & deft. was entitled to twenty-one days' notice of action.—*WATERHOUSE v. KEEN* (1825), 4 B. & C. 200; 6 Dow. & Ry. K. B. 257; 3 Dow. & Ry. M. C. 100; 107 E. R. 1033.

*Annotations*:—(1) to (1) *Refd.* *Fearnley v. Morley* (1826), 5 B. & C. 25; *Jackson v. Curwen* (1826), 5 B. & C. 31; *Fenton v. Swallow* (1834), 1 Ad. & El. 723. *As to* (2) *Refd.* *Charrington v. Johnson* (1815), 1 L. T. O. S. 398; *Mid. Ry. v. Withington* L. B. (1833), 1 L. T. O. S. 788; *Green v. St. Pauls Vestry* (1839), 1 Q. B. 693. *Generally, Month.* *Hull Dock Co. v. La Marche* (1828), 6 L. J. O. S. K. B. 216; *Parker v. G. W. Ry.* (1841), 7 Man. & G. 253; *Benson v. Dunn* (1871), 23 L. T. 848; *Bradford Corp. v. Myers*, [1916] 1 A. C. 212; *Brookbank v. R.*, [1925] 1 K. B. 52.

**704.** — — —.]—By a turnpike Act, certain tolls were imposed upon carriages drawn by horses, another toll upon horses not drawing, & other tolls upon oxen, etc. There was a proviso that all persons having once paid the toll for their carriages, horses, & cattle, returning the same day with the same carriages, horses, & cattle, should pass toll free. By a subsequent Act, reciting that it was expedient to increase the tolls, the provisions in the former Act, except with certain alterations, were re-enacted. One of the alterations was, that the former tolls should cease, & that instead thereof there should be paid for every horse or beast of draught drawing a carriage 6d. After the passing of the latter Act, four horses drawing a stage coach passed through one of the toll gates in the morning, & the same four horses, drawing a different stage coach, belonging to the same proprietor, repassed through the same gate in the evening:—*Held*: no second toll was payable.—*FEARNLEY v. MORLEY* (1826), 5 B. & C. 25; 7 Dow. & Ry. K. B. 832; 4 Dow. & Ry. M. C. 117; 4 L. J. O. S. K. B. 225; 108 E. R. 9.

**705.** — — —.]—By a turnpike Act, a certain toll was imposed upon every horse or other beast drawing any carriage, etc., a certain other toll upon every horse not drawing, & other tolls upon every drove of oxen, etc. There was a proviso that no collector should take more than one toll from any person for or in respect of the same carriage, horses, beast, or other cattle passing once & repassing once in the same day through the same or any of the gates on the roads, such person producing a ticket denoting that such toll had been paid on that day for or in respect of such horse, beast, or other cattle:—*Held*: a second toll was not payable in respect of the same horses passing once & repassing once in the same day, but drawing a different carriage belonging to the same proprietor.—*JACKSON v. CURWEN* (1826), 5 B. & C. 31; 7 Dow. & Ry. K. B. 838; 4 Dow. & Ry. M. C. 3; 4 L. J. O. S. K. B. 227; 108 E. R. 12.

*Annotation*:—*Appld.* *Niblett v. Pottow* (1831), 1 Bing. N. C. 81.

**706.** — — —.]—By a turnpike Act a certain toll was to be taken at every turnpike on the road from W. to O., for four horses drawing any carriage, etc. A subsequent sect. provided, that no person should pay toll more than once in the same day for passing or repassing with the same horses, or carriages, through any of the turnpikes, but that

again from W. to M. was exempted from a second toll by a proviso in Provincial Toll-gates Act.—*YOUNG v. PERCY* (1875), 3 C. A. 62.—*N.Z.*

*e. Levy at each time of passing—*

*Statutory authority.* A road co. is, under 14 & 15 Vict. c. 122, s. 3, authorised to take tolls at each gate at each time of passing, for any portion of the road, on either side or on both

sides of a gate, for a distance of not more than half-way, & not exceeding five miles in the whole. *LITTLE v. DUNDAS & WATERLOO MACADAMIZED ROAD CO.* (1851), 2 C. P. 399.—*CAN.*

**Sect. 5.—Tolls: Sub-sect. 5, 6 & 7. A.]**

every person after having paid toll once, & producing a ticket, should pass with the same horses & carriages toll free during such day:—*Held*: a second toll was payable for passing on the same day two toll gates on the road, with the same carriage, but drawn by different horses; for the clause imposing the toll was clear, & the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment. —*HOPKINS v. THOROGOOD* (1831), 2 B. & Ad. 916; 1 L. J. K. B. 56; 100 E. R. 1383.

*Annotation*:—*Consd. Johnson v. Cocksedge* (1858), 5 C. B. N. S. 286.

**707.** ———. ———.]—By a local Act a toll was imposed on horses drawing carriages; for default of payment the collector was authorised to distrain any horse or carriage upon which toll was imposed by that Act. No person was to pay more than once a day in respect of any carriage or any horse, & no toll was to be taken in respect of any carriage, horse, or beast conveying materials for the road:—*Held*: the toll was imposed on the horse only, & not on the combination of carriage & horse; & the same horse passing a second time the same day, with a different carriage & different passengers, was exempt from toll.—*NIBLETT v. PORTOW*, (1834), 1 Bing. N. C. 81; 4 Moo. & S. 595; 3 L. J. C. P. 251; 131 E. R. 1048.

**708.** ———. ———.]—A local turnpike Act imposed tolls for every horse drawing any coach, & other tolls upon every horse not drawing; it provided, generally, that if the tolls had in any one day been paid for the passing of any horse, such horse should on that day be permitted to repass once toll free; but enacted that the tolls for horses drawing any stage-coach, should be payable every time of passing. The trustees let the tolls, with power to collect them according to the Act, & subject to such rules & restrictions as should be made by the trustees: & the lessee covenanted with the trustees, to permit the owners of stage-coaches, waggons, etc., to pass in the following manner: viz., horses drawing any such carriage, as thereinbefore mentioned, to be respectively allowed to pass along the road on payment of full toll going, & quarter toll returning, at any time during the same day. Horses passed through a gate, drawing a stage-coach, & full toll was paid for them; they returned the same day, drawing another stage-coach, & the lessee exacted full toll: *Held*: the lessee ought, by his covenant, to have demanded quarter-toll only. —*FENTON v. SWALLOW* (1834), 1 Ad. & El. 723; 110 E. R. 1383.

*Annotation*:—*Reid. North Central Waggon Co. v. M. S. & L. Ry.* (1886), 56 L. T. 755.

**709.** ———. ———.]—By a local turnpike Act tolls are made payable on horses. By sect. 11 it is provided, that, "except as hereinafter provided to the contrary," only one full toll shall be payable for horses passing & repassing once in the same day. By sect. 12, "all horses, etc., except horses or cattle drawing any stage-coach, waggon or other stage carriage," returning the same day, shall, on the production of a ticket denoting payment, pass toll free. By sect. 13, no horse which shall have paid the toll once, shall be permitted to return toll free when drawing "another or different waggon, wain, cart, or other such carriage." By sect. 14, horses drawing any post-chaise or other carriage travelling for hire, shall pay as often as a new hiring takes place. Sect. 15 provides that no additional toll shall be payable in respect of any stage-coach which shall be freed by such ticket on account only of their conveying other passengers, or of the horses or cattle drawing the

same having been changed:—*Held*: in respect of the same horses passing through the toll-gate with a stage-coach, & returning the same day with a different stage-coach & passengers, only a single toll for each horse was payable, the horses & both coaches belonging to the same proprietor.—*EKIN v. FLAY* (1845), 1 New Sess. Cas. 561; 5 L. T. O. S. 53; 9 J. P. 266.

**710.** ———. *Vehicle returning loaded.*]—10 Geo. 4, c. 59, an Act to amend an "Act for consolidating the trusts of the several turnpike roads north of the river Thames," by sect. 28 enacts, "that the tolls hereby made payable shall be paid in each of the districts for every horse or beast drawing any stage coach, van, caravan, waggon or other carriage, conveying passengers or goods for pay hire or reward for each time of passing along any of the roads in that district":—*Held*: this sect. only applies where a carriage conveys passengers or goods, & a charge is made in respect of the passengers or goods, & not where the carriage itself is let to hire; & therefore, where a van was hired to fetch furniture from H. to L. & toll was paid as the van went out, a second toll was not payable as the van returned loaded.—*SHORT v. HUDSON* (1860), 5 H. & N. 559; 29 L. J. M. C. 208; 2 L. T. 215; 157 E. R. 1303; *sub nom. HUDSON v. SHORT*, 24 J. P. 359; 8 W. R. 439.

**711. Act comprising several roads—How far one payment frees other gates.**]—By a local turnpike Act, the road was divided into three separate districts or divisions, a different set of trustees being appointed for each. Sect. 14 enabled "the trustees," or any person or persons by them appointed, to demand & take, at the turnpikes or gates erected or to be erected by virtue of the act, amongst others, a toll of 4*d.* "for every horse, etc., drawing any waggon, etc., with four wheels, having the felloes of the wheels thereof of the breadth or gauge of four & a half inches." Sect. 15 provided that any person having paid the toll for the passing of any horse, carriage, etc., upon producing a ticket should be permitted to pass & re-pass toll free through the same gate or through such other gate or gates, if any, as the ticket for such payment should free, at any time during the same day; & sect. 16 enacted "that no more than one full toll should be demanded or taken for or in respect of the same horses, etc., for passing on the same day through all or any of the toll-gates, etc., along the whole line of the roads":—*Held*: a single toll of 4*d.* paid for passing a toll-gate in one of the three districts or divisions cleared all the gates in the three districts.—*JOHNSON v. COCKSEGE* (1858), 5 C. B. N. S. 286; 27 L. J. M. C. 314; 23 J. P. 87; 141 E. R. 114.

**712.** ———. ———.]—A local Act, comprised within the trusts eighteen several roads. Sect. 11 empowered the trustees to demand & take "at the several & respective toll-gates which shall be upon or on the sides of the roads such tolls as the trustees shall direct, not exceeding," amongst others, "for every horse drawing any cart, waggon, etc., with wheels of a less breadth than four & a half inches, the sum of 6*d.*"; & "for every horse or mule, laden or unladen, & not drawing, the sum 1*d.*" Sect. 13 enacted that "for passing & re-passing any number of times on the same day with the same horses, beasts, or carriages liable to toll through any of the toll-gates to be continued or erected by virtue of this Act upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road, shall be taken, that is to say, two full tolls, & no more, upon the road from A. to B.; two full tolls, & no more, upon the road



from C. to D.; two full tolls, & no more, upon the road from E. to F.; one full toll, & no more, upon all the other roads comprised in this Act"; & sect. 14 enacted that "all horses, beasts, & cattle in respect whereof the tolls hereby authorised to be taken shall have been paid at any toll-gate on the roads or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, & in going & returning through such other toll-gate, if any, as the ticket for such payment shall free; to pass toll-free at all times on the same day:—*Held*: (1) sect. 13 did not authorise the trustees to demand two full tolls from a traveller passing through only one gate on a line of road upon which two full tolls were chargeable; (2) where a party has paid one full toll on passing through a gate, he was not chargeable with two full tolls on passing on the same day through another gate on another of the roads on which two full tolls were demandable; but he was liable to a second single toll, there being nothing on the ticket to indicate that it freed any other gate; (3) a traveller who had paid one full toll on passing through a gate on one of the roads on which one full toll was payable, was not entitled to pass toll-free on the same day through a gate on another of the roads upon which one full toll was payable, the one full toll being by sect. 13 payable upon "each" of the roads comprised in the Act; (4) sect. 11 of the local Act specifically providing for progressive charges in respect of the diminished breadth of wagon wheels, virtually repealed Turnpike Roads Act, 1822 (c. 126), s. 7; & consequently, the toll is limited to the sums mentioned in the local Act.—*JAMES v. DICKINSON, WILLIAMS v. WILLS, LOVERING v. LIMPANY* (1863), 14 C. B. N. S. 416; 143 E. R. 508.

**713. Whether exemption extends beyond return journey.**—By a local turnpike Act certain tolls were authorised to be taken for horses, carts, etc., with a proviso that if the toll should have been paid for the passing of any horse, etc., through a toll gate, such horse, etc., should be permitted to repass during the same day free: *Held*: this proviso did not extend to exempt from toll a horse, etc., which had once passed & repassed, the words "pass" & "repass" meaning "going" & "returning."—*HILL v. BROWNING* (1870), 22 L. T. 712.

**714.**—A local turnpike Act provided that in case toll should have been paid for the passing of any horse, etc., such horse should at any time during the same day be permitted to repass toll free on production of the ticket for former passing:—*Held*: the word "repassing" meant returning, & the exemption did not apply to a horse that had once passed & returned the same day.—*ARMSTRONG v. HUNT* (1870), 34 J. P. 823.

#### SUB-SECT. 6.—SITUATION OF TOLL-GATES.

**715. Bridge toll—Reasonable distance from bridge.**—By a private Act, the owner of a ferry was empowered to substitute a bridge for the ferry, & to set up toll-gates or turnpikes & toll-houses in, upon, across, or near to the bridge, or at or upon any of the approaches or communications

therewith; & from time to time to remove the same & set up others in lieu thereof, at the same place or at any other place upon any part of the bridge or approaches, & to demand & take tolls or pontage thereat." The toll-gates were, sometime after erection at a point near the bridge, removed, & others erected at a spot distant nine hundred & two yards from the bridge:—*Held*: the new toll-gates were not placed at a reasonable distance from the bridge under the statute, & toll could not be legally demanded thereat.—*ROYAL v. YAXLEY* (1872), 36 J. P. 680; 20 W. R. 903.

#### SUB-SECT. 7.—LIABILITY TO AND EXEMPTION FROM TOLLS.

##### 1. General Exemptions.

**716. Inhabitants of particular place—By custom.**—*PAINE v. PARTRICH*, No. 1677, *post*.

**717. Carriage & horses belonging to Sovereign.**—A carriage & horses belonging to the Queen, driven by the Queen's coachman, & used by a member of the Queen's household, or his family, with the Queen's permission, though not upon the Queen's service, are exempt from turnpike tolls.—*WESTOVER v. PERKINS* (1859), 2 E. & M. 57; 28 L. J. M. C. 227; 33 L. T. O. S. 221; 23 J. P. 727; 5 Jur. N. S. 1352; 7 W. R. 582; 121 E. R. 22.

*Involutions*: *Consd.* Weymouth Corp'n. v. Nugent (1865), 6 B. & S. 22. *Mentd.* East London Waterworks Co. v. Mile End Old Town Overseers (1860), 29 L. J. M. C. 60.

**718. Seafaring person—Who is.**—By a local Act passed in 1834 the co. of proprietors of the Southampton & Itchen Floating Bridge & Roads was incorporated, & certain tolls were payable for passing over such bridge, there being an exemption from toll in favour of "any fisherman or seafaring person being an inhabitant of the parish of St. Mary Extra." By a sect. in a subsequent Act it was enacted that the words "fishermen, seafaring men, & seafaring persons" in the recited Acts or any of them should not be deemed or construed to extend to or include any person who should not be *bona fide* a fisherman, seaman, mariner, sailor or pilot.

*Resp.* had for many years been engaged upon one of the Peninsular & Oriental Co.'s steamships trading between Southampton & Alexandria, & was an inhabitant of the parish of St. Mary Extra; he signed articles like all other seamen employed on board & was bed cabin steward; he was liable to do what the captain ordered him to do either above or below deck, but without special orders, his duties were confined to the bed-cabins; he had occasionally lent a hand in making & shortening sail & in heaving the capstan when weighing anchor, but he never kept watch on board & never steered:—*Held*: he was "a seafaring person" within the statute, & so entitled to exemption from toll.—*SHARP v. FIELDS* (1864), 10 L. T. 338; 28 J. P. 681.

**719. Mails—Application of exemption.**—The proprietors of a certain bridge & roads had been empowered to construct same by a local Act & it was thereby enacted that all persons, horses, cattle & carriages should have free liberty, upon payment of the tolls prescribed by the Act, to

#### PART V. SECT. 5, SUB-SECT. 6.

*1. Six miles from one previously passed.*—When tolls fixed by the commrs. were exacted by a toll-gate keeper at a gate not six miles from the one previously passed, the toll-gate

keeper was held not liable to summary conviction.—*R. v. BROWN* (1846), 4 C. C. R. 117.—*CAN.*

*2. On extension of road.*—*KNOTT v. HAMILTON & FLAMBOURGH ROAD CO.* (1880), 45 U. C. R. 338.—*CAN.*

#### PART V. SECT. 5, SUB-SECT. 7.—A.

*719. Mails—Application of exemption.*—A carriage in which a person who contracted with the Postmaster-General carried the mails, & also carried passengers & goods for hire, is not



**Sect. 5.—Tolls: Sub-sect. 7, A. & B. (a).]**

pass over such bridge & roads without hindrance. For a period of between eighty & ninety years before Feb. 1885 the persons in the employ of the Postmaster General duly paid the tolls but since that date exemption for such persons had been claimed & the tolls not paid. The proprietors then presented a petition of right, the object of which was to show that the persons in the employment of the Postmaster General were liable to pay the tolls in question. The Crown demurred to the petition of right. The alleged liability depended upon whether there was an express enactment still subsisting & exempting the mails from the tolls imposed by the local Act:—*Held*: (1) upon the construction of 25 Geo. 3, c. 57, the local Act, Turnpike Roads Act, 1822 (c. 126); Turnpike Roads Act, 1823 (c. 95) & 1 Vict. c. 32, the express exemption of the mails from tolls, contained in 25 Geo. 3, c. 57, was made applicable by sect. 53 of the local Act to the bridge & roads in question; (2) 25 Geo. 3, c. 57, although partially, and to a limited extent repealed by Turnpike Roads Act, 1822 (c. 126), & Turnpike Roads Act, 1823 (c. 95) was not by the two last-mentioned Acts repealed as to such bridge & roads; (3) the mails were specially exempted from the payment of tolls to the proprietors of the bridge & roads, 1 Vict. c. 32, s. 19, & the suppliants were not entitled to any relief under their petition of right; (4) neither usage nor long continued practice could have any effect upon the Acts in question.—*NORTHAM BRIDGE CO. v. R.* (1880), 55 L. T. 759.

*See, generally*, POST OFFICE.

**720. Police Application of exemption.]**—The words “any turnpike road or bridge” in County Police Act, 1840 (c. 88), s. 1, are not limited to a “turnpike trust road or bridge,” or to a road or bridge where tolls are authorised to be taken in respect of “horses & carriages only,” & therefore the exemption, in that sect., of the county police from toll applied to the tolls which “the Northam Bridge & Roads Co.” were by their Act authorised to demand & take from persons passing, on foot or with horses or carriages, etc., over the bridge built by the co. across the River Itchen, at Northam, in the county of Southampton, or through the toll-gates erected by the co. on the roads made & maintained by them leading to the bridge.—*LONGLAND v. ANDREWS*, *LONGLAND v. DOLING* (1865), 3 H. & C. 564; 34 L. J. Ex. 90; 12 L. T. 233; 29 J. P. 280; 11 Jur. N. S. 412; 13 W. R. 784; 159 E. R. 652.

*See, generally*, POLICE.

**Clergy.]** *See* ECCLESIASTICAL LAW, Vol. XIX., pp. 361, 428, Nos. 1815, 1816, 2049.

**Minister & laymen proceeding to place of worship.]** *See* ECCLESIASTICAL LAW, Vol. XIX., p. 520, Nos. 3909, 3910.

**Soldiers & military vehicles.]**—*See* ROYAL FORCES.

### B. Under Particular and Local Acts.

#### (a) Particular Articles or Persons.

**721. Passengers & luggage on omnibus—Toll paid in respect of horses.]**—Toll is not payable for

exempt under the Act.—*YOTSG v. PERCY* (1875), 3 C. A. 62.—*N.Z.*

**719 h. — — —.]**—A coach employed in carrying mails under the authority of the Postmaster-General, though not exclusively so employed is exempt from toll.—*HILARY v. MACARA* (1882), 1 N. Z. L. R. C. A. 42.—*N.Z.*

**h. — — —.]**—*Whether exempt.]*—Under

12 Vict. c. 84, carriages conveying the mail were not exempted from tolls.—*PARIS & DUNDAS ROAD CO. v. BABCOCK* (1882), 10 U. C. R. 335.—*CAN.*

**PART V. SECT. 5, SUB-SECT. 7.—B. (a).**

**k. Person using less than 100 yards**

passengers' luggage in an omnibus, or for a sheep & lamb in a basket on the omnibus, or for a man riding a horse, under an Act imposing toll, separately, on carriages, on portmanteaus, trunks, etc., on passengers & travellers, on sheep, lambs, etc., & on horses ridden or not ridden.—*PORTSMOUTH BRIDGE CO. v. NANCE* (1843), 6 Man. & G. 229; 6 Scott, N. R. 823; 1 L. T. O. S. 256; 134 E. R. 870.

**722. Rider of horse—Toll already paid in respect of horse.]**—*PORTSMOUTH BRIDGE CO. v. NANCE*, No. 721, *ante*.

**723. Charcoal—Whether “firewood.”]**—Charcoal is not firewood within the meaning of a statute, exempting firewood from the payment of toll at a turnpike.—*TYLER v. BROWNING* (1751), Say. 4; 96 E. R. 783.

**724. Carts carrying manure.]**—A cart drawn by horses laden with manure for the manurance of land is exempt from toll.—*R. v. ADAMS* (1817), 6 M. & S. 52; 105 E. R. 1162.

**725. — — —.]**—By a sect. of a turnpike Act, carriages laden with materials for repairing roads were exempted from toll in the parishes in which the materials were to be used, or were procured; & by the same sect., carriages laden with manure or lime were also exempted. By the following sect., the trustees under the Act were empowered to compound with persons residing in one parish & occupying lands in an adjoining parish:—*Held*: the exemption in favour of carriages laden with manure or lime was general, & not confined or restricted by the preceding part of the sect. containing the exemption, or by the following sect.—*HICKINBOTHAM v. PERKINS* (1819), 8 Taunt. 795; 129 E. R. 593; *sub nom.* *HICKINBOTHAM v. PERKINS*, 3 Moore, C. P. 185.

*Annotations.*—*Reed*, Clements v. Smith (1860), 3 E. & E. 238; Toomer v. Reeves (1867), L. R. 3 C. P. 62.

**726. — — —.]**—A waggon of the seller conveying artificial manure to the farm of the purchaser is within the exemption from turnpike toll in 5 & 6 Will. 4, c. 18, s. 1, as “a carriage employed in conveying manure for land.”—*FOSTER v. TUCKER* (1870), L. R. 5 Q. B. 224; 39 L. J. M. C. 72; 22 L. T. 124; 34 J. P. 678.

**727. — — — “Anything used in manuring land” —Lime.]**—Under an exemption from toll in an Act of Parliament for carts carrying compost, etc., or anything whatever used in the manuring of land the carriage of lime is not exempt. The words “or anything whatsoever used in the manuring of land” were considered as only applying to the carriage of ploughs, harrows & such like instruments.—*KING v. GOUGH* (1773), 2 Chit. 655.

**728. — — — Ploughs, harrows, etc.]**—*KING v. GOUGH*, No. 727, *ante*.

**729. — — — Carts going empty to fetch manure.]**—An Act of Parliament, exempting carts, etc., loaded with manure from toll, exempts them from toll, if they are going empty to fetch manure.—*HARRISON v. JAMES* (1787), 2 Chit. 517.

**730. — — — Material for—Partly for use & partly for sale.]**—Uncrushed bones, which are taken through a turnpike to a farm, to be there crushed, & part of them there used as manure, & the residue to be afterwards sold, & to be used as manure at

of road.]—*Miff.*, travelled over less than 100 yards of the L. & P. S. road, including bridge:—*Held*: under the proviso to 16 Vict. c. 190, s. 31, he was exempt from toll.—*WILSON v. GROVES* (1859), 17 U. C. R. 419.—*CAN.*

**1. — — —.]**—*WILSON v. MIDDLESEX COUNTY CORPN.* (1859), 18 U. C. R. 348.—*CAN.*

other places, are exempt from toll, under Turnpike Roads Act, 1822 (c. 126), s. 32, & 5 & 6 Will. 4. c. 18, s. 1.—*PRATT v. BROWN* (1838), 8 C. & P. 244.

**731. — Soil for sale as manure.]**—A local road Act exempted from tolls carts employed in carrying "mould, dung, soil, marl, manure, or compost employed in husbandry for manuring or improving land":—*Held*: this exemption included soil carried by the owner to be deposited in a place belonging to himself & there sold for the purpose of its being employed as manure by others; & the same construction was applicable to the exemption contained in 5 & 6 Will. 4, c. 18, s. 1.—*R. v. FREKE* (1850), 5 E. & B. 914; 25 L. J. M. C. 61; 26 L. T. O. S. 236; 20 J. P. 531; 2 Jur. N. S. 162; 4 W. R. 261; 7 Cox, C. C. 32; 119 E. R. 732.

*Annotation*:—*Folld. Foster v. Tucker* (1870), L. R. 5 Q. B. 221.

**732. — Carts containing manure & other articles—Empty vegetable baskets.]**—The provision of stat. Turnpike Roads Act, 1822 (c. 126), ss. 28, 32, which exempts from toll on turnpike roads carriages employed only in carrying manure, & enacts that toll shall not be demanded for them "by reason only of any basket or baskets, empty sack or sacks, or spade, shovel, or fork necessary for loading or unloading such manure, etc., being in or upon any such carriage, etc.," is not repealed by 5 & 6 Will. 4, c. 18, s. 1, which enacts, that "no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land, save and except lime, & the necessary implements used for filling the manure, & the cloth that may have been used in covering any hay, clover, or straw which may have been conveyed." A person drove through a turnpike gate a cart laden with garden produce, packed in baskets, paying the toll, & returned the next morning with the cart laden with manure for land, on the top of which were the baskets empty:—*Held*: no toll was demandable on account of these baskets being on the cart.—*RICHENS v. WIGGINS* (1863), 3 B. & S. 953; 2 New Rep. 66; 32 L. J. M. C. 114; 8 L. T. 384; 27 J. P. 599; 9 Jur. N. S. 1055; 11 W. R. 617; 122 E. R. 356.

**733. Cattle going to or returning from pasture—Horse ridden to fetch them from pasture.]**—In a turnpike Act imposing tolls on horses, etc., "cattle going to or returning from pasture" & "horses attending cattle returning from pasture" are exempted:—*Held*: a horse, ridden by the owner of the cattle at pasture in order to fetch them from pasture did not come within either of the exemptions.—*HARRISON v. BROUGH* (1796), 6 Term Rep. 706; 101 E. R. 783.

*Annotation*:—*Refd. Norris v. Poate* (1825), 3 Bing. 41.

**734. — Cattle driven from one pasture to another.]**—1 & 2 Will. 4, c. 25, s. 1, enacts that "no toll shall be demanded or taken for any horse, sheep, or other beast or cattle going to or from water or pasture, etc., & passing on any turnpike road, provided that such horse, etc., do not pass upon such turnpike road more than the space of two miles in going to or returning from water or pasture." A., who carried on the business of a farmer & cattle-dealer, had two pasture-fields, one on each side of a toll-bar. Having purchased beasts & sheep at a market, he drove them to the one pasture, & after keeping them there a day, drove them through the toll-bar to the other pasture, intending the next day to send them to another market on that side of the bar, for sale.

The distance between the two pastures along the turnpike-road was less than two miles:—*Held*: the animals were exempt from toll.—*WARMBY v. DEAKIN* (1863), 14 C. B. N. S. 124; 2 New Rep. 75; 32 L. J. M. C. 201; 8 L. T. 319; 10 Jur. N. S. 98; 11 W. R. 669; 143 E. R. 392.

**735. Material for repair of highway—Whether repair of bridge included.]**—A bridge is not a highway within 13 Geo. 3, c. 81, s. 60, by which carriages employed in carrying materials for the repair of any turnpike road or public highway, are exempted from toll; & therefore toll is payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road.—*OSMOND v. WIDDICOMBE* (1818), 2 B. & Ald. 40; 106 E. R. 285.

**736. — Whether repair of public footway included.]**—(1) Where a road has been found to have been used for a length of time as a footway to the adjoining lands:—*Held*: it was a public highway, & under Turnpike Roads Act, 1822 (c. 126), s. 32, materials for the repair of same are exempt from tolls.

(2) When under a local Act cos. had power to convert streets within their districts into public highways, & to pave, flag, & maintain same, & were entitled to bring materials for that purpose free of tolls:—*Held*: they were entitled to bring materials to repair such streets before these were declared public highways, if they had previously been used as highways either for foot passengers only or for carriage traffic generally.—*R. v. LORD* (1855), 4 W. R. 83.

**737. — Whether other goods wares & merchandise.]**—(1) Where, by an Act of Parliament for substituting a new channel, "the Eau Brink cut," for the old course of an ancient navigable river, the comrs. were empowered to levy certain tolls for the navigation of the new cut on certain enumerated articles, & "other goods, wares, & merchandise":—*Held*: gravel destined for the reparation of certain adjacent turnpike roads was liable to toll, though not specified, by virtue of the general words.

(2) Where by a turnpike Act, the trustees were empowered to "make use of any public or parish drains leading to or near their roads, or any ditch contiguous to them for the conveyance in boats of materials for the reparation of the roads, & to hale on the brinks of such drains or ditches, & also to have free passage over certain bridges therein named, for all horses, carts, & carriages bringing or going for such materials without paying any toll for same":—*Held*: the drains therein contemplated were such as might be thereafter cut, & the Eau Brink cut was not a public or parish drain within the meaning of that sect.; but merely a new channel for the old river. *COULTON v. AMBLER* (1841), 13 M. & W. 403; 3 Ry. & Can. Cas. 724; 14 L. J. Ex. 10; 9 J. P. 153.

**738. "Implements of husbandry"—Steam engine - For working threshing machine - Though capable of other use.]**—Under Turnpike Roads Act, 1822 (c. 126), s. 32, & 14 & 15 Vict. c. 38, s. 4, a steam engine used exclusively for working a threshing machine belonging to the same owner, & passing a turnpike gate at the same time with the threshing machine, but in a separate cart, is exempted from toll as an implement of husbandry. Although the steam engine be capable of being applied to other purposes.—*It. v. MALTY* (1858), 8 E. & B. 712; 27 L. J. M. C. 59; 30 L. T. O. S. 256; 22 J. P. 575; 4 Jur. N. S. 237; 6 W. R. 213; 120 E. R. 265.

**739. — — For working plough.]**—By Locomotive Act, 1861 (c. 70), s. 1, tolls are imposed

Sec. 5.—Tolls: Sub-sect. 7, B. (a) & (b).]

on "every locomotive propelled by any power containing within itself the machinery for its own propulsion"; by sect. 10 all carriages drawn by any locomotive are entitled to the same exemption as they would be if drawn by animal power; & by sect. 12 all provisions of any general or local Acts relating to turnpike roads are to apply to all locomotives propelled by other than animal power, & to carriages drawn by such locomotive. By Turnpike Roads Act, 1822 (c. 126), s. 32, "no toll shall be demanded . . . for any horse, or beast, or carriage employed in carrying or conveying . . . any ploughs, harrows, or implements of husbandry, or for any horses or other beasts employed in husbandry, going to or returning from plough or harrow, not travelling more than two miles on the turnpike road." A locomotive engine, propelled by its own steam power, having on it gear necessary for working a plough, passed through a turnpike gate on its way to a place more than three miles from the gate, to drive a plough which, from its construction, could not be used without a steam engine & gear:—*Held*: the steam engine was not within any of the above exemptions from toll. *SKINNER v. VINGER* (1873), 1 L. R. 9 Q. B. 199; 43 L. J. M. C. 49; 38 J. P. 534.

740. — For use by others than owner.]—A local turnpike Act declared that no exemption should be allowed in respect of "any agricultural implement or machine let to hire or travelling for the purpose of being used by any other person than the owner thereof." Resp.'s threshing machine was taken by his men to another person's farm, there to be worked by them for the purpose of threshing such person's corn at so much per quarter. On its way thither it passed through a turnpike gate which was within the district governed by the Act:—*Held*: the threshing machine was liable to toll.—*RAPLEY v. RICHARDS* (1861), 4 New Rep. 238; 28 J. P. 486; 12 W. R. 804.

741. — Threshing machine - Local Act overriding general Act.]—Turnpike Roads Act, 1822 (c. 126), s. 4, enacted that all its provisions should extend to all turnpike Acts that should be thereafter passed, except as to things expressly referred to & varied by such Acts: & sect. 32, that all implements of husbandry should be exempt from toll. By 9 Geo. 4, c. 77, s. 19, it was provided that Turnpike Roads Act, 1822 (c. 126), shall extend to every local Act as fully as if it were re-enacted in such Act. By 14 & 15 Vict. c. 38, s. 4, it was provided that implements of husbandry, when mentioned in the Turnpike Roads Act, 1822 (c. 126), should include threshing machines. By a local Act it was provided in the interpretation clause that cart should include threshing machine; & in a subsequent sect., which was the only sect., in the Act to which this interpretation could apply, that a toll of 6d. should be payable on every horse drawing a cart:—*Held*: the local Act did expressly refer to & vary the provisions of the general Act, & threshing machines were liable to toll. *Semble*: any provisions in a local Act repugnant to those in the general Act would override them, even though not expressly referring to the things & matters in the general Act.—*ABLETT v. PRITCHARD* (1866), L. R. 1 C. P. 210; Har. & Ruth. 274; 35 L. J. M. C. 101; 14 L. T. 16; 30 J. P. 108; 12 Jur. N. S. 211; 14 W. R. 331.

742. "Fodder for cattle"—Barley meal or barley to be ground for pig-food.]—Turnpike Roads Act, 1822 (c. 126), s. 32, enacts "that no toll shall be demanded or taken" on any

turnpike road, for "any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day," "any hay, straw, fodder for cattle, & corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder or corn in the straw, potatoes or other agricultural produce, & which has not been bought, sold or disposed of, nor is going to be sold or disposed of." A horse & cart passed through a toll gate, carrying threshed barley, which had grown on land in the occupation of the owner, to a mill to be ground into meal for feeding the owner's pigs. They repassed on the same day laden with barley-meal obtained from the mill, the produce of another parcel of barley grown by the same owner on the same land, & previously sent to be ground into meal for the same purpose. The horse & cart had not been employed in any other way on the same day:—*Held*: they were exempt from toll under the above enactment on each journey: for both the barley & the barley-meal came within the description of "fodder for cattle."—(*CLEMENTS v. SMITH* (1860), 3 E. & B. 238; 30 L. J. M. C. 16; 3 L. T. 295; 25 J. P. 246; 6 Jur. N. S. 1149; 9 W. R. 53; 121 E. R. 431.

743. "Agricultural produce"—Milk.]—Milk does not come within the meaning of the words "or other agricultural produce," in Turnpike Roads Act, 1822 (c. 126), s. 32, so as to be exempt from toll.—*ORAM v. GAIT* (1860), 1 L. T. 326; 24 J. P. 70.

744. "Timber"—Larch poles for hurdles.]—A local turnpike Act authorised a certain toll to be levied on carts laden with timber. R. was driving a cart having larch poles about twenty feet long & ten inches medium circumference to be used for making hurdles, but they were not of twenty years' growth. The turnpike trustees had for ten or twelve years at their toll gates demanded & received the toll for such larch poles, as if they were timber, & there was no other evidence beyond that mentioned of what timber meant:—*Held*: the justices were justified in drawing the inference that the poles were timber, or at all events this ct. could not hold they were wrong in doing so.—*ROBERTS v. LEWIS* (1870), 43 J. P. 348.

*(b) Particular Vehicles.*

745. Stage waggon—Defined.]—A local turnpike Act authorised a toll to be taken for stage waggons conveying goods for pay or reward:—*Held*: a waggon delivering, at various & uncertain places, for pay, goods from a wharf to which they were brought by canal at various & uncertain times, was not a stage waggon, & a stage waggon was to be considered one which went & returned at regular & stated periods, to & from one certain known place & another.—*R. v. PEARSON* (1838), 2 J. P. 423.

746. — Whether includes carrier's van.]—A turnpike Act contained a clause giving certain exemptions from toll, but excepted from it, by a proviso, all horses drawing any stage coach, diligence, van, caravan, or stage waggon, or other stage carriage, conveying passengers or goods for pay. R. was a wharfinger & agent to a co., who were carriers of goods by canal. R. kept waggons & horses, which he employed in carrying out goods brought by the company to his wharf, situate at S., for persons in the neighbourhood, & bringing goods from the neighbourhood to his wharf, for transit by the canal. For such his conveyance of

goods he made charges on each parcel. His waggons were so employed in carrying goods to & from persons residing at or near a place called L., or places intermediate between that & S., almost every day except Sundays. The waggons went out & returned at different hours according to circumstances; on some days they made more journeys than on others, & they seldom omitted going altogether. R. had no office or receiving house at L.:—*Held*: R.'s waggons were not stage waggons or carriages within the terms of the proviso, & therefore were not excluded from the exempting clause.—*R. v. RUSCOE* (1838), 8 Ad. & El. 386; 3 Nev. & P. K. B. 428; 1 Will. Woll. & H. 435; 7 L. J. M. C. 94; 2 Jur. 888; 112 E. R. 884.

**747.** ———— *Used for goods & for passengers.*—By a local turnpike Act, all persons were exempted from payment of toll more than once on the same day, except in respect of "stage coaches & other such public carriages." Itesp. was a common carrier, passing to & from along the road three days a week, with a light covered tilted van on four wheels, drawn by one horse; he principally used the van for the carriage of goods, but he sometimes carried passengers at fixed rates; the cart was not licensed, but paid a duty of £2 6s. 8d., under 16 & 17 Vict. c. 90:—*Held*: resp. was not liable to pay more than one toll a day, as although he sometimes carried passengers, the cart was not principally employed for that purpose, & therefore did not come within the meaning of the clause "stage coaches & other such public carriages."—*PEARSON v. TAZEWELL* (1865), 19 C. B. N. S. 384; 13 L. T. 158; 30 J. P. 150; 14 W. R. 39; 144 E. R. 835.

**748.** ———— *By a local turnpike Act the following tolls were imposed, amongst others:* "A. For every horse drawing any coach, caravan, or other such light carriage, except stage coaches, 4d. B. For every horse drawing any stage coach licensed to carry not more than sixteen passengers, 5d.; & licensed to carry more than sixteen passengers, 6½d. C. For every horse drawing any van or other such carriage for the conveyance of goods for hire or pay, 6½d. D. For every horse drawing any caravan or other such carriage, licensed to carry passengers for hire, at the same rate as stage coaches carrying the same number of passengers." & a subsequent clause provided that only one full toll should be taken for passing & repassing on the same day. A., a carrier, was the owner of a four-wheeled van, in which he journeyed on certain days, & at stated times, between Bath & Chippenham, "carrying goods occasionally, & passengers occasionally, & sometimes both," for payment. He paid the annual duty of £2 6s. 8d. imposed by 16 & 17 Vict. c. 90, Sched. D. "for every carriage used by any common carrier principally & *bonâ fide* for & in the carrying of goods, wares, or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, & in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any licence by the comrs. of inland revenue"—*Held*: A. was not chargeable with return toll, as the proprietor of a "stage carriage," under sect. 9 of the local Act, which provided that "for or in respect of the horses drawing any stage-coach, stage-waggon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward, for which toll should have been paid, & which should return on the same day through the same turnpike gate or bar, the tolls thereby made payable should be paid for every time of passing

& repassing through every such gate or bar, in like manner as if no toll had been before paid thereat."—*EATWELL v. RICHMOND* (1865), 18 C. B. N. S. 364; 5 New Rep. 329; 12 L. T. 52; 13 W. R. 429; 144 E. R. 485.

*Annotations*:—*Distd. Comley v. Carpenter* (1865), 15 C. B. N. S. 378. *Consd. Pearson v. Tazewell* (1865), 19 C. B. N. S. 384.

**749.** ———— *By a local turnpike Act, the following tolls, amongst others, were imposed:* "For every horse or other beast drawing any coach, stage coach, diligence, van, caravan, sociable, berlin, landau, chariot, *vis-à-vis*, barouche phaeton, chaise-marine, calash, curricule, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, 9d.: For every horse or other beast drawing any waggon, wain, cart, or other such like carriage, having the fellos of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, 6d." & a subsequent clause provided that one toll only should be paid for passing & re-passing on the same day. A., a carrier, was the owner of a covered caravan, the single toll on which was admitted to be 6d., with which he travelled between Cirencester & Cheltenham every Tuesday & Thursday, at a pace not exceeding four miles an hour. He used his caravan principally for carrying goods, for hire, but he frequently, as he did upon the occasion in question, conveyed therein also passengers, for hire. He was not licensed under the Stage Carriage Act, 1832 (c. 120), but paid the duty imposed by 16 & 17 Vict. c. 90, Sched. D., "for every carriage used by any common carrier principally & *bonâ fide* for & in the carrying of goods, wares, or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, & in such manner that the stage carriage duty, or any composition for the same, shall not be payable under any licence by the comrs. of inland revenue":—*Held*: A. was the proprietor of a "stage carriage conveying goods for pay or reward," within sect. 11 of the local Act, which provided that "the tolls thereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, van, caravan, or stage-waggon, or other stage-carriage conveying passengers or goods for pay or reward, shall be payable & paid every time of passing or re-passing along the road"; & therefore liable to the return-toll.—*COMLEY v. CARPENTER* (1865), 18 C. B. N. S. 378; 6 New Rep. 231; 12 L. T. 453; 11 Jur. N. S. 712; 13 W. R. 812; 114 E. R. 491.

*Annotation*:—*Consd. Pearson v. Tazewell* (1865), 19 C. B. N. S. 384.

**750.** ———— *Whether includes cart carrying coals for hire.*—*PARKE v. FOSTER* (1858), 30 L. T. O. S. 257.

**751. Taxed cart.—Defined.**—A local Act provided that there should be charged, as toll at a certain turnpike gate, "for every horse or other beast drawing" "any taxed cart," 3d.:—*Held*: a cart which had been taxed, in the previous year, under 16 & 17 Vict. c. 90, sched. (D), was a taxed cart within the local Act.—*PURDY v. SMITH* (1859), 1 E. & E. 511; 28 L. J. M. C. 150; 32 L. T. O. S. 275; 23 J. P. 599; 5 Jur. N. S. 912; 7 W. R. 300; 120 E. R. 1001.

*Annotation*:—*N.F. Williams v. Lear* (1872), L. R. 7 Q. B. 285.

**752.** ———— *By a local turnpike Act, a larger toll was imposed on certain carriages, including "taxed cart" than on others:* *Held*: "taxed cart" meant a taxed cart as defined by House Tax Act, 1803 (c. 161), sched. D, No. 4.—*WILLIAMS v. LEAR* (1872), L. R. 7 Q. B.

*Sect. 5.—Tolls: Sub-sect. 7, B. (b); sub-sect. 8.]*

285; 41 L. J. M. C. 70; 25 L. T. 906; 36 J. P. 644.

**753. Spring-van.—Whether “carriage” or “cart.”—How determined.—Size, weight & purpose.**—A local turnpike Act put a lower toll on horses drawing coaches, sociables, chariots, curricles, gigs, whiskeys, caravans, hearses, & such like carriages; & a higher toll on waggons, wains, drays, carts, & such like carriages. A brewer's cart or van used for delivering beer was on springs, & weighed about 1 ton. On a dispute as to toll: *Held*: the justices were wrong in holding that the fact of its being on springs put it in the first class, & they ought to consider the size, weight & purpose of the vehicle, but neither of these facts was conclusive, though all were elements for determining under which class it was to be ranked. *SMITH v. WATSON* (1864), 20 J. P. 70.

**754. Bicycle Whether carriage.**—A local turnpike Act imposed the following tolls, for every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, *vis-à-vis*, phaeton, curricle, etc., 6d.; for every carriage of whatever description, & for whatever purpose, which shall be drawn or impelled, or set or kept in motion by steam or other power of agency than being drawn by any horse or horses, or other beast or beasts of draught, 5s.; *Held*: a bicycle was not a carriage liable to toll under the Act. — *WILLIAMS v. ELLIS* (1880), 5 Q. B. D. 175; 49 L. J. M. C. 47; 12 L. T. 249; 44 J. P. 394; 28 W. R. 416.

*Annotations:—Consd.* Cannan v. Abingdon (1900), 16 T. L. R. 318; Simpson v. Teignmouth & Shaldon Bridge Co., [1903] 1 K. B. 105. *Refd.* Parkyn v. Preist (1881), 7 Q. B. D. 313.

**755.** — — — *J.* By a special Act, passed in 1767, the owner of a bridge across the Thames, & his heirs & assigns, were authorised to take the following, amongst other, tolls for passage over the bridge: “For every coach, chariot, berlin, hearse, chaise, chair, calash, waggon, wain, dray, cart, car, or other carriage whatsoever with four wheels the sum of 4d. & with less than four wheels the sum of 2d.”; *Held*: a bicycle ridden over the bridge was a “carriage” within the Act, so that the owner of the bridge was entitled to take the toll of 2d. in respect of the bicycle. *CANNAN v. ABINGDON (EARL)*, [1900] 2 Q. B. 66; 69 L. J. Q. B. 517; 82 L. T. 382; 61 J. P. 501; 48 W. R. 470; 16 T. L. R. 318; 41 Sol. Jo. 395, D. C.

*Annotation:—Consd.* Simpson v. Teignmouth & Shaldon Bridge Co., [1903] 1 K. B. 40a.

**756.** — — — *J.*—By sect. 78 of a local Act, the owners of a bridge across the Teign were authorised to take the following, amongst other, tolls for passage over the bridge: “For every coach, chariot, hearse, chaise, berlin, landau & phaeton, gig, whiskey, car, chair, or coburg, & for every other carriage hung on springs, the sum of 6d. for each wheel, & for each horse or other beast of draught drawing the same, the sum of 2d.”; *Held*: a bicycle ridden over the bridge was not within the sect. *Qu.*: whether a bicycle is a “carriage hung on springs.” — *SIMPSON v. TEIGNMOUTH & SHALDON BRIDGE CO.*, [1903] 1 K. B. 405; 72 L. J. K. B. 204; 88 L. T. 117; 67 J. P. 65; 51 W. R. 545; 19 T. L. R. 225; 47 Sol. Jo. 278; 1 L. G. R. 235, C. A.

*Annotation:—Apld.* Smith v. Kynnersley, [1903] 1 K. B. 788.

**757.** — — — **Whether “sledge, drag or such like carriage.”**—By a special Act, passed in 1799, the trustees of a bridge were authorised to demand

before any passage should be permitted over the bridge the following, amongst other, tolls: “For every sledge, drag, or such like carriage, the sum of 6d.”;—*Held*: the clause did not authorise the charge of 6d. in respect of a bicycle passing over the bridge.—*SMITH v. KYNERSLEY*, [1903] 1 K. B. 788; 72 L. J. K. B. 357; 88 L. T. 449; 67 J. P. 125; 51 W. R. 548; 19 T. L. R. 335; 47 Sol. Jo. 382; 1 L. G. R. 393, C. A.

**758. Railway carriages & trucks—Travelling along railway.**—Sect. 23 of a local Act for the paving of Cambridge, authorised the imposition of a rate on the inhabitants for the purposes of the Act, & by sect. 39 enacted that there should be paid to the receiver appointed thereunder “for stage coaches & diligences, & also for all loaded waggons, carts, wains, & other carriages, & also for horses laden with any goods, wares, merchandise, or other commodities coming to or going from or out of the town of Cambridge & precincts thereof, the following tolls once in every day, namely, for every stage coach, diligence, or other such public carriage carrying passengers or parcels for hire, the sum of 1s. . . . which sums respectively shall & may be demanded & taken for & in the name of a paving toll, . . . & the moneys arising therefrom shall be & are hereby vested in the comrs., . . . & it shall & may be lawful . . . to levy same . . . by distress of any carriage or carriages or cattle, upon which such tolls are by this Act imposed, . . . & which several tolls so to be demanded, taken, & received shall be paid to such person or persons so to be appointed collectors thereof as aforesaid, within any of the streets or other public passages of the town of ‘Cambridge’”:—*Held*: this sect. applied only to carriages in actual motion upon the public highways & streets of the town, & not to carriages & trucks conveying passengers or goods along a railway within the local limits of the Act, but not an actual highway or street of the town in the ordinary sense of those terms.—*NEWMARKET RY. CO. v. FOSTER* (1854), 2 C. L. R. 1617; 23 L. T. O. S. 172; 18 J. P. 392; 2 W. R. 532.

*Annotation:—Refd.* Edinburgh & Glasgow Ry. v. Lanthgow Mags. (1859), 31 L. T. O. S. 26.

**759. Waggonette.—Whether a carriage.**—A local turnpike Act in sub-sect. 5 put a toll of 6d. on “every coach, etc., or other carriage drawn by two horses,” & in sub-sect. 7 of the same sect. a toll of 8d. on “every waggon, van, cart, or other such carriage, with wheels of less breadth than three inches, drawn by one horse.” A waggonette with two horses was driven by M., & if it had had a single horse would clearly have come within sub-sect. 7:—*Held*: the justices were wrong in holding the waggonette exempt, for it was a carriage, & so came within sub-sect. 5.—*WILLIAMS v. MOORE* (1878), 43 J. P. 589.

**760. Tramcar.—Whether a “coach.”**—Tramcar held to be a coach within 7 Geo. 3, c. 73.—*PLYMOUTH, STONEHOUSE & DEVONPORT TRAMWAYS CO. v. GENERAL TOLLS CO., LTD.* (1898), 14 T. L. R. 531, H. L.

*Annotations:—Consd.* Smith v. Kynnersley, [1903] 1 K. B. 788. *Refd.* Cannan v. Abingdon, [1900] 2 Q. B. 66; Simpson v. Teignmouth & Shaldon Bridge Co., [1903] 1 K. B. 105.

**761. Delivery cart.—Whether “exposing goods for sale.”**—A mineral water cart used for delivery of goods from a distant manufactory to customers in an urban district, in which a local Act was in force, was not liable to a toll imposed by such local Act upon every cart “used for exposing or in which shall be exposed to sale any article, commodity or thing” brought into any public

market-place or public street. — **NEWTON-IN-MAKERFIELD URBAN COUNCIL v. LYON** (1900), 69 L. J. Q. B. 230; 81 L. T. 756; *sub nom.* **NEWTON-IN-MAKERFIELD URBAN DISTRICT COUNCIL v. BROWN**, **NEWTON-IN-MAKERFIELD URBAN DISTRICT COUNCIL v. LYNN**, 48 W. R. 222; 44 Sol. Jo. 170, D. C.

*Annotations*. — **Apld.** **Philpot v. Allright** (1906), 94 L. T. 540. **Refd.** **Jenkins v. Thomas** (1910), 9 L. G. R. 321.

**762. Toll levied on goods—According to number of horses employed—Alteration in vehicle immaterial.**—Where it appeared in evidence upon an action of *indebitatus assumpsit* for toll that a corp'n. were entitled by a general grant of toll explained by usage to be due for all commercial goods passing in & out of their city on horses or in carts or waggons, that is at the rate of 1d. for every horse load, & 2d. for every cart load drawn by one horse, & 2d. more for each additional horse: —*Held*: any alteration of the carriage by which the goods were so conveyed as by taking them in stage coaches instead of carts or waggons could not vary the right of toll in the proportion of 2d. for each horse drawing the coach although the number of horses were estimated by the weight of passengers rather than of goods. — (**CARLISLE CORPN. v. WILSON** (1804), 5 East, 2; 1 Smith, K. B. 297; 102 E. R. 909).

*Annotation*. — **Refd.** **Newmarket Ry. v. Foster** (1854), 18 J. P. 392.

**763. Toll levied according to breadth of wheels.** — A local turnpike Act imposed specific tolls on carriages in proportion to the breadth of their wheels, such tolls being increased in proportion to the narrowness of the wheels, & being highest where the wheels were of less breadth than six inches: — *Held*: the carriages subject to such tolls were exempted from the additional toll imposed by the latter part of sect. 23 of 13 Geo. 3, c. 81, & the local Act virtually repealed that sect. — (**RIDGE v. GARLICK** (1818), 8 Taunt. 421; 2 Moore, C. P. 481; 129 E. R. 447).

*Annotations*. — **Consd.** **Pickford v. Davis** (1834), 1 Bing. N. C. 141. **Apld.** **James v. Dickinson**, **Williams v. Wills**, **Loveling v. Lumpany** (1863), 14 C. B. N. S. 416.

**764.** — Where a local turnpike Act directs a higher or lower rate of toll to be collected in respect of the greater or lesser breadth of wheels, & where in addition to the tolls under such local Act, the additional tolls in respect of breadth of wheels authorised to be taken by 13 Geo. 3, c. 81, have been collected & imposed, although erroneously, parties are not relieved from such additional tolls by Turnpike Roads Act, 1822 (c. 95), s. 6. — (**PICKFORD v. DAVIS** (1834), 1 Bing. N. C. 141; 4 Moo. & S. 683; 3 L. J. C. P. 268; 131 E. R. 1071).

**765.** — A local turnpike Act put a toll of 3d. on every horse drawing a cart, etc., & provided that if the wheel was more than six inches broad, one-half only of such toll should be taken. The Turnpike Roads Act, 1822 (c. 126), s. 7, says if the wheel is less than four & a half inches, one-half more toll is to be taken than where the wheel is six inches: — *Held*: a cart with one horse having a wheel less than four & a half inches was bound to pay only 3d. — (**BEERLING v. TERRY** (1802), 6 L. T. 186; 26 J. P. 676).

#### SUB-SECT. 8.—EVASION OF.

**766. Remedy—Distress for penalty—Validity of warrant.** — (1) *Pltf.* was convicted under the Turnpike Roads Act, 1822 (c. 126), for forcibly passing through a toll gate situate on a turnpike road, made under the authority of a local Act, & thereby avoiding the toll due. *Pltf.* refused to pay the sum in which he was convicted & a warrant of distress against his goods was issued. The conviction contained no adjudication of the payment of the penalty: — *Held*: it was not therefore bad, since it followed the form given in the schedule to Turnpike Roads Act, 1822 (c. 126).

(2) The conviction stated the toll gate to be situate on a turnpike road: the warrant stated only the toll gate to be situate in the particular parish & county, omitting the turnpike road: — *Held*: no variance; (3) the warrant was not void for not stating that the toll gate was situate on a turnpike road; (4) no demand of the penalty was requisite previously to issuing the warrant of distress under Turnpike Roads Act, 1822 (c. 126), s. 141. — (**BARNES v. WHITE** (1815), 1 C. B. 192; 1 New Sess. Cas. 501; 11 L. J. M. C. 65; 4 L. T. O. S. 333; 9 Jur. 182; 135 E. R. 511).

**767. — Penalty—Whether for peaceful evasion—Claim of exemption.** — *Qu.*: whether Turnpike Roads Act, 1822 (c. 126), s. 139, which imposes a forfeiture not exceeding £10 upon any person who "shall pass through any turnpike gate" "without paying the toll appointed to be paid at such gate," be applicable to a party passing without violence through a turnpike gate, & not paying the toll, though demanded, under an erroneous impression that he is exempt from toll. — (**R. v. IRVING** (1818), 12 Q. B. 429; 11 L. T. O. S. 219; 12 Jur. 498; 12 J. P. Jo. 358; 116 E. R. 928).

**768. — Action—Misrepresentation by driver of vehicle—Toll not demanded.** — An action of debt for turnpike tolls lies where debt, has frequently passed through the gate, misrepresenting facts, which led the collector to believe he was not entitled to receive toll, & consequently demanded no toll at the times debt, passed through.

*Deft.*, an hotel keeper, attempted to avoid the payment of toll by taking passengers in his omnibus free, & charging for the carriage of their luggage by a spring-cart. On the first occasion to toll was demanded & paid under protest, but was afterwards returned: — *Held*: it was not necessary to maintain the action to prove a demand of toll every time the vehicle passed through the gate; or, if a demand were necessary, there was evidence to show an evasion of the demand.

I am not disposed to say that a demand on each occasion of debt's passing through the turnpike gate was necessary. I am inclined to think the board stating the tolls payable, is sufficient; but if a demand be necessary, there was sufficient evasion shown here to dispense with it. (**CRESSWELL, J.**) — (**MAURICE v. MARSDEN** (1850), 19 L. J. C. P. 152; *sub nom.* **MORRIS v. MARSDEN**, 14 L. T. O. S. 444).

*Annotation*. — **Refd.** **Westover v. Perkins** (1859), 28 L. J. M. C. 227.

**769. Validity of toll—Admissibility of evidence—Question for justices.** — *Deft.* having been

#### PART V. SECT. 5, SUB-SECT. 8.

*m. Conviction—Contents of.* — A conviction for evading payment of toll on the road of the Albion Plank Road Co., incorporated by 9 Vict. c. 88: — *Held*: bad, in omitting, any

statement of the information; the summons & appearance or default of accused; his plea denying or confessing; the evidence; in not showing that any toll was claimed, or what toll, or how imposed by reason of the completion of the road or any part of

it; it did not appear therein that debt, had proceeded on the road with any carriage or animal liable to pay toll, & after turning out of the road had returned to or re-entered it with such carriage or animal beyond a toll-gate without paying toll, whereby payment

Sec. 5.—Tolls: Sub-sects. 8 & 9.]

convicted of forcibly passing a turnpike gate without paying toll, the sessions, on appeal, rejected evidence to show that the gate had been unlawfully erected, & this ct. refused a *mandamus* to compel the sessions to receive such evidence, the admissibility of it being exclusively a question for the justices; & the ct. also refused to issue a *mandamus* to the sessions to hear an original complaint, touching the conduct of the trustees in the erection of the gate after a lapse of twenty-six years, from the time when it was erected leaving the party to proceed by indictment for the nuisance, or by an action of trespass if his passage was obstructed.—*R. v. CAMBRIDGESHIRE JJ.* (1822), 1 Dow. & Ry. K. B. 325; 1 Dow. & Ry. M. C. 80.

*Annotations:—Mentd.* R. v. Grant (1819), 13 Jur. 1026; R. v. Offlow General Income Tax Commrs. (1911), 27 T. L. R. 353.

**770. What amounts to evasion—Necessity for demand.]—**MAURICE v. MARSDEN, No. 768, *ante*.

**771. — Deviation Passing along more than one hundred yards.]** A local turnpike Act provided for a considerable line of road, including bridges, which, & the one hundred yards at the end of which, were repaired by the county. The Act provided for toll, & contained the usual exemption clause, that toll should not be demanded for any carriage, etc., which should only cross the road, & which should not pass more than one hundred yards thereon: *Held*: this exemption did not extend to a case, where more than one hundred yards had been passed on the road, including so much as had been passed on the part repaired by the county; although the trustees of the road did not contribute to the county repairs.—*BUSSEY v. STOREY* (1832), 4 B. & Ad. 98; 1 Nev. & M. K. B. 639; 1 Nev. & M. M. C. 522; 2 L. J. K. B. 166; 110 E. R. 392.

*Annotations:—Apld.* Pope v. Langworthy (1833), 1 Nev. & M. K. B. 617, n.; Pilpson v. Harvett (1834), 1 Cr. M. & R. 473; R. v. Worcestershire JJ. (1853), 21 L. T. O. S. 154.

**772. — — — — —.]—**Under Turnpike Roads Act, 1822 (c. 126), s. 32, exempting from payment of toll, carriages, etc., "which shall only cross any turnpike road, or shall not pass above 100 yards thereon," a carriage is not exempt from toll which passes along 100 yards of a road from A. to B., for repairing which trustees have been appointed under a local Act, although a part of the 100 yards be a street which by a subsequent Act, the trustees are forbidden to repair.—*POPE v. LANGWORTHY* (1833), 5 B. & Ad. 464; 1 Nev. & M. M. C. 532; 1 Nev. & M. K. B. 647; 2 L. J. K. B. 170; 110 E. R. 802.

*Annotations:—Apld.* Pilpson v. Harvett (1834), 1 Cr. M. & R. 473. *Fold.* R. v. Worcestershire JJ. (1853), 21 L. T. O. S. 154.

**773. — — — — —.]—**By certain Acts of Parliament, the management & repair of the portion of a turnpike road, within a borough, made by trustees under a local Act, was taken out of the trustees & vested in the council of the borough, & the council were empowered to set up toll-houses, gates, etc., within the borough, in lieu of the toll houses, gates, etc., within the borough; & the interest of the trustees in the toll houses, etc., within the borough was to vest in the council, subject, as to the sale & disposal of the same to the General Turnpike Acts, but without prejudice to the mtges. of the tolls, etc. There was then a provision that the mtge. debt was to be apportioned

between the council & trustees, & the council's proportion was to be paid out of the borough improvement rate; & the portion of the road within the borough was, after such payment, to be free from the payment of the mtge. debt on such road, & should no longer form any part of the roads belonging to the trust. The council had removed the toll-gates within the borough, & set up toll-gates beyond the borough, but had not paid any part of the mtge. debt on the tolls:—*Held*: a person passing with a horse & gig along the portion of the turnpike road within the borough, being more than one hundred yards, & then passing for a considerable distance along a public highway not a part of the turnpike road, & then entering again the turnpike road through a side gate, merely to cross the turnpike road, was not exempted from payment of toll at such side gate, on the ground that the distance he would have to cross would be less than one hundred yards.—*R. v. WORCESTERSHIRE JJ.* (1853), 21 L. T. O. S. 154; 17 J. P. 393.

**774. — — — — —.]—**V., going in a carriage from his own house to a town, drove along a parish road; he then used a private road without any express licence from the owner, & by that way entered the turnpike road; he then used the turnpike road for eighty-six yards, & then by parish roads reached the town, & returned by the same route. He could not by any other route have gone to the town without becoming liable to pay turnpike tolls:—*Held*: assuming that V. used this route because by using any other he would become liable to pay toll, this was not an evasion of payment of toll within Turnpike Roads Act, 1822 (c. 126), s. 41, but a successful arrangement to avoid becoming liable to payment.

Distinct users of different fragments of turnpike road, each less than one hundred yards, in crossing a turnpike, cannot be tacked together so as to make up a user of more than one hundred yards within Turnpike Roads Act, 1822 (c. 126), s. 32 (a) (*COLERIDGE, J.*).—*VEITCH v. EXETER ROADS TRUSTEES* (1858), 8 E. & B. 980; 27 L. J. M. C. 116; 30 L. T. O. S. 316; 22 J. P. 610; 4 Jur. N. S. 584; 6 W. R. 290; 120 E. R. 367.

*Annotation:—Refd.* Harding v. Headington (1871), 43 L. J. M. C. 59.

**775. — — — — —.]—**A person is liable to pay toll at a toll-gate on a turnpike road though he has not travelled one hundred yards on the road before coming to the gate, if, after passing through the gate, he uses the road for a space which, together with that he has passed over previously, exceeds in all the distance of one hundred yards.—*HORWOOD v. POWELL* (1861), 30 L. J. M. C. 203; 4 L. T. 372; 25 J. P. 406; 9 W. R. 659.

*Annotation:—Refd.* Harding v. Headington (1874), L. R. 9 Q. B. 157.

**776. — — — — —.]—**On to land of another.]—M. driving his sheep along a turnpike road, before going up to the gate, went aside to an inn, & put the sheep up for the night. The innkeeper was the occupier of fields extending on both sides of the gate, & allowed his customers who brought cattle to go through his fields, & into the road at a point beyond the gate, so as not to pass through the gate & pay toll. M. having next morning availed himself of this privilege, & being summoned for evading the toll:—*Held*: there was evidence to justify a conviction of M., under Turnpike Roads Act, 1822 (c. 126), s. 41.—*MELLOR v. LEES* (1865), 29 J. P. 548.

was evaded.—*R. v. HAYSTAD* (1849), 7 U. C. R. 9.—*CAN.*

C. S. U. C., c. 49, s. 95, stating that deft. wilfully passed a gate without paying & refusing to pay toll:—

*Held*: good.—*R. v. CAISTER* (1870), 30 U. C. R. 247.—*CAN.*

n. — — — — —.]—A conviction under



**777. — On to own land.]—**By Turnpike Roads Act, 1822 (c. 126), s. 41, if any person shall, with horse, carriage, etc., pass from any turnpike road over any land near to or adjoining thereto, not being a public highway, & such person not being the owner or occupier, etc., of such land, with intent to evade the payment of tolls . . . or if any person shall do any other act with intent to evade tolls whereby the same shall be evaded, every such person shall forfeit a sum not exceeding £5. *Resp.*, being the occupier of a farm adjacent to a turnpike road, made a gap in the hedge a few feet on one side of a toll-gate at which tolls were authorised to be taken, & formed a semi-circular road for a few yards over his farm, with a gap into the turnpike road a few feet on the other side of the gate. He then, with a horse & carriage, having passed more than one hundred yards along the turnpike road, with the intention to avoid paying the toll, passed through one gap over the road on his own land, & back again by the other gap into the turnpike road, & then passed more than one hundred yards along the turnpike road:—*Held*: *resp.* came within the exception in sect. 41, & was not liable to a penalty for evading the toll.—*HARDING v. HEADINGTON* (1874), L. R. 9 Q. B. 157; 43 L. J. M. C. 59; 29 L. T. 833; 38 J. P. 501; 22 W. R. 262.

**778. — Taking off horses before reaching toll-gates.]—**H. drove two stone carts through the toll-gate, & after returning through the gate, took out the two horses, & put them to a timber drag which had been brought by other three horses of the same owner, but which other horses were taken out before reaching the gate. By the local Act a horse was entitled to pass four times in one day for one toll. H. refused to pay for the horses in the timber drag, & the justices convicted him of evading toll under Turnpike Roads Act, 1822 (c. 126), s. 41:—*Held*: there was evidence to sustain the conviction, & conviction affirmed accordingly.—*HARTLEY v. BOWLZER* (1865), 11 L. T. 767; 29 J. P. 102.

**779. — Leaving carriage on highway—Journey continued on foot.]—**By Turnpike Roads Act, 1822 (c. 126), s. 41, it is provided that if any person shall leave upon a turnpike road any horse, cattle, beast, or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened, he shall forfeit any sum not exceeding £5. A. was driven by his coachman from his house along a turnpike road up to but not through a turnpike gate. A. then got out & walked through the gate to a railway station beyond it, & went away by a train, & his coachman drove the carriage back to his house:—*Held*: A. had not left his carriage upon the road within the Act, & had not therefore incurred the penalty imposed.—*STANLEY v. MORTLOCK* (1870), L. R. 5 C. P. 497; 39 L. J. M. C. 150; 22 L. T. 758; 18 W. R. 1130.

#### SUB-SECT. 9.—EXTINGUISHMENT.

**780. By statute.]—**A turnpike Act passed in 1815 provided that "no toll should be demanded or taken of or from any of the inhabitants of the town of S. at any toll gate or toll bar to be erected in the town." In 1838 the turnpike trustees removed a turnpike gate, which since 1815 had

stood in the town, to a site without the town, & twelve hundred yards distant from its old position. At that time & for several years afterwards there was not any house on either side of the road between the old & the new site of the gate; but within the last few years some fifty or sixty detached or semi-detached houses had been built, some on one & some on the other side of the road, between the two sites, but the houses were not contiguous or continuous, there being arable & other fields, & a reservoir, etc., intervening. From 1838 until June, 1878, the inhabitants of the town of S. had been in the habit of passing through the gate without paying toll, & on applt., an inhabitant of the town, driving through the gate in Aug. 1878, toll was demanded from him by *resps.*, the toll collectors, & was paid under protest by applt., who subsequently laid a complaint before the magistrates against *resps.* for unlawfully demanding & taking toll from him as an inhabitant of the town of S. The magistrates, after hearing the evidence on both sides & personally inspecting the *locus in quo*, found, as a fact, that "there was not any collection of houses at the toll gate, nor a continuous series of houses from the old to the present site of the gate, & the gate did not, at the time of its erection or of the complaint, stand within the town of S.," & they accordingly dismissed the complaint; & on appeal therefrom it was:—*Held*: (1) dismissing the appeal, the question, whether within a town or not within a town was a question of fact for the determination of the magistrates, & the magistrates having found that the gate was not within the town, the *cts.* were not at liberty to go behind that finding, but must treat it as a question of fact on which the magistrates had jurisdiction to determine, & had determined, for themselves. But the *cts.* also expressed their opinion that, having regard to the facts of the case, the finding of the magistrates was right in point of fact; (2) the omission of the trustees to demand toll for a period of forty years established no right in the public to exemption, which nothing but an Act of Parliament could create or sanction; nor had the trustees any right or power to exempt any person, or class of persons, from payment of the toll except those expressly exempted by the Act.

Within the last few years there has been a great deal of building within the neighbourhood between the spot where the old toll-bar stood & the place where it was erected in 1838. If the effect of those building operations had been such as to bring the toll-bar within the town of Sutton, though it was not so in 1838, I should have been of opinion that applt., being an inhabitant of the town of Sutton, was entitled to exemption from the toll, on the ground that the toll-gate was within the town though it was not at the time of its removal. In my opinion a town grows with the buildings, & wherever it can be said that the buildings have advanced to such an extent that that which was formerly without the town is now within it, the exemption will apply to that part of the town so newly added (*HAWKINS, J.*).—*DEARDS v. GOLDSMITH* (1870), 40 L. T. 328.

**781. — Exempting trustee from duty to repair—Statute silent on subject of tolls.]—**Where tolls are payable by persons passing along a turnpike road, & an Act of Parliament exempts & prohibits the trustees of such road from repairing a certain portion of it, & imposes the liability on

**PART V. SECT. 5, SUB-SECT. 9.**  
**a. Change in character of road—**  
**Purchase by city corporation.]—**Where

under the powers conferred by 51 Vict. c. 53, s. 9, for extending the limits of the city of O., the city acquired, at an agreed price, part of the

road of a toll road co. within such extended limits, such part thereupon ceased to have its previous character of a toll road, & became the same as the



**SECT. 5.—Tolls: Sub-sects. 9, 10, 11, 12 & 13.**  
**Part VI. Sects. 1, 2 & 3: Sub-sect. 1.]**

others but is silent on the subject of tolls, such portion still continues for the purposes of toll to be a part of the turnpike road. — *HIPSON v. HARVETT* (1834), 1 Cr. M. & R. 473; 5 Tyr. 51; 4 L. J. Ex. 36; 149 E. R. 1166.

**782. Whether by non-exaction—Forty years.]—**  
*DEARDS v. GOLDSMITH*, No. 780, *ante*.

**783. Merger—Prescriptive right merging in statutory right.]—**A municipal corpn. having a prescriptive right to take certain customary tolls for the passage of carriages, cattle, etc., over a bridge belonging to them, obtained in 1734 a local Act which, after reciting their right to take the customary tolls, enacted that the customary tolls should be & remain vested in them, & empowered them to take the tolls, with a variation as to the exemption of freemen of the borough. In 1810 the corpn. obtained another local Act which repealed the former Act & empowered them to take down the old bridge & build a new one & to take tolls which varied from the old tolls in amount & subject-matter. This Act was temporary & had expired: *Held*: the prescriptive right to take tolls had been merged in & extinguished by the statutory right given in 1734, & neither had nor could have been revived by the later Act, & the right to take tolls expired with the later Act. — *NEW WINDSOR CORPN. v. TAYLOR*, [1899] A. C. 41; 68 L. J. Q. B. 87; 63 J. P. 164; 15 T. L. R. 67, H. L.; *sub nom.* *WINDSOR CORPN. v. TAYLOR*,

79 L. T. 450, H. L.; *affg.* S. C. *sub nom.* *TAYLOR v. NEW WINDSOR CORPN.*, [1898] 1 Q. B. 186, C. A. *Annotations:—Reid.* A.-G. v. Reynolds, [1911] 2 K. B. 888. *Mentd.* A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508.

**784. ——— Whether revived on expiry of statute.]—***NEW WINDSOR CORPN. v. TAYLOR*, No. 783, *ante*.

#### SUB-SECT. 10.—LIABILITY OF BRIDGE TOLLS TO LAND TAX.

*See* LAND TAX.

#### SUB-SECT. 11.—TOLLS AS APPENDANT TO A MANOR.

*See* COPYHOLDS, Vol. XIII., p. 24, Nos. 179-192.

#### SUB-SECT. 12.—TOLLS OF MARKETS AND FAIRS.

*See* MARKETS.

#### SUB-SECT. 13.—HARBOUR TOLLS AND WHARF DUES.

*See* SHIPPING; WATERS & WATERCOURSES.

## Part VI.—Repair of Highways.

### SECT. 1. STANDARD OF REPAIR.

**785. General rules—Whether former standard applies.]—**Where inhabitants submit to a fine, they must also repair the way.

The matter is not at an end by debts. being fined, but writs of *distingas* shall be awarded *in infinitum*, till we are certified that the way is repaired; but debts. are not bound to put it in better condition than has been time out of mind, but as it has been usually at the best (*per* CUR.).

*R. v. LUWORTH (INHABITANTS)* (1704), 6 Mod. Rep. 103; 1 Salk. 359; Holt, K. B. 339; 91 E. R. 313.

*Annotations:—Consd.* *Blundell v. Catterall* (1821), 5 B. & Ad. 264. *Reid.* *R. v. Henley* (1847), 10 L. T. O. S. 110; *Local Improvement Comrs. v. Stafford* J.J. (1888), 20 Q. B. D. 791.

**786. ———.]—**Upon an indictment for non-repair of a highway, the question for the jury is not whether the road is in as good repair as it ever was, or usually has been, but whether it is in a state of sufficient repair, with reference to the present use of it.—*R. v. HENLEY (INHABITANTS)* (1847), 2 New Mag. Cas. 354; 10 L. T. O. S. 110; 2 Cox, C. C. 334; 11 J. P. Jo. 804.

*Annotations:—Reid.* A.-G. v. Scott, [1905] 2 K. B. 160; A.-G. v. Sharpness New Docks & Gloucester & Birmingham Navigation Co., [1914] 3 K. B. 1.

**787. ——— Standard suitable for present user.]—**  
*R. v. HENLEY (INHABITANTS)*, No. 786, *ante*.

other public streets of the city.—*CANADA ATLANTIC RY. CO. v. OTTAWA CORPN.*, *MONTREAL & OTTAWA RY. CO. v. OTTAWA CORPN.* (1901), 2 O. L. R. 330; 21 C. L. T. 323.—*CAN.*

### PART VI. SECT. 1.

**787 I. General rules—Standard suitable for present user.]—**The statutory duty to keep highways in repair is a

duty which is owed to persons using motor-cars, as well as to those using vehicles drawn by horses or other animals. *CONYOR v. BRANT* (1914), 31 O. L. R. 275; 5 O. W. N. 438; 6 O. W. N. 206. *CAN.*

**787 II. ———.]—**A County Council has a discretion as to how far, & when, the facilities for traffic on any road, etc., to be adapted to the existing

**788. ——— Substantial repair—Road little used.]**

(1) When a road has been found to be a high road on an indictment against a parish for not repairing it, the parish is not excused from putting it into good & substantial repair, by the circumstance that it is little used & has never been repaired with hard materials, that it passes into another parish which denies it to be a highway, & that it is of no use to repair the part in one parish until the liability of the adjoining parish has been determined.

It cannot be contended that because it has never been repaired the parish is exempt from the duty of repairing when from want of repair it has become impassable (*COLERIDGE, J.*).

(2) The ct. will not prescribe the mode of repair; & if the sum sworn to had appeared to have been calculated only to meet a particular mode, it would not have been governed by the calculation. It is sworn, however, & it is not denied, that £151 will be necessary to put the road into a substantial state of repair. Under the circumstances, therefore, I think this fine ought to be imposed; but I think it will be not improper to stay the execution until the first day of Michaelmas term next, to enable the parish to repair effectually. If it shall then appear that this has been done, the fine may be modified; if not it will be levied (*COLERIDGE, J.*).—*R. v. CLAXBY (INHABITANTS)* (1855),

conditions of population, traffic, etc., on such road, even if such adaptation involve a reduction or diminution in the previously existing convenience & efficiency of the road.—*STOWELL v. GERALDINE COUNTY COUNCIL* (1890), 8 N. Z. L. R. 720. —*N.Z.*

**p. ——— Not for motors driven at improper speed.]—**A road authority is not bound to maintain

3 C. L. R. 986; 24 L. J. Q. B. 223; 25 L. T. O. S. 103; 19 J. P. 295; 1 Jur. N. S. 710; 3 W. R. 451.

**789.** — Fit for ordinary traffic.]—A parish bound to repair a road must make it reasonably passable at all times of the year.

A parish is not bound to make the road hard, or bring stone or other hard substances to repair the road; but they are bound in some way, by stone or other hard substances, if necessary, to put the road in such repair so as to be reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year (BLACKBURN, J.).—*R. v. HIGH HALDEN (INHABITANTS)* (1859), 1 F. & F. 678.

*Annotation*:—*Reid*. A.-G. v. Scott, [1905] 2 K. B. 160.

**790.** — [.]—BURGESS v. NORTHWICH LOCAL BOARD, No. 601, *ante*.

**791.** Road crossing bed of tidal river—Materials washed away by tide.]—Where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them. Where a public way crosses the bed of a river, which flows over it at every high tide [washing away the materials placed there to form the road] & leaves [in their place] a deposit of mud, *semble*: the parish is not bound to make it good.—*R. v. LANDULPH (INHABITANTS)* (1834), 1 Mood. & R. 393, N. P.

*Annotations*:—*Dbtd.* Bridgwater Trustees v. Bootle-cum-Linacre (1866), L. R. 2 Q. B. 4. *Reid*. R. v. Henley (1847), 10 L. T. O. S. 110; C. L. Ry. v. London City Land Tax Commrs., [1911] 2 Ch. 467.

**792.** Towing path—Maintained under statutory authority.]—WINCH v. THAMES CONSERVATORS, No. 35, *ante*.

**793.** Where road subsides—Liability of party causing subsidence.]—LODGE HOLES COLLIERY CO., LTD. v. WEDNESBURY CORPN., No. 630, *ante*.

**794.** Public footpath.]—A surveyor of highways has no right at common law under guise of repairing a public path to improve it into a totally different kind of path & a more commodious path than it used to be. Accordingly he cannot at common law make cuttings to improve the levels, or build bridges, where none formerly existed, to carry the path across streams.—RADCLIFFE v. MARSDEN URBAN DISTRICT COUNCIL (1908), 72 J. P. 475; 6 L. G. R. 1186.

**795.** — Over private road—Road set out under inclosure award.]—REYNOLDS v. BARNES, No. 874, *post*.

Liability of county authority—To contribute to expenses of highway authority—Standard of road raised.]—*See* No. 1216, *post*.

—Unauthorised expenditure.]—*See* No. 1118, *post*.

## SECT. 2.—MODE OF REPAIR.

**796.** Whether court will prescribe.]—*R. v. CLAXBY (INHABITANTS)*, No. 788, *ante*.

**797.** — [.]—(1) The liability imposed upon county councils by Local Government Act, 1888 (c. 41), s. 11, of maintaining & repairing main roads is general, it being left to them to determine the best means of discharging that liability.

its roads in such repair that they shall be safe for motors driven at an improper speed.—*ROX v. WELLESLEY TOWNSHIP* (1918), 43 O. L. R. 214; 14 O. W. N. 249.—CAN.

**798 i.** — Fit for ordinary traffic.]—The word "repair," as used with reference to a highway, is a relative term, & if the particular road is kept in such reasonable state of repair that those requiring to use it may, using

ordinary care, pass to & fro upon it in safety, the requirement of the law is satisfied.—*POLEY v. EAST FLAMBOROUGH TOWNSHIP* (1896), 29 O. R. 139.—CAN.

## PART VI. SECT. 3, SUB-SECT. 1.

*q.* Right to take material—Authority to take—Given by bye-law.]—Under R. S. O., 1887, c. 184, the council of every township may, as necessity

The ct. will not prescribe what particular works or repairs are necessary for the maintenance of the roads.

(2) No mandamus will lie against a local authority to do any particular works.—*A.-G. v. STAFFORDSHIRE COUNTY COUNCIL*, [1905] 1 Ch. 336; 74 L. J. Ch. 153; 92 L. T. 288; 69 J. P. 97; 53 W. R. 312; 21 T. L. R. 139; 3 L. G. R. 379.

*Annotation*:—*As to* (1) *Reid*. Wednesbury Corpn. v. Lodge Holes Colliery Co., [1907] 1 K. B. 78.

**798.** Main road—In discretion of County Council.]—*A.-G. v. STAFFORDSHIRE COUNTY COUNCIL*, No. 797, *ante*.

## SECT. 3.—MATERIALS FOR REPAIR OF HIGHWAYS.

### SUB-SECT. 1.—FROM LAND ALLOTTED OR ACQUIRED FOR THE PURPOSE.

**799.** Allotment under inclosure award—Materials must not be used for private purposes—Construction of award.]—Where an inclosure Act directed that the comrs. should set out & allot a certain portion of the common lands for the getting of stone, gravel & other materials, for the repairs of the highways & other roads to be set out under the Act, & for the use of the inhabitants within the parish:—*Held*: this did not authorise the inhabitants to take such materials for their private purposes, but only for the repairs of the roads.—*RYLATT v. MARFLEET* (1845), 14 M. & W. 233; 14 L. J. Ex. 305; 153 E. R. 462.

**800.** — Lapse of right—Under Real Property Limitation Act, 1833 (c. 27).]—An Inclosure Act directed the comrs. to set out land for getting stone, etc., for repairing the parish roads, which should be vested in the surveyors of highways & their successors, & enacted that all the grass & herbage growing, arising, & renewing on the roads & on the land to be set out & appointed for getting stone, etc., should belong to & be the property of the persons to whom the comrs. should allot the same, exclusive of all other persons whomsoever, or should be applied to some parochial or other use or purpose. The comrs. in pursuance of the Act, awarded, set out, allotted & appointed to the surveyors of highways & their successors an allotment No. 158, containing 1 acre, save & except the grass & herbage thereof, upon trust & for the purpose of getting stone, etc., for repairing the roads, & they awarded, set out, allowed & assigned to P. & his heirs contiguous allotments, No. 157 & No. 159, together with the grass & herbage of No. 158; they also ordered & directed that the grass & herbage growing, arising, & renewing on the public roads & ways should be let from year to year, & the moneys arising thereby be applied to the repair of the highway, etc. The surveyors obtained gravel for the highways from No. 158 down to the year 1813, when they discontinued to do so, & purchased gravel from pits in the neighbouring parishes; & thenceforth until 1838 they never entered upon or exercised in No. 158 any right under the award. In 1813, P. built a cottage &

arises for their doing so, exercise the right to take gravel, etc., from any particular parcel of land, having first declared the necessity to exist & chosen & described the land from which the material is to be taken, by a bye-law.—*ROSK v. WEST WAWANOMIT TOWNSHIP* (1890), 19 O. R. 204.—CAN.

*r.* — & sell surplus.]—A road board acquired a quarry, & applied

**Sect. 3.—Materials for repair of highways: Sub-sects. 1 & 2. A.]**

harn, & other buildings, on part of No. 158, & enclosed part of it with a fence; he also cut off a corner of it, which had ever since formed part of the adjoining arable field, & cleared out the old pit, & converted it into a pond:—*Held*: there had been a discontinuance of possession by the surveyors, & an actual possession by P. for twenty years, & therefore their right was barred by sects 2, 3, of above Act.—*THEW v. WINGATE* (1862), 10 B. & S. 714; 38 L. J. Q. B. 310, n.; 34 J. P. 183, n.

*Annotation*:—*Reid*. *Smith v. Stocks* (1869), 10 B. & S. 701.

**801.** ————.]—A gravel pit & a road to it were allotted by comrs. under an Inclosure Act to the surveyors of highways of a hamlet for the repair of its roads & ways. From 1837 to 1863 the surveyors ceased to take gravel from the pit or to use the road, & took no steps to assert their right to the pit or road, but got gravel for the repair of the highways from another pit two miles off, which they purchased from time to time from pltf.'s father & from pltf. The land allotted for the road & gravel pit was entirely surrounded by old enclosures belonging & land allotted to pltf.'s predecessors in title. In 1837 the tenant of the greater part of the land in which the pit was situated filled up part of the pit, & from that time cultivated the surface as arable land, together with the adjacent parts of the field. In 1839 another tenant ploughed up the remaining portion of the pit, which abutted upon land in his occupation, & also the allotted road, which passed through other land in his occupation; & both continued to be cultivated by pltf.'s tenants as arable land from that time till 1863. In 1844 the tenant of pltf., who was in occupation of the surface of the greater part of the pit, was elected one of the surveyors of the highways, & held that office for one year. On a special case giving the ct. power to draw inferences of fact:—*Held*: (1) actual possession of the gravel pit & road was taken by the tenants of the adjoining lands in 1837 & 1839, & therefore the title of the surveyors of highways to the gravel pit & road had, by sects. 2, 3, of above Act become extinguished; (2) the circumstance of the tenant occupying part of the pit being elected surveyor of highways after possession had been taken of it, did not interrupt the running of the period of limitation, as the character of his possession as tenant under pltf. was not altered during his year of office.—*SMITH v. STOCKS* (1869), 10 B. & S. 701; 38 L. J. Q. B. 306; 20 L. T. 740; 34 J. P. 181; 17 W. R. 1135.

**802.** ———— Subsequently acquired compulsorily — Disposal of proceeds of sale.]—Land allotted by an inclosure award of 1831 to a highway surveyor for road materials was bought by a railway co. under their compulsory powers. The purchase money was paid into ct., the dividends thereon being paid to the surveyor for the time being. Upon application by an urban district council, as the present highway authority, for payment out to them of the capital: *Held*: subject to the consent of the Local Govt. Board, the money might be paid out to the council under Lands

Clauses Act, 1845 (c. 18), s. 69, as they had become absolutely entitled to it under 39 & 40 Vict. c. 62, s. 1.—*Re BRUMBY & FRODINGHAM URBAN DISTRICT COUNCIL* (1904), 69 J. P. 96; *sub nom. Re BRUMBY & FRODINGHAM URBAN DISTRICT COUNCIL, Re TRENT ANCHOLINE & GRIMSBY RY. CO.*, 3 L. G. R. 258.

**803.** ———— Disposal of exhausted allotment—“Fair & reasonable” price.]—Applt. was the owner of land adjoining an exhausted gravel pit, the soil of which had been previously allotted to the surveyor of highways under Highway Act, 1835 (c. 50), s. 48. The highway board in whom were vested the powers of surveyor of highways, applied to justices at a special sessions to fix the price at which the pit should be sold. The justices by order consented to the sale of the pit, & fixed the price at £450, which, owing to special circumstances, a gentleman in the parish was willing to give for it. It appeared that £135 6s. 6d. was a fair & reasonable price, as between the highway board & applt. & the £450 a reasonable price having regard to the interests of the parish only:—*Held*: (1) under Highway Act, 1835 (c. 50), s. 105, there was an appeal against the order to the quarter sessions; (2) the justices were bound to fix the price of the pit fairly as between the adjoining owner & the parish, & not with regard to the interests of the parish exclusively; & the smaller sum was the proper price.—*R. v. DRAYTON HIGHWAY BOARD* (1876), 1 Q. B. D. 608; 45 L. J. M. C. 126; *sub nom. GRIFFIN v. DRAYTON-IN-HALES HIGHWAY BOARD*, 35 L. T. 251; 40 J. P. 773; *sub nom. R. v. MAINWARING, ETC. (STAFFORD COUNTY JJ.) & DRAYTON IN WALES HIGHWAY BOARD*, 24 W. R. 756.

**804.** Pit allotted under statute—Right to enlarge pit.]—The B. local board having, under an Act of Parliament, power to cut, dig, gather, carry & take away any quantity or quantities of gravel for the repair of roads, etc., from a pit belonging to pltf.:—*Held*: not bound to confine themselves to the original dimensions of the pit, but entitled to dig gravel laterally, so as to enlarge the area of the pit.—*ELLIS v. BROMLEY LOCAL BOARD* (1876), 45 L. J. Ch. 763; 35 L. T. 182; 24 W. R. 716, C. A.

*Annotation*:—*Reid*. *Silles v. Fulham B. C.* (1903), 67 J. P. 273.

**805** Right to take material—Transfer with liability to repair.]—A highway was duly declared a main road. Before that time the highway surveyor of B. parish was entitled to take gravel from a pit for repairs. The county council under Local Government Act, 1888 (c. 41), s. 11, claimed also to take from the gravel pit:—*Held*: the right to the gravel passed to the county council with the duty to repair the highway.—*Re NORFOLK COUNTY COUNCIL v. BITTERING HIGHWAY SURVEYOR* (1894), 58 J. P. 497.

**SUB-SECT. 2.—FROM OTHER LAND.**

**A. Waste Land and Foreshore.**

*See Highway Act, 1835 (c. 50), ss. 51, 52.*

**806.** Right to take stone from foreshore—Whether claimable by prescription or custom.]—

its funds in the quarrying of the stone & the preparation of road metal & screenings for its own use. There was a large surplus of stone in the quarry over & above all possible future requirements of the board, which sold this surplus stone to the public, expending part of its funds in preparing such stone for sale:—*Held*: inasmuch

as the Board had lawfully acquired the quarry *bono fide*, & the quarry contained a supply of material in excess of the Board's present or future requirements, it was entitled to sell the surplus.—*A.-G. v. HEATHCOTE ROAD DISTRICT (INHABITANTS)* (1894), 12 N. Z. L. R. 535.—N.Z.

**a.** ———— From land outside adminis-

trative area—Of Highway authority —If paid for—Roads & Bridges (Scotland) Act, 1878.]—EDINBURGH MAGISTRATES v. MIDLOTHIAN COUNTY COUNCIL, [1911] S. C. 1157.—SCOT.

**PART VI. SECT. 3, SUB-SECT. 2.—A.**  
1. Statutory power to take stone from waste—Under Highway Act, 1831

Ptff., by virtue of a grant from the Crown, claimed, as lord of the manor of C., to be entitled to the beach or shore of the sea between high & low water mark. Defts. the surveyors of highways, took the stones to mend the highway of the parish. Upon a bill filed by ptff. against them, defts. put in their answer, denying the right claimed by ptff. & insisting upon their right to take the stones by custom & also by prescription, & also under Highways Act, 1835 (c. 50); & upon a motion to dissolve the injunction obtained by ptff. :—*Held*: the rights claimed by ptff. were legal, & must be decided by an action; the ct. must consider which of the two parties was likely to sustain most injury; notwithstanding the want of distinct evidence respecting injury, the ct. to prevent a possible mischief, would grant an injunction, & give ptff. leave to bring an action, but it refused to say that he must do so.—*CLOWES v. BECK* (1851), 13 Beav. 347; 20 L. J. Ch. 505; 17 L. T. O. S. 300; 51 E. R. 134; *on appeal* (1852), 2 De G. M. & G. 731, L. J.

*Annotation*:—*Reid*. *Constable v. Nicholson* (1863), 14 C. B. N. S. 230.

807. ———.]—A surveyor of highways cannot justify a trespass, under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high & low water mark, or otherwise, for the purpose of repairing the highways of the parish. *Scmble*: it would be a good justification to plead such a prescriptive right in the inhabitants of the parish alleging that the surveyor was one of the inhabitants.—*PADWICK v. KNIGHT* (1852), 7 Exch. 851; 22 L. J. Ex. 198; 19 L. T. O. S. 206; 16 J. P. Jo. 437; 155 E. R. 1196.

*Annotations*:—*Reid*. *Constable v. Nicholson* (1863), 14 C. B. N. S. 230; *Austin v. Amhurst* (1877), 47 L. J. Ch. 407.

808. ———.]—To an action of trespass for breaking & entering certain land of ptff., being part of the sea-shore between high & low water mark in or adjoining the township of O., & taking gravel, stones, sand, etc., defts. pleaded several pleas of justification, some setting up a right in the inhabitants of the township of O. to take the gravel, etc., to be used for the cultivation & improvement of their land; others claiming it for the necessary repairs of the highways in the township; others setting up a prescriptive right under a thirty or sixty years' user respectively; & others claiming to exercise the right, as parish officer, for the repair of the highways :—*Held*: the pleas were bad: for that, so far as they were capable of being construed as justifying under a custom, such custom would be void, being a claim of a *profit à prendre in alieno solo*, which can only exist by grant or prescription; & that, if the claim were founded on prescription, it would be equally bad, inasmuch as it was a claim by persons, who, not being a corporation, were incapable of taking by grant, & not being claimed in a *que estate*.—*CONSTABLE v. NICHOLSON* (1863), 14 C. B. N. S. 230; 2 New Rep. 76; 32 L. J. C. P. 240; 11 W. R. 698; 143 E. R. 434.

*Annotations*:—*Consid*. *Hilvers v. Adams* (1878), 3 Ex. D. 361; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633. *Reid*. *Austin v. Amhurst* (1877), 7 Ch. D. 682; *Saltash Corpn. v. Goodman* (1880), 5 C. P. D. 431; *Hough v. Clark & Hall* (1897), 23 T. L. R. 682.

809. Right to take stone from beach above highwater mark.—Whether claimable by custom.]—(1) A special custom to take shingle from the beach above high water mark for the repairing of

the highways of the parish, is bad as to such portion of the beach as is private property, being a custom of a *profit à prendre* in another man's land.

(2) Highway Act, 1835 (c. 50), does not empower a highway board to take shingle from the beach below high water mark for the repair of the highways, so as to cause an increased danger of encroachment by the sea.—*PITTS v. KINGSBRIDGE HIGHWAY BOARD* (1871), 25 L. T. 195; 19 W. R. 884.

810. Statutory power to take stone from waste.—Under Highway Act, 1835 (c. 50), s. 51.—*Foreshore*.]—*CLOWES v. BECK*, No. 806, *ante*.

811. ———.]—Risk of encroachment by sea increased.]—*PITTS v. KINGSBRIDGE HIGHWAY BOARD*, No. 809, *ante*.

*See* Highway Act, 1835 (c. 50), s. 52.

812. ———.]—Mountain sheep-walk in Wales.]—Ptff., claiming to be the owner of a mountain in Wales, sought to restrain deft. council from obtaining stone for highway repair from it. Defts. claimed the right to obtain the stone as from "waste land or common ground," under above sect., & also disputed ptff.'s title. Ptff. proved no paper title to the land, but proved that she was the owner of certain farms adjoining the mountain, & had long been accustomed to let to the tenants of these farms rights of grazing sheep on the mountain, a particular part of the mountain being appropriated for this purpose to each farm. There was no evidence of any title to the soil of the mountain in the Crown or in any person other than ptff. :—*Held*: ptff. had sufficiently proved ownership of the mountain to sustain the action, & the mountain was not waste land or common ground.—*SCOTT v. TOWYN RURAL DISTRICT COUNCIL* (1907), 5 L. G. R. 1050.

813. ———.]—River flowing through inclosed land.]—The provisions of above sect., empowering a highway authority to obtain road-making materials in any "waste land or common ground, river or brook" without a justice's licence, do not extend to the gathering of materials from the bed of a river running through inclosed land.—*ALLINSON v. CUMBERLAND COUNTY COUNCIL* (1907), 97 L. T. 187; 71 J. P. 398; 23 T. L. R. 606; 51 Sol. Jo. 532; 5 L. G. R. 871, D. C.

814. ———.]—Discretion of justices to make order.]—By above sect., power is given to a surveyor of highways to get & carry away gravel, etc., in any waste land or common ground.

Appls. having refused leave to resps. to take gravel from a common, the latter applied to justices, who made an order under Commons Act, 1876 (c. 56), s. 20, on the express ground that the sect. only gave them power to prescribe the conditions under which the right given by Highway Act, 1835 (c. 50), s. 51, was to be exercised, & that they had therefore no discretion to refuse altogether to make an order :—*Held*: the decision of the justices was wrong, & they had absolute discretion, under Commons Act, 1876 (c. 56), s. 20, to make or refuse to make an order.—*HAYES COMMON CONSERVATORS v. BROMLEY RURAL DISTRICT COUNCIL*, [1897] 1 Q. B. 321; 66 L. J. Q. B. 155; 76 L. T. 51; 61 J. P. 104; 45 W. R. 207; 13 T. L. R. 136; 41 Sol. Jo. 160, D. C.

815. ———.]—What amount may be taken.]—The right to get materials from waste lands for the repair of the highways under above sect. carries with it a power to stack such materials on the

(c. 43), s. 80.—*LYELL'S TRUSTEES v. FORFARSHIRE ROAD TRUSTEES* (1882), 9 R. (Ct. of Sess.) 792; 19 Sc. L. R.

559.—*SCOT*.

—*River flowing through inclosed land*.]—*LYELL'S TRUSTEES v.*

*FORFARSHIRE ROAD TRUSTEES* (1882), 9 R. (Ct. of Sess.) 792.—*SCOT*.

**Sect. 3.—Materials for repair of highways: Sub-sect. 2, A. & B. Sects. 4 & 5: Sub-sect. 1.]**

waste lands for a reasonable time, such a power being reasonably necessary to enable the statutory rights to be carried out. The amount of materials so got under above sect. is limited to such as in the discretion of the surveyor is necessary for repairs in immediate contemplation, though the express limitation in the sect. only extended to the carrying away more than the authority was entitled to.—**RUSSELL (EARL) v. MIDHURST RURAL DISTRICT COUNCIL** (1908), 98 L. T. 530; 72 J. P. 180; 24 T. L. R. 308; 6 L. G. R. 402.

**816. ——— Right to stack surplus included.]**—**RUSSELL (EARL) v. MIDHURST RURAL DISTRICT COUNCIL**, No. 815, *ante*.

**B. Inclosed Land.**

See Highway Act, 1835 (c. 50), ss. 53, 54.

**817. Excepted lands — "Garden" — Construction of turnpike Act.]**—Power for trustees of turnpike to dig for gravel, except in gardens:—*Held*: the exception extended to fields planted with garden stuff. **HUGHES v. BRAND** (1751), Amb. 105; 27 E. R. 67, L. C.

**818. ——— "Avenue to a house" — Not exempt from user for carriage of material.]**—A licence may be granted to get materials for the repair of the highways under Highway Act, 1835 (c. 50), s. 54, although the materials when got must be carried away by an "avenue to a house," the exception of such an avenue (*inter alia*) in the sect. referring only to the digging or getting of the materials, not to the carrying of them away when got.—**RAMSDEN v. YEATES** (1881), 6 Q. B. D. 583; 50 L. J. M. C. 135; 44 L. T. 612; 45 J. P. 538; 29 W. R. 628, D. C.

**819. ——— Park — Whether land in question a park — Jurisdiction of justices to decide.]**—On an application by a surveyor of highways for a licence under Highway Act, 1835 (c. 50), ss. 53, 54, the justices made an order authorising him to take materials for a period of five years from certain enclosed land which in the opinion of the High Ct. was a park:—*Held*: (1) the question whether the land was a park or not was one which was preliminary to the exercise of the jurisdiction given by the statute, & the justices could not by wrongly deciding that the land was not a park give themselves jurisdiction in the matter; (2) a licence, to be valid, must not purport to operate for a longer period than is necessary for the execution of repairs, & the licence, being for a period of five years without reference to the necessities existing at the date of its grant, was bad.—**R. v. BRADFORD**, [1908] 1 K. B. 305; 77 L. J. K. B. 475; *sub nom.*

**R. v. BRADFORD, Ex p. CHAMBERS**, 98 L. T. 620; 72 J. P. 61; 24 T. L. R. 195; 6 L. G. R. 333, D. C. *Annotations*:—*As to* (1) *Refd.* May v. Mills (1914), 30 T. L. R. 287; *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 788. *As to* (2) *Expld.* **R. v. Adams, Ex p. Pope**, [1923] 1 K. B. 415.

**820. What licence of magistrates must show — Nature of material required.]**—An order of sessions under a turnpike Act for entering upon land to provide materials, should show a notice to the occupier, under the Act, & of the kind of provision for repair wanted; also of the fields where it is intended to search; & should award a satisfaction to owner, & occupier, if distinct.—**R. v. MANNING** (1757), 2 Keny. 561; 1 Burr. 377; 96 E. R. 1279. *Annotation*:—*Refd.* Taylor v. Clemson (1844), 11 Cl. & Fin. 610.

**821. ——— Repairs for which granted.]**—A licence granted by justices under Highway Act, 1835 (c. 50), authorising a highway authority to take from inclosed land materials for the repair of highways is not bad on its face because it does not specify the precise period during which it is to be operative or because it is granted in respect of unspecified repairs.—**R. v. ADAMS, Ex p. POPE**, [1923] 1 K. B. 415; 92 L. J. K. B. 120; 128 L. T. 597; 87 J. P. 61; 39 T. L. R. 165; 67 Sol. Jo. 315; 21 L. G. R. 144, D. C.

**822. ——— Lands to be entered.]**—**R. v. MANNING**, No. 820, *ante*.

**823. ——— Wood forming part of larger wood.]**—A highway surveyor applied under Highway Act, 1835 (c. 50), s. 54, for an order to take materials for highway repairs out of a wood of H. The wood consisted of 13 acres, & was part of a larger wood of 100 acres:—*Held*: the order was bad for not specifying the part of the wood where the materials were to be taken.—**HOOPER v. HAWKINS** (1886), 51 J. P. 246; 2 T. L. R. 805, D. C.

**824. ——— Duration of licence.]**—**R. v. ADAMS, Ex p. POPE**, No. 821, *ante*.

**825. Duration of licence.]**—A licence granted by justices to get materials from inclosed land for the repair of the highways under Highway Act, 1835 (c. 50), ss. 53, 54, does not continue indefinitely, but is limited to the necessities of the particular occasion in respect of which it was granted.—**MANVERS (EARL) & BROWNE v. BARTHOLOMEW** (1878), 4 Q. B. D. 5; 48 L. J. M. C. 3; 39 L. T. 327; 43 J. P. 54; 27 W. R. 167, D. C.

*Annotations*:—*Consd.* **R. v. Bradford**, [1908] 1 K. B. 365. *Expld.* **R. v. Adams, Ex p. Pope**, [1923] 1 K. B. 415. *Mentd.* **Russell v. Midhurst R. D. C.** (1908), 98 L. T. 530.

**826. ———.]**—**R. v. BRADFORD**, No. 819, *ante*.

**827. Compensation — Who entitled — Owner & occupier.]**—**R. v. MANNING**, No. 820, *ante*.

**828. Jurisdiction to award.]**—13 Geo. 3, c. 78,

**PART VI. SECT. 3, SUB-SECT. 2. — B.**

**b. Excepted lands — "Orchard." —**It is a condition precedent to the jurisdiction of Justices to make an order under Grand Jury (Ireland) Act, 1836, s. 162, authorising entry on lands to take road materials, that the lands are not an orchard; & their decision that it is not an orchard may be challenged on certiorari.—**J. (The Vicar) v. QUEEN'S COUNTRY JJ.**, [1908] 2 L. R. 285.—*IR.*

**c. ———.]**—**R. (DARCY) v. COUNTY CARLOW JJ.**, [1916] 2 L. R. 313.—*IR.*

**d. ——— "Planted wall." — HENDERSON'S TRUSTEE v. DUNFERMLINE D. C.** (1899), 2 F. (Cl. of Sess.) 164; 37 So. L. R. 119; 7 S. L. T. 245.—*SCOT.*

**e. ——— Shingle bank.]**—In an action by the proprietor of an estate

against the County Council for interdict against defenders removing stones from the shingle bank which lay along a river on the estate, the defence was that defenders were entitled, as the road authority to remove the stones in respect that the shingle bank was open uncultivated land or waste within (General Turnpike Act, 1831, s. 80, or if it was enclosed land, that the stones were not required for pursuer's private use. On the facts:—*Held*: the shingle-bank was enclosed "land" within the Act, & stones were required for pursuer's private use.—**GRAHAM v. ST. CYRUS DISTRICT COMMITTEE OF KINCARDINESHIRE** (1900), 2 F. (Cl. of Sess.) 671; 37 So. L. R. 479.—*SCOT.*

**f. ——— Inclosed land planted as shelter to house.]**—In an action to restrain a district committee from taking road material from ground in the proximity of a mansion-house:—

*Held*: the ground in question was "inclosed ground planted as shelter to a house" within the exception in General Turnpike Act, s. 80.—**OYENSTONE v. DUNDEE DISTRICT COMMITTEE OF FORFAR COUNTY COUNCIL** (1920), 57 So. L. R. 694.—*SCOT.*

**8271. Compensation — Who entitled — Owner & occupier.]**—An owner in fee-simple in occupation of lands is not entitled to compensation for damage over & above the surface damage caused by the removal of road material, save where materials are taken from any quarry or gravel pit *bona fide* demised, with liberty to work same.—**BRITTON v. TIPPERARY COUNTY COUNCIL**, South Riding, [1913] 2 L. R. 468.—*IR.*

**g. Necessity to show extent of operations.]**—The onus is on a district municipal council entering on land &

ss. 27 & 29, authorising surveyors of highways to take & carry the refuse stones from quarries for the repair of the highways, making satisfaction for damage done to the lands of any person by carrying away same; & directing that if the surveyors cannot agree with the landowners upon the amount of such satisfaction, it shall be settled & ascertained by an order of justices; & providing further, that no pltf. shall recover for any trespass, etc., if tender or sufficient amends be made before action brought; & that in case no such tender be made, deft., by leave of ct. before issue joined, may pay money into ct. — *Held*: surveyors, having broken a new way over pltf.'s land, in order to carry such materials for repair, in a case where an old but circuitous road existed before; & having, after the damage done, & after an action of trespass brought against them, paid money into ct. by way of amends; the sufficiency of such amends cannot be questioned *at nisi prius*; the statute having referred the quantum of amends, if not agreed upon, to the decision of justices of the peace. But it seems to be competent to pltf. in such action to show that the making of such new road over his land was maliciously or wantonly done by the surveyors, & not for the necessary or convenient carriage of the materials over the land for the purposes of the Act; & in such case he would not be concluded by the amends tendered or paid into ct. — *BOYFIELD v. PORTER* (1811), 13 East, 200; 101 E. R. 316.

*Annotations*: — *Consd.* *Peters v. Clarkson* (1844), 7 Man. & G. 518. *Held*. *R. v. Cumberland J.J.* (1822), 1 B. & C. 61.

**829. — For what matters—Whether stones gathered off enclosed land.**—Under Highway Act, 1835 (c. 50), s. 51, justices are entitled to grant the surveyor of highways a licence to gather stones upon inclosed land within the parish for the repair of its highways, without making any compensation to the owner for the value of such stones. *ALDERFORD RURAL SANITARY AUTHORITY v. SCOTT* (1881), 7 Q. B. D. 210; 50 L. J. M. C. 103; 45 L. T. 73; 45 J. P. 619; 20 W. R. 741, D. C.

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#### SECT. 4.—CONTRACTS FOR REPAIR OF HIGHWAYS.

**830. Disqualification from contracting—Whether member of local highway authority included.**—Notwithstanding Local Government Act, 1891 (c. 73), s. 25, a rural district councillor is not a surveyor of highways nor subject to penalties under sect. 46 of the Highway Act, 1835 (c. 50), for letting to hire a team to be used in repairing highways within the district of the council of which he is a member without any licence in writing from two justices of the peace, & for receiving payment from the council in respect thereof. — *BUCKLEY v. HANSON* (1898), 77 L. T. 664; 62 J. P. 119; 42 Sol. Jo. 198; 18 Cox. C. C. 688, D. C.

**831. Effect of adoption of Local Government Act, 1888 (c. 97)—Work done within two months of adopting resolution.**—Pltf. & defts. entered into a contract whereby pltf. agreed to supply gravel & execute repairs of roads in defts.' district.

In a portion of defts.' district a resolution to adopt above Act was passed on Mar. 24, 1886, & after the lapse of two months, as required by the provisions of the Act, had the force of law. Pltf. sued defts. for cost of gravel supplied & repairs executed on the roads in such portion during the two months. Defts. disputed their liability:—*Held*: defts. were liable. — *DRIVER v. KINGSTON HIGHWAY BOARD* (1871), 24 L. T. 480; 35 J. P. 696; 20 W. R. 20.

**832. Stamp duty—"Contract relating to maintaining & repairing of highways"—Agreement as to payment of contribution due by district council.**—On Nov. 28, 1897, an agreement was made between applts. & the urban district council of F., whereby the payment for the year ending Mar. 1898, in pursuance of the Local Government Act, 1888 (c. 41), towards the cost of maintenance, & repair & reasonable improvement connected with the maintenance & repair of all main roads within the district of the urban council, was fixed at a certain sum. The money was to be paid in four instalments, & there was a proviso that nothing, except as expressly declared, should alter the rights & liabilities of the parties thereto:—*Held*: this was not an agreement made pursuant to the Highway Acts for or relating to the making, maintaining, & repairing of highways, which would only require a 6d. stamp, but that it was made under the Local Government Act, & came under the heading "deed of any kind whatsoever not described in the schedule" of the Stamp Act, & so required a 10s. stamp. — *CUMBERLAND COUNTY COUNCIL v. INLAND REVENUE COMRS.* (1898), 78 L. T. 679; 62 J. P. 407; 14 T. L. R. 408, D. C.

*Annotation*: *Fold* *Southampton County Council v. I. R. Comrs.* (1905), 92 L. T. 361.

**833. — — — — —** When a county council make an agreement under seal with a district council under Local Government Act, 1888 (c. 41), s. 11 (1), for the repairing, maintaining, & keeping in repair main roads in their district, such an agreement is not an agreement "made or entered into pursuant to Highway Acts for or relating to the making, maintaining, or repairing of highways" within the schedule to the Stamp Act, 1891 (c. 39), which would require a 6d. stamp, but comes within the heading in that schedule: "Deed of any kind whatsoever not described in this schedule", & therefore requires a 10s. stamp. — *SOUTHAMPTON COUNTY COUNCIL v. INLAND REVENUE COMRS.* (1905), 92 L. T. 361; 69 J. P. 105; 21 T. L. R. 199; 3 L. G. R. 1060.

#### SECT. 5.—HIGHWAYS REPAIRABLE BY INHABITANTS AT LARGE.

##### SUB-SECT. 1.—IN GENERAL.

**834. Distinguished from highways repairable *ratione tenuræ*.**—(1) An action for personal injuries sustained by one of the public owing to the non-repair of a highway, does not lie against a local board of health constituted under the Public Health Act, 1848 (c. 63). (2) By 15 & 16 Vict. c. 42, s. 13, the term "highway" in Public Health

taking any timber, stones, gravel or other material for repairs of roads, etc., to show what is intended to be taken, & the extent of the operations to be carried on. — *COOK v. NORTH VANCOUVER DISTRICT CORPN.* (1911), 16 B. C. R. 129.—CAN.

*h. Power to blast.*—*WHITSON v.*

*BLAIRGOWRIE DISTRICT COMMITTEE* (1897), 24 R. (Cl. of Sess.) 519.—SCOT.

##### PART VI. SECT. 4.

*k. Necessity for corporate seal.*—To bind a corpn. by an executory contract to purchase from pltf. all gravel required for repair of a road for

an indefinite period, would require an agreement under their corporate seal. — *HILL v. INGERSOLL & PORT BURWELL GRAVEL ROAD CO.* (1900), 32 O. R. 194.—CAN.

*l. Contract not made in accordance with bye-law of corporation—Action by ratepayer.*—*DWYER v. OTTAWA CORPN.* (1898), 25 A. R. 121.—CAN.

**Sect. 5.—Highways repairable by inhabitants at large: Sub-sects. 1, 2 & 3, A. & B. (a).]**

Act, 1848 (c. 63), s. 68, by which highways are vested in the local board, shall mean "any highway repairable by the inhabitants at large":—*Held*: the words "repairable by the inhabitants at large" are used in contradistinction to repairable by individuals *ratione tenuræ*; & on demurrer to a declaration alleging it was the duty of a local board to repair a public footpath, it must be taken that it was a highway repairable by the inhabitants at large.—*GIBSON v. PRESTON CORPN.* (1870), 1 L. R. 5 Q. B. 218; 10 B. & S. 912; 39 L. J. Q. B. 131; 22 L. T. 293; 31 J. P. 342; 18 W. R. 689.

*Annotations*:—*As to* (1) *Distd. Kent v. Worthing L. B.* (1882), 10 Q. B. D. 118. *Consd. Moore v. Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462. *Distd. Tucker v. Abridge Highway Board* (1888), 63 J. P. 87. *Apprvd. & Apd. Cowley v. Newmarket L. B.* [1892] A. C. 345. *Consd. Oliver v. Horsham L. B., Thompson v. Brighton Corpn.* (1893), 63 L. J. Q. B. 181; *Maguire v. Liverpool Corpn.*, [1905] 1 K. B. 767. *Refd. White v. Hindley L. B.* (1875), L. R. 10 Q. B. 219; *R. v. Poole Corpn.* (1887), 19 Q. B. D. 602; *Gibraltar Sanitary Comrs. v. Orilla* (1890), 15 App. Cas. 400; *Steel v. Dartford L. B.* (1891), 60 L. J. Q. B. 256; *Sydney Municipal Council v. Bourke*, [1895] A. C. 433; *Dawson v. Bingley U. C.*, [1911] 2 K. B. 149. *As to* (2) *Refd. Healey v. Batley Corpn.* (1875), L. R. 19 Eq. 375.

**835. Whether street necessarily included—South Wales.]**—The comrs. appointed in pursuance of the South Wales Turnpike Act, 1844 (c. 91), by which Act, also, the roads of the county of Glamorganshire were vested in deft. board, directed that a certain road situated within the borough of S. should be continued as a turnpike road, & in 1815 a toll-gate was erected on it, at which tolls have been collected up to the present time. In the year 1850 a provisional order was made, by which the Public Health Act, 1818 (c. 63), was applied to the borough of S., & a local board of health for the borough was appointed. By the sect. 68 of that Act it is provided that all present & future streets, being highways within any district, shall vest in & be under the management of the local board of health, & that board is directed to repair these roads. By 15 & 16 Vict. c. 42, s. 13, it is declared that the word "highway" in sect. 68 shall mean "any highway repairable by the inhabitants at large":—*Held*: though the road in question was in fact a street, it was not a "highway repairable by the inhabitants at large," & therefore had not become vested in the local board of health, but had remained vested in & subject to the powers of deft. board.—*SWANSEA IMPROVEMENT & TRAMWAYS CO. v. COUNTY ROADS BOARD FOR GLAMORGANSHIRE* (1879), 41 L. T. 593; 43 J. P. 798.

**SUB-SECT. 2.—WHO ARE LIABLE.**

**836. "Inhabitants."]**—Indictment against the inhabitants of a parish for not repairing a road. Plea, that the inhabitants of a particular district within the parish have immemorially repaired all the roads within that district, of which the road indicted was one:—*Held*: this plea was good, although it did not state any consideration for the liability of the inhabitants of the district.

It is a general rule of the common law, that highways & bridges are, except in certain excepted cases, to be repaired by the inhabitants of the territory wherein they are situate, as a charge upon the land within that territory, to be defrayed by the occupiers for the time being: the charge is upon the land, under which word houses,

etc., are included, & upon the inhabitants in respect of the land, not in respect of their person or residence. An occupier of land is chargeable although he reside elsewhere; a resident, not being an occupier, such as an inmate or servant, is not chargeable (LORD ELLENBOROUGH, C.J.).—*R. v. ECCLESFIELD (INHABITANTS)* (1818), 1 B. & Ald. 348; 106 E. R. 128; *previous proceedings* (1816), 1 Stark. 393, N. P.

*Annotations*:—*Consd. R. v. West Riding of Yorkshire* (1821), 4 B. & Ald. 623. *Expld. G. W. Ry. v. Denchworth Surveyors of Highways* (1861), 25 J. P. 342. *Consd. R. v. Ashby Folville* (1866), L. R. 1 Q. B. 213. *Expld. R. v. Rollett* (1875), L. R. 10 Q. B. 469. *Refd. R. v. New Sarum* (1845), 7 Q. B. 941; *R. v. Central Wingland* (1877), 36 L. T. 798. *Mentd. Freeman v. Road* (1863), 4 B. & S. 174; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

**837. Occupiers.]**—*FAWCETT v. FOWLIS*, No. 900, *post*.

**SUB-SECT. 3.—TO WHAT HIGHWAYS LIABILITY EXTENDS.**

**A. At Common Law.**

**838. General rule.]**—*R. v. SHOREDITCH (INHABITANTS)* (1639), March, 26; 82 E. R. 396.

**839. —.]**—A private way is to be repaired of common right by that vill or hamlet where it lies, but a public highway is to be repaired by the whole parish, unless some person is bound to do it either by prescription tenure or encroachment.—*ANON.* (undated), 3 Salk. 182; 91 E. R. 764.

**840. —.]**—*AUSTIN'S CASE*, No. 2, *ante*.

**841. —.]**—The inhabitants of every parish of common right ought to repair the highways. Therefore if particular persons are made chargeable to repair the ways by a statute lately made, & they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants (HOLT, C.J.).—*ANON.* (1698), 1 Ld. Raym. 725; 91 E. R. 1384.

*Annotations*:—*Consd. R. v. Oxfordshire* (1825), 6 Dow. & Ry. K. B. 231; *R. v. Bradfield* (1874), L. R. 9 Q. B. 552.

**842. —.]**—*R. v. GREAT BROUGHTON (INHABITANTS)*, No. 907, *post*.

**843. —.]**—*R. v. LEAKE (INHABITANTS)*, No. 225, *ante*.

**844. —.]**—*R. v. HATFIELD (INHABITANTS)*, No. 902, *post*.

**845. Application of rule—Party primarily liable insolvent.]**—*ANON.* (1698), No. 841, *ante*.

**846. —.]**—Failure of party primarily liable to repair.]—*R. v. HEAVEN*, No. 915, *post*.

**847. —.]**—Limited liability imposed on others by statute.]—If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road Act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish.—*R. v. SHEFFIELD (INHABITANTS)* (1787), 2 Term Rep. 106; 100 E. R. 58.

*Annotations*:—*Expld. R. v. Oxfordshire* (1825), 4 B. & C. 194. *Consd. Little Bolton v. R.* (1843), 12 L. J. M. C. 104; *Cubitt v. Maxse* (1873), L. R. 8 C. P. 704. *Refd. Willes v. Wallington* (1862), 32 L. J. C. P. 86. *Mentd. R. v. United Kingdom Electric Telegraph Co.* (1862), 6 L. T. 378.

**848. Exceptions to general rule—Particular persons liable—Must be certain.]**—*R. v. HATFIELD (INHABITANTS)*, No. 902, *post*.

—By custom or prescription.]—*See* Sect. 6, sub-sect. 3, *post*.

—By statute.]—*See* Sect. 6, sub-sect. 2, *post*.

—Highways in particular township or district.]—*See* Sect. 5, sub-sect. 4, *post*.



*B. Highways Constructed under Statute.**(a) Inclosure Acts.*

**849. Road set out as private road—Declared by commissioners to be repairable by public—*Ultra vires.***—The comrs. appointed by a local Act which enacted that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, & that the private roads should be repaired by such person or persons as they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the Act.—*R. v. COTTINGHAM (INHABITANTS) (1794), 6 Term Rep. 20; 101 E. R. 413.*

*Annotations*:—*Consd. A.-G. v. Tanworth R. D. C. (1901), 85 L. T. 190. Apud. A.-G. & Settle R. D. C. v. Lumsdale R. D. C. (1902), 86 L. T. 822. Rejd. R. v. Edmonton (1831), 1 Mood. & R. 24.*

**850. ————]**—*R. v. RICHARDS, No. 1009, post.*

Powers of inclosure commissioners, generally, see *COMMONS*, Vol. XI., pp. 69 *et seq.*

**851. ——— Subsequent dedication & public user.]**—*R. v. WRIGHT, No. 186, ante.*

**852. ————]**—*R. v. BRADFIELD (INHABITANTS), No. 265, ante.*

**853. Non-compliance with statutory requirements—Justices' certificate of completion.]**—By an Act for inclosing lands in several parishes & townships, it was directed that the allotments to be made in respect of certain messuages, etc., should be deemed part & parcel of the townships respectively in which the messuages, etc., were situate. The comrs. under the Act were directed, in their award, to make such orders as they should think necessary & proper concerning all public roads, " & in what township & parish same are respectively situate," & by whom they ought to be repaired. The comrs. by their award directed that there should be certain roads. One of these, passed between new allotments. The road was ancient. The part of the common over which it ran, before the award, was in the township of H., & the road was still in that township unless its situation was changed by the local Act & the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable:—*Held*: the Act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, & therefore the road in question continued to be in H. Under 41 Geo. 3, c. 109, s. 9, a road continued, as well as a road newly made, under the award of comrs. of inclosure, must be declared by justices in special sessions to be fully completed & repaired, before the inhabitants of the district can be indicted for not repairing it.—*R. v. HATFIELD (INHABITANTS) (1835), 4 Ad. & El. 156; 111 E. R. 756.*

*Annotations*:—*Rejd. R. v. Cricklade St. Mary (1850), 15 L. T. O. S. 296; R. v. Arnold, etc. (Berkshire J.J.) (1857), 22 J. P. 545; R. v. East Hagbourne (1859), 23 J. P. 116.*

**854. ————]**—By an inclosure Act, incorporating 41 Geo. 3, c. 109, the general inclosure Act in force at the time, the comrs. for inclosing certain common lands were authorised to stop up, divert or alter any public ways over the waste, with the concurrence of two justices. They were also empowered to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish. Before the inclosure Act, a public bridleway led across a common. There was no definite track where the land lay open. The comrs. ordered the common to be inclosed, &

set out a road thirty feet wide, with the same termini & in the same line as the old bridleway, & in their award directed that it should be a public bridleway & a private carriage road for certain persons, who should keep it in repair. The road was set out accordingly. On the trial of an indictment against the parish for not keeping it in repair, no order or certificate of justices was proved: *Held*: the old public way was never effectually stopped; the defined road set out was in effect the same way; & the parish were still liable to repair it as a bridle road, & were not exonerated by the fact that it was now set out as a private carriage road also.—*R. v. CRICKLADE ST. SAMPSON (INHABITANTS) (1850), 14 Q. B. 735; 4 New Mag. Cas. 112; 19 L. J. M. C. 169; 15 L. T. O. S. 296; 11 J. P. 401; 14 Jur. 000; 117 E. R. 283.*

*Annotation*:—*Mentd. R. v. Russell (1854), 23 L. J. M. C. 173.*

**855. ————]** Upon an indictment for the non-repair of a public carriage road, it appeared that the road was an ancient highway; that eighteen years ago the indicted parish, wherein the road was situate, was inclosed under 6 & 7 Will. 4, c. 115, which incorporates 41 Geo. 3, c. 109; & the road was described in the award. Before the award the comrs. made an alteration in the original road by straightening & widening it, but the whole of the original road was comprehended in the existing road as set out in the award. Both before & since the award the parish had repaired it, but no steps had been taken by the comrs. for putting the road into complete repair, there never was any declaration by justices that it had been fully completed & repaired, & no proceedings had been taken under Highway Act, 1835 (c. 50), s. 23. It passed through allotable land on both sides except that a small portion on one side was an old inclosure:—*Held*: the parish was not liable to repair the road.—*R. v. EAST HAGBOURNE (INHABITANTS) (1859), Bell, C. C. 135; 28 L. J. M. C. 71; 32 L. T. O. S. 338; 23 J. P. 116; 5 Jur. N. S. 316; 7 W. R. 236; 8 Cox, C. C. 135, C. C. R.*

*Annotations*:—*Rejd. Williams v. Eton (1859), 7 W. R. 291; Leigh U. C. v. King, [1901] 1 K. B. 747, Calaba v. Walton-upon-Thames District Council, [1914] 1 K. B. 481.*

**856. ————]**—Previously to the passing of the local & personal public Acts after mentioned, a district was extraparochial & uninhabited. A local Act empowered comrs. to divide the district into allotments, & set out roads, which, upon the confirmation within a certain time, of a certificate from the surveyors, but not before, were to be repaired by the inhabitants of the respective parishes, townships & places having right of common in the district. The comrs. set out a road, which was used by the public; but no certificate was ever made; & the time for confirmation expired. A further local Act recited that it would be of public utility if the lands, roads, etc., of the districts were made to constitute distinct townships, & if the public laws in force concerning constables & for the relief of the poor were put in force in such townships; & enacted that a certain part of the district, comprehending the road in question, should be the township of M.; that all public laws in force or to be made relating to constables or the relief of the poor should be put in force in the townships in like manner as in any parish; & that the inhabitants & occupiers in any township should not be liable to contribute to the relief of the poor, or to any other parochial rates, in any other parish, etc., & *vice versa*. Overseers, chapelwardens, surveyors of the highways, & constables were also regularly appointed



**Sect. 5.—Highways repairable by inhabitants at large: Sub-sect. 3, B. (a), (b) & (c), & C.]**

in M. Highway rates were laid; & some repairs performed by the township upon the road:—**Held:** the inhabitants of M. were not bound to repair the road, either by force of the above statutes, or on any general principle of law.—**R. v. MIDVILLE (INHABITANTS)** (1843), 4 Q. B. 240; 3 Gal. & Dav. 522; 114 E. R. 888.

**Annotations:—****Reld.** R. v. Arnould, etc. (Berkshire JJ.) (1857), 22 J. P. 545; R. v. East Hagbourne (1859), 32 L. T. O. S. 338.

**Compare** No. 192, *ante*, Nos. 876, 879, 880, 882, *post*.

**857. Roads out of district.]—**By an inclosure Act, passed 7 Geo. 3, with reference to the inclosure of certain commons & waste grounds, after reciting that the persons interested were owners & proprietors of messuages, etc., in the several townships therein mentioned, including amongst others, the township of W., it was enacted that the comrs. should appoint & undertake the repair of (*inter alia*) two roads mentioned in the statement of claim. Pltts. alleged that these roads were duly made in accordance with the award, & were for many years kept in repair by the surveyor of the township of W. & that the township was included in deft. urban district, & that defts. were liable to repair them. There was no evidence, that the inhabitants of W., taken as a body, had ever in fact repaired or paid for the repair of the roads in question since 1787, although it was shown that since 1859 certain of the inhabitants of the township had contributed towards the repair of the roads for their own convenience. It was contended by pltts. that liability to repair the road in question was imposed upon the defts.:—**Held:** in the circumstances, the ct. was justified in reading in after the words "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively" the words "within whose district such public highways are situated"; the doctrine of *contemporanea expositio* did not apply; & defts. were not liable to repair the roads in question as same were outside their district.—**A.-G. & SETTLE RURAL DISTRICT COUNCIL v. LUNESDALE RURAL DISTRICT COUNCIL** (1902), 80 L. T. 822.

**(b) Turnpike Acts.**

**858. Conditions precedent—Completion of entire road.]** Where trustees are authorised to make a turnpike road from A. to C., the entire road must be completed before the public can be compelled to repair any part. Although the road from A. to B., an intermediate point, has been finished between twenty & thirty years, & repaired from time to time by the public; & although the road at point B. joins another public road which is complete.—**R. v. EDGE LANE (INHABITANTS)** (1830), 4 Ad. & El. 723; 1 Har. & W. 737; 6 Nev. & M. K. B. 81; 3 Nev. & M. M. C. 527; 5 L. J. M. C. 91; 111 E. R. 959.

**Annotations:—****Fold.** R. v. Cumberworth (1836), 4 Ad. & El. 731. **Distd.** R. v. Westhoe Highways Overseers (1846), 6 L. T. O. S. 371. **Consd.** Roberts v. Roberts (1862), 3 B. & S. 183. **Distd.** R. v. French (1879), 4 Q. B. 507. **Reld.** R. v. Bury (1844), 2 L. T. O. S. 309; Cubitt v. Masse (1873), L. R. 8 C. P. 104.

**859. ———.]—**R. v. CUMBERWORTH (INHABITANTS), No. 434, *ante*.

**860. ———.]—**Completion of entire system.]—R. v. FRENCH, No. 78, *ante*.

**861. ———.]—**R. v. CUMBERWORTH (INHABITANTS), No. 437, *ante*.

**862. ———.]—**By a local Act trustees were

appointed for making turnpike roads over & along the course of two ancient highways, & also for making one new road; on all of which they were empowered to take toll & to erect toll gates, etc. By the Act, money was to be raised by subscription as well as by toll; & the trustees were to apply money already subscribed, in the first place to the payment of preliminary expenses & of the two ancient roads, & in the next, money thereafter subscribed to the purposes aforesaid, as well as to the making of the new road; & there was a provision for the erection of toll gates on the old roads before the completion of the new road. The trustees were designated by the Act, trustees of the roads, in the plural:—**Held:** (1) the completion of all three roads was not a condition precedent to the right of the trustees to take toll on any of them, or to derive any other benefit under the Act; (2) the old roads became turnpike roads as soon as completed, & therefore the trustees were at liberty to apply to justices under 5 & 6 Vict. c. 60 (continuing the provisions of 2 & 3 Vict. c. 81), for contribution out of the highway rates; & an order made by justices upon such application for payment of a certain sum was good.—**R. v. WESTHOE HIGHWAYS OVERSEERS** (1840), 6 L. T. O. S. 371.

**863. ——— Road not completed by trustees—Adoption by public.]—**Indictment against a township, liable by prescription, for not repairing a road, described as a common Queen's highway. Plea: not guilty. The road was made by trustees under a local Turnpike Act, which was to be in operation for twenty-one years, & which would have expired before the bill was found, had it not been kept in force by temporary continuation Acts. On the trial, it was admitted that the road was out of repair, & had been opened, & used for many years: but the township contended that they were not liable to repair a temporary turnpike road at all; or, if they were, that there was a variance between the proof as to the nature of the road & the allegation in the indictment; & evidence, that the trustees had never put the road in good repair, or properly fenced or finished it, was tendered & rejected as immaterial:—**Held:** (1) the road, at least so long as the Act continued in force, was a common Queen's highway, & was properly described as such in the indictment; (2) the township was liable to repair it; (3) the evidence tendered was immaterial, it being admitted that the road had been opened & long used *de facto* throughout the whole line.—**R. v. LORDSMERE (INHABITANTS)** (1850), 15 Q. B. 689; 4 New Sess. Cas. 205; 10 L. J. M. C. 215; 16 L. T. O. S. 123; 14 J. P. 704; 15 Jur. 82; 117 E. R. 620.

**Annotations:—***As to* (1) **Reld.** A.-G. & Warwickshire County Council v. Oxford Canal Navigation (1903), 51 W. R. 386. *As to* (2) **Appl.** R. v. Horley (1863), 11 W. R. 433. **Consd.** Healey v. Batley Corp'n. (1875), L. R. 19 Eq. 375.

**864. Effect of diversion of road.]—**4 Geo. 4, c. 95, s. 68, which provides for apportioning the liability to repair turnpike roads that have been diverted, is not confined to bodies politic or corporate & individuals, but applies also to parishes.—**R. v. BARTON (INHABITANTS)** (1840), 11 Ad. & El. 343; 3 Per. & Dav. 190; 9 L. J. M. C. 23; 4 J. P. 57; 4 Jur. 431; 113 E. R. 440. **Annotations:—****Mentd.** R. v. Pickles (1812), 12 L. J. Q. B. 40; Dodgson v. Scott (1818), 5 Ry. & Can. Cas. 654.

**(c) Local Acts.**

**865. Statutory liability limited in time—Whether performance amounts to adoption.]—**(1) Where a public road had been made such pursuant to the

provisions of an Act of Parliament, which was to continue in force for a limited period only, & the inhabitants of a parish, through which it passed, were thereby bound to do statute duty:—*Held*: the performance of such statute duty, was not an adoption of the road by the parishioners, & at the expiration of the Act, they were not bound by common law to repair such road.

(2) A road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, & of an acceptance of the right by the public or the parish (*LITTLEDALE, J.*).—*R. v. MELLOR* (1830), 1 *Lew. C. C.* 158; 1 *B. & Ad.* 32; 8 *L. J. O. S. M. C.* 109; 109 *E. R.* 699.

*Annotations*:—*As to* (1) *Refd.* *R. v. Cumberworth & Cumberworth Hall, Lower Division* (1836), 2 *Har. & W.* 439; *R. v. Lordsmere* (1850), 15 *Q. B.* 689; *A. G. v. Shippson*, [1901] 2 *Ch.* 671. *As to* (2) *Refd.* *R. v. Edge Lane* (1835), 5 *L. J. M. C.* 91. *Generally, Refd.* *R. v. Cumberworth* (1832), 3 *B. & Ad.* 108.

**866. Compliance with statutory requirements.]**—Before the passing of the Public Health Act, 1848 (c. 63), the repair of the streets in *L.* was under the control of comrs. by virtue of a local Act, which empowered the comrs. to declare any new street to be a highway. This statute was afterwards repealed, & the Public Health Act, 1848 (c. 63), was applied to *L.*:—*Held*: a street made while the local Act applied, & which was not declared by the comrs. to be a public highway, though dedicated to the public, was not a highway within the Public Health Act, 1848 (c. 63), & that an order of the comrs. requiring the inhabitants of premises abutting on the street to repair it, under sect. 69, was therefore valid.—*WILLES v. WALLINGTON* (1863), 13 *C. B. N. S.* 865; 1 *New Rep.* 129; 32 *L. J. C. P.* 86; 27 *J. P.* 295; 143 *E. R.* 342, *Ex. Ch.*

**867. —.]**—By a local Act for paving & lighting the town of *H.*, trustees were appointed with power to cause the streets, etc., to be paved, repaired & lighted, & to levy rates for the purpose on the tenants & occupiers of all houses, etc., within the township; & all persons paying the rates were exempted & discharged from all other charges of paving or lighting the streets. While this Act was in operation in 1810, a new street was set out on private property connecting two highways; & in 1819 it was passable for carriages, & had been open to & used by the public ever since. In 1823 this Act was repealed by a second local Act, & by that Act trustees were appointed, & all persons were exonerated from statute duty for the repairs of the public highways within the town, & from payment of any composition in lieu thereof, & from all liability by law to be called upon for the repairs of such highways; the surveyors under the Act were to have all the rights, duties, & obligations of surveyors of highways, & all indictments & other legal process for non-repair of the roads, etc., were to be brought against the trustees. The trustees were empowered to cause the present & future streets, etc., to be paved, etc.; & when any new streets already laid out, or which should thereafter be laid out, should be sufficiently paved & put in good repair, the trustees had power, on application of the adjoining owners, to declare same public streets, & they were afterwards to be kept in repair by the trustees; & where any streets, which then were or thereafter should be set out on private property, should have been open to & used by the public for three successive years, the trustees might cause them to be paved, etc., & afterwards such streets were to be deemed to be public streets, & kept in repair by the trustees. The street had never been paved, nor declared public by the trustees; & up to 1851, though the

houses in it had been from time to time rated under the local Acts, the trustees had not repaired it, nor had the expenses of any repairs been paid out of the parochial district or other rates, nor by the inhabitants of the township or district. In 1851 the Public Health Act, 1848 (c. 63), was applied to the district; & the local board of health proceeded under sect. 69 to pave the street, & charged the expense on the adjoining landowners:—*Held*: the street came within the exception in sect. 69 as interpreted by 15 & 16 *Vict. c. 42, s. 13*, of a "highway repairable by the inhabitants at large"; for that there was nothing in the first local Act to prevent a street becoming a highway by dedication & user; the street had, therefore, become a highway repairable by the inhabitants at large before 1823; & the second local Act only applied to streets then in progress or afterwards laid out, & had no effect on streets already public.—*HIRST v. HALIFAX LOCAL BOARD* (1870), 14 *R. 6 Q. B.* 181; 40 *L. J. M. C.* 43; 35 *J. P.* 261; 19 *W. R.* 279.

**868. Necessity for adoption.]**—*R. v. ST. BENEDICT, CAMBRIDGE (INHABITANTS)*, No. 317, *ante*.  
**Concurrent liability imposed on others.]**—*See* Nos. 917-919, *post*.

#### *C. Under Highway Act, 1835, s. 23.*

**869. To what roads applicable—Roads already dedicated.]**—(1) An indictment for the non-repair of a highway, describing the way as immemorial, is not supported by proof of a highway extinguished, as such, sixty years before, by an enclosure Act, but since used by the public, & repaired by the district charged. (2) The above sect. is not retrospective in respect of roads completely public by dedication at the time of the Act; it applies to roads then made, & in progress of dedication.—*R. v. WESTMARK, TITHING* (1840), 2 *Mood. & R.* 305, *N. P.*

*Annotations*:—*As to* (1) *Refd.* *R. v. Turweston* (1850), 16 *Q. B.* 109. *As to* (2) *Refd.* *HIRST v. Halifax L. B.* (1870), 14 *R. 6 Q. B.* 181; *Brockman v. Folkestone Corp.* (1912), 76 *J. P.* 443.

**870. — Roads completely made—But not dedicated.]**—*R. v. WESTMARK, TITHING*, No. 869, *ante*.

**871. — Road made by turnpike trustees.]**—On appeal against a conviction for obstructing a highway, the sessions confirmed the conviction, subject to a case. The case showed that the road in question was made by turnpike trustees, under a temporary turnpike Act, which expired in 1818; but the whole line of turnpike road authorised by the Act was never completed. That the road as made had been used by the public, & had been repaired by the parish, both before & since the expiration of the Act; & the question for the ct. was, if there was any evidence that it was a highway compulsorily repairable by the parish:—*Held*: (1) there was evidence of a dedication, & of an adoption by the public, & though the fact that the road was originally made under the turnpike Act might explain away such evidence in fact, it did not conclusively in law rebut it; (2) above sect. did not apply to a road made by turnpike trustees; & consequently the absence of a certificate by two justices, etc., as required by above sect. did not prevent the road becoming compulsorily repairable by the parish, on a dedication by the owners of the soil in 1848.—*R. v. THOMAS* (1857), 7 *E. & B.* 399; 28 *L. T. O. S.* 303; 21 *J. P.* 661; 3 *Jur. N. S.* 713; 5 *W. R.* 321; 119 *E. R.* 1295.

*Annotations*:—*As to* (2) *Dist. Cababé v. Walton-on-Thames U. C.*, [1914] *A. C.* 102. *Refd.* *Leigh U. C. v. King*, [1901] 1 *K. B.* 747; *North Staffordshire Ry. v. Hanley Corp.* (1909), 73 *J. P.* 477.

*Sect. 5.—Highways repairable by inhabitants at large: Sub-sect. 3. (1.; sub-sect. 4.)*

**872. — Part of road—Road not of requisite width throughout.]—**Justices, after the parish had resolved that a road proposed to be dedicated to the public was of sufficient utility, were called upon to certify that it was made in conformity to above sect. They refused to grant their certificates, being of opinion that it was but a part of a road which in another part was not of the requisite width:—*Held*: the justices were right in their decision.—*R. v. SURREY JJ.* (1861), 3 L. T. 808; 25 J. P. 134.

*Annotation.—R. v. Surrey JJ. & Wells, Ex p. Lewin* (1892), 66 L. T. 575.

**873. — Road must be completely made up & taken over.]—**By a local Act the inhabitants of that portion of the township of D., which lies within the limits of the town of S. were exempted from liability for the repairs of the highways within the parts of the township which are not within those limits. In 1857, Public Health Act, 1848 (c. 63), was applied to the township of D. In 1853, A., an owner of land, commenced laying out & making a road, which was within that part of the township of D. which was not included within the limits of the town of S., & completed it in 1854; & on May 25, 1858, gave notice to the local board of health of his intention to dedicate it to the use of the public. Between commencing the road & the giving of the notice he conveyed plots of land on both sides of the road for building purposes. Each of the plots extended for the whole length thereof fronting the intended road three yards into it: but there was a covenant in each deed of conveyance that the purchaser would leave the space of three yards open & unbuilt upon, to the intent that it might be added to & form part of the road. The local board refused to adopt the road as a highway, on the ground that it had not been sewered, levelled, paved, flagged & channelled to their satisfaction. On Aug. 30, 1858, A. obtained a certificate of two justices that the road was made in a substantial manner, & of the width required by Highway Act, 1835 (c. 50), & caused this certificate to be enrolled; & on April 21, 1859, gave notice thereof to the local board. The road was used by the public, & kept in repair by A. for twelve months after the certificate was enrolled. Upon an indictment against the inhabitants of the township of D. for the subsequent non-repair of the road:—*Held*: assuming that Highway Act, 1835 (c. 50), s. 23, was not superseded by Public Health Act, 1848 (c. 63), s. 70, still the road had not been made to the satisfaction of the local board, who, by sect. 117 of the latter statute, were the surveyors of highways within the township of D., & therefore had not become a highway repairable by the inhabitants of D.—*R. v. DUKINFIELD (INHABITANTS)* (1863), 4 B. & S. 158; 32 L. J. M. C. 230; 27 J. P. 803; 122 E. R. 420.

*Annotations.—R. v. Norfolk JJ.* (1874), 31 L. T. 585; *Leigh U. C. v. King*, [1901] 1 K. B. 747; *Cababé v. Walton-on-Thames U. C.*, [1914] A. C. 102.

**874. — "Private driftway or horsepath."]**—(1) The liability to maintain & keep in repair private or occupation roads & ways set out by a valuer through lands inclosed under Inclosure Act, 1845 (c. 118), which by sect. 68 of that Act is imposed on the owners of the lands, is a liability arising after the formation & completion of such roads & ways, & is limited by the extent to which they were formed & made up. The amount of their formation & completion is to a large extent at the discretion of the valuer, in the

circumstances of each case. Footways may be set out where necessary for the accommodation of inclosed lands or adjoining owners interested in them, & roads formed & completed under the Act may be covered with grass for their whole extent. *Semle*: (2) such a private or occupation road or way is a "private driftway or horsepath" within Highway Act, 1835 (c. 50), s. 23, which excludes the public liability to repair unless the procedure specified in the section has been followed. *Qu.*: whether, when there is a public right of way by means of a footpath, dedicated prior to the passing of Highway Act, 1835 (c. 50), & a private road is constructed under Inclosure Act, 1845 (c. 118), over same site, the local authority or the persons responsible for the repair of the highways would be immune under Highway Act, 1835 (c. 50), s. 23, from keeping it up so far as it was proper for the purposes of the passage of foot passengers.—*REYNOLDS v. BARNES*, [1909] 2 Ch. 361; 78 L. J. Ch. 641; 101 L. T. 71; 73 J. P. 330.

**875. — Onus of proof.]—***A.-G. v. WATFORD RURAL COUNCIL*, No. 192, *ante*.

**876. — Highways by dedication & public user.]—**(1) Above sect., which limits the liability of a parish to repair new highways, applies to highways which have become such as the result of dedication presumed from public user.

(2) A road is "made by & at the expense of an individual or private person, body politic or corporate," within the meaning of above sect. if the owner of the soil suffers it to be used as a road long enough for it to become a road in fact, & if any expense there may be has to be at his charge.

I do not say that there might not be a case where, if, for instance, the lapse of time was long, & the parish had all along repaired the road, the mere absence of direct proof of the formalities might be held not to be fatal (*LORD DUNEDIN*).

(3) Above sect. is not confined to a case in which the same person makes the road & spends the money.

(4) In an appeal by the owner of property adjoining a way which had become a street against a provisional apportionment of expenses with regard to making up the way under the Private Street Works Act, 1892 (c. 57):—*Held*: the absence of evidence of any intention of any particular owner at any particular time to dedicate the way as a highway did not prevent Highway Act, 1835 (c. 50), s. 23, from applying to it, & as there was no evidence from which compliance with the requirements of that sect. could be inferred, the way was not a highway repairable by the inhabitants at large, & was a "street" which the council could make up under the provisions of the Private Street Works Act, 1892 (c. 57).—(*CABABÉ v. WALTON-ON-THAMES URBAN COUNCIL*, [1914] A. C. 102; 83 L. J. K. B. 243; 110 L. T. 674; 78 J. P. 129; 58 Sol. Jo. 270; 12 L. G. R. 104, II. 1.)

**877. — "Made at the expense of an individual"—User with knowledge of owner of soil.]—***CABABÉ v. WALTON-ON-THAMES URBAN COUNCIL*, No. 876, *ante*.

**878. — Expense not incurred by landowner.]—***CABABÉ v. WALTON-ON-THAMES URBAN COUNCIL*, No. 876, *ante*.

**879. Compliance with statutory formalities—Effect of non-compliance—Road still a highway.]—**If a road has been dedicated to the public & used, but the necessary steps have not been taken, by notice, etc., under above sect. to make it repairable by the parish, it is still a highway in other respects; & an action is maintainable for obstructing it to

891. ———.]—To charge a township with liability by custom to repair all highways within it which would otherwise be repairable by the parish comprising such township, it is not necessary to prove that there are or have been ancient highways in the township. Without such proof, a jury may infer the custom from other evidence; as, that the parish consists of five townships, one of which is the township in question: that four have always repaired their own highways; that no surveyor has ever been appointed for the parish; & that the township in question has repaired a highway lately formed within it.—**R. v. BARNOLDSDWICK (INHABITANTS) (1843), 4**

**Sect. 5.—Highways repairable by inhabitants at large: Sub-sects. 4 & 5, A. & B.]**

Q. B. 499; 3 Gal. & Dav. 545; 12 L. J. M. C. 44; 7 J. P. 146; 114 E. R. 987.

**Annotations:—**Folld. R. v. Rollett (1875), L. R. 10 Q. B. 469. Refd. R. v. Ardsley (1878), 38 L. T. 71.

**892. — Admissibility of evidence.]—**

(1) Where a highway is supported by a wall, & such wall becomes dangerous by reason of non-repair, the inhabitants of the place in which such highway is situate, if liable to repair the highway, can be convicted upon an indictment for non-repair, it being a question for the jury whether the wall forms part of the highway or not.

(2) Evidence of repairs to a highway by the owners of the adjoining lands is inadmissible upon an indictment against the inhabitants of the place in which such highway is situate, unless liability on the part of such owners to repair the highway in question, *ratione tenuræ*, has been specially pleaded.

(3) Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would otherwise be *primâ facie* liable.—R. v. LORDSMERE (INHABITANTS) (1880), 54 L. T. 766; 51 J. P. 86; 2 T. L. R. 623; 16 Cox, C. C. 65, C. C. R.

**Annotation:—**As to (1) Refd. A. G. v. Oxford Canal Navigation (1903), 72 L. J. Ch. 285.

**893. — Township.]—**On appeal against an appointment of surveyor of highways for the township of N., the sessions found that the parish of M. consisted to two townships, M. & N.; that from the earliest period within living memory, to the year 1709, surveyors were appointed for these townships, one for each; that from that time, to save expense, there had been one appointment of two surveyors for the parish at large, one of them always being an inhabitant of M., & the other of N.; & that each acted as surveyor in his own township; that distinct rates had been made for each township, & applied distinctly to the repairs of the highways in each; that the surveyors kept distinct accounts, but that these as well as the rates, before they were taken to the magistrates, were examined & allowed at a general parish vestry; & that the occupiers of lands had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate: *Held*: the facts found were sufficient evidence that each township was immemorably bound to repair the roads within it, & consequently the appointment of surveyors for each township was proper.—R. v. KING'S NEWTON (INHABITANTS) (1831), 1 B. & Ad. 826; 9 L. J. O. S. M. C. 51; 100 E. R. 993.

**894. — Highway in one township—**

**Joint liability.]—**(1) The rated inhabitants of a district indicted for non-repair of a highway, are not rendered competent witnesses for the defence by 54 Geo. 3, c. 170, s. 9.

An indictment charged that the inhabitants of the townships of Bondgate in Auckland, Newgate in Auckland, & the borough of Auckland, in the parish of St. Andrew Auckland, were immemorably liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew Auckland, & no consideration was laid:—*Held*: (2) bad, in arrest of judgment, as not showing that the highway was within defts.' district; (3) no objection, that the inhabitants of the three townships were charged conjointly.—R. v. BISHOP AUCKLAND

(INHABITANTS) (1834), 1 Ad. & El. 744; 1 Mood. & R. 286; 110 E. R. 1392.

**Annotation:—**As to (1) Refd. Morrell v. Martin (1840), 6 Bing. N. C. 373.

**895. — By custom.]—**R. v. BARNOLDSWICK (INHABITANTS), No. 891, *ante*.

**SUB-SECT. 5.—AVOIDANCE OF LIABILITY.**

**A. By Agreement.**

**896. Whether inhabitants exempt.]—**(1) Indictment for non-repair of a highway within a certain limit, charging the Corpn. of L. with a prescriptive liability to repair all common highways, etc., within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of showing that the highway in question was not within any of the exceptions.

(2) A count stating defts.' liability to arise by virtue of an agreement with the owners of houses alongside of it is also bad: for the parish who are *primâ facie* bound to the repair of all highways within their boundaries cannot be discharged from such liability by any agreement with others.—R. v. LIVERPOOL CORPN. (1802), 3 East, 86; 102 E. R. 529.

**Annotations:—**As to (2) Refd. R. v. Scarisbrick (1837), 6 Ad. & El. 509. *Generally*, Mendt. R. v. Birmingham & Gloucester Rly. (1842), 3 Q. B. 223.

**897. Sufficiency of consideration.]—**To an indictment against the inhabitants of the parish of A. for the non-repair of a highway, defts. pleaded that from time immemorial the inhabitants of the parish of G., in consideration of levying & receiving rates on certain lands in the parish of A. adjoining the highway, have repaired & ought to repair the highway; to which there was a replication that the agreement had been determined by notice. On demurrer to the replication:—*Held*: prosecutors were entitled to judgment; for that the consideration was insufficient to support the alleged liability of G., as neither could the consideration be enforced, nor could it be immemorial, for it must have arisen since the statutes creating the power to levy rates. The alleged liability, therefore, amounted to no more than an arrangement between the two parishes which could be put an end to at any time. *Qu.*: whether, in point of law, a parish could be bound by prescription to repair highways in another parish.—R. v. ASHBY FOLVILLE (INHABITANTS) (1806), L. R. 1 Q. B. 213; 7 B. & S. 277; 35 L. J. M. C. 151; 30 J. P. 340; 12 Jur. N. S. 520; 10 Cox, C. C. 269.

**898. — Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors; each township having appointed its own surveyors, & levied its own highway rates. With the exception of the highway in question, & one other, each of the seven townships had from time immemorial repaired its own highways. The highway had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair:—*Held*: A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, & such arrangement in the absence of sufficient consideration was not binding on W.—R. v. ARDSLEY (INHABITANTS)**

(1878), 3 Q. B. D. 255; 47 L. J. M. C. 65; 38 L. T. 71; 42 J. P. 262; 26 W. R. 405, C. C. R.

**899. Proof of agreement.]**—The township of S. was indicted for not repairing a road in S., on a custom alleged & proved, that all the townships in the parish in which S. was situate repaired their own roads in general. In answer, it was shown that the township of N., in another parish, was adjacent to S.; & that an agreement had been made, two hundred & fifty years before, between the then owner of all S. & the then owner of all N., whereby the boundary between the properties was marked out, & the owner of S. agreed to allow to the owner of N., & the rest of the inhabitants of N., a road through S., of which S. was to repair part, & N. another part, being the subject of the indictment; & that further assurance for the performance of the agreement should be made by a sufficient lawyer. It was also shown that afterwards the owner of S. filed a bill for specific performance against the owner of N., the event of which did not appear; but that the owners of lands in N. had ever since repaired in conformity with the agreement:—*Held*: not to be evidence for a jury of an instrument binding the owner of N., & all claiming through him, to repair, assuming that such a conveyance could have been made so as to exonerate the inhabitants of S.—*R. v. SCARISBRICK (INHABITANTS)* (1837), 6 Ad. & El. 509; 1 Nev. & P. K. B. 582; Nev. & P. M. C. 248; Will. Woll. & Dav. 246; 6 L. J. M. C. 103; 1 J. P. 210; 112 E. R. 194.

*Annotation*:—*Refd.* *R. v. Beeby* (1839), 8 L. J. M. C. 38.

**900. —.**—*R. v. ARDSLEY (INHABITANTS)*, No. 898, *ante*.

**901. —.**—*Alleged agreement from time immemorial.*—*R. v. ASHBY FOLVILLE (INHABITANTS)*, No. 897, *ante*.

#### *B. By Custom or Prescription.*

**902. Particular person liable—Must be certain.]**—Where in an indictment against a township for non-repair of a road, the prescription stated & proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large:—*Held*: this placed the township in the situation of a parish, & it was necessary for defts. to show by evidence some other persons in certainty who were liable, in order to deliver themselves from their liability to repair.—*R. v. HATFIELD (INHABITANTS)* (1820), 1 B. & Ald. 75; 108 E. R. 866.

*Annotations*:—*Consd.* *R. v. Searesbrick* (1837), Will. Woll. & Dav. 246. *Refd.* *R. v. Ardsley* (1878), 38 L. T. 71.

**903. Others liable by prescription.]**—*R. v. SHOREDITCH (INHABITANTS)* (1639), March, 26; 82 E. R. 390.

**904. —.**—*ANON.* (undated), No. 839, *ante*.

**905. —.**—*AUSTIN'S CASE*, No. 2, *ante*.

**906. Others liable by custom.]**—*AUSTIN'S CASE*, No. 2, *ante*.

**Liability of particular district or township.]**—*See* Sect. 5, sub-sect. 4, *ante*.

**907. What must be proved—Reason for exemption.]**—An indictment against a division of a parish for not repairing a highway must show for what reason the inhabitants are liable.

By common law & of common right the inhabitants of the parish at large are bound to repair the highways: there is no reason shown why this particular division should be obliged to do it (*Aston, J.*).—*R. v. GREAT BROUGHTON (INHABITANTS)* (1771), 5 Burr. 2700; 98 E. R. 418.

**908. —.**—*Consideration.*—Indictment against a parish for non-repair of a highway lying within

it; plea, that the inhabitants of another parish have repaired, & been used & accustomed to repair, & of right ought to have repaired:—*Held*: ill, for the plea ought to have shown a consideration.—*R. v. ST. GILES', CAMBRIDGE (INHABITANTS)* (1816), 5 M. & S. 260; 105 E. R. 1046.

*Annotations*:—*Distd.* *R. v. Ecclesfield* (1818), 1 B. & Ald. 348; *R. v. West Riding, Yorkshire* (1821), 4 B. & Ald. 623. *Appld.* *R. v. Machynlleth & Pennegoes* (1823), 2 B. & C. 166; *Dawson v. Willoughby, Surveyor of Highways* (1864), 5 B. & S. 920; *R. v. Ashby Folville* (1866), L. R. 1 Q. B. 213. *Refd.* *R. v. Rollett* (1875), L. R. 10 Q. B. 469.

**909. Jurisdiction to try.]**—(1) Where, in trespass against two magistrates for breaking & entering plff.'s close in the parish of A. & seizing his sheep, it appeared that defts., upon the complaint of the surveyor of the highways appointed for the whole parish, convicted plff. of neglecting to do statute duty, & issued a warrant to levy the penalty under which the act complained of was done:—*Held*: the conviction being good upon the face of it, was a sufficient defence, & plff. could not, in this action, try the question, whether the land which he occupied was exempt from the burthen of repairing the roads in other parts of the parish; (2) the surveyor called upon plff. to do certain statute duty, or compound for it. The conviction stated that he was an occupier of land in the parish, & had neglected to do the work, but did not notice the composition:—*Held*: it was unnecessary to do so, or to state that plff. kept a team; for that, if he did not keep a team, or had compounded for the statute duty, that was a matter of defence, which ought to have been urged by him in answer to the complaint.

The present plff. as an occupier of lands within the parish was *prima facie* liable to the burden imposed (Lord Tenterden, C.J.).—*FAWCETT v. FOWLES* (1827), 7 B. & C. 391; 1 Man. & Ry. K. B. 102; 1 Man. & Ry. M. C. 21; 6 L. J. O. S. M. C. 44; 108 E. R. 770.

*Annotations*:—*Is to* (1) *Consd.* *Birmingham v. Shaw* (1849), 10 Q. B. 868. *Appld.* *Blethingdon, Surveyors of Highways v. Peyton* (1849), 6 Dow. & L. 248. *Refd.* *Mersey Docks Trustees v. Cameron* (1861), 9 C. B. N. S. 812; *Pedley v. Davis* (1861), 10 C. B. N. S. 492. *As to* (2) *Refd.* *R. v. Walsh* (1831), 1 Ad. & El. 451. *Generally, Mend.* *Le Feuvre v. Miller* (1848), 8 E. & B. 321.

**910. How tested.]**—A prescription not to contribute to the repairs of the highways of a township in consideration of a prescriptive liability to repair altogether certain of those roads, is not a right the existence of which the ct. will ascertain by an issue.—*R. v. SHROPSHIRE JJ.* (1819), 3 New Sess. Cas. 611, n.; 13 J. P. 315.

*Annotation*:—*Distd.* *Blethingdon, Surveyors of Highways v. Peyton* (1849), 6 Dow. & L. 248.

**911. Admissibility of evidence—To prove identity of former surveyors.]**—(1) On the trial of an indictment for the non-repair of highways, entries in an ancient parish book, produced by the churchwarden from the parish chest, were offered in evidence, to show who were the surveyors of the highways in 1707:—*Held*: the evidence was receivable.

(2) A minute-book, kept by the magistrates' clerk, was offered in evidence, to show who had been appointed by the magistrates to be surveyors of the highways for the year 1812:—*Held*: this evidence was not receivable without proof of a search for the original appointment, under the hands & seals of the magistrates. *Qu.*: whether the minute-book would have been receivable as secondary evidence, if the original appointment had been lost.—*R. v. PEMBRIDGE (INHABITANTS)* (1841), Car. & M. 157; *subsequent proceedings* (1842), 3 Q. B. 901.

**912. Sufficiency of evidence—Non-repair.]**—



**Sect. 5.—Highways repairable by inhabitants at large: Sub-sect. 5, B., C. & D. Sect. 6: Sub-sects. 1, 2 & 3.]**

The parish of C. contained four townships, each of which had been accustomed from time immemorial to maintain its own highways. There was, from time immemorial, in one of the townships a hamlet, the owners & occupiers in which had never in the memory of man paid highway rates, nor done team work nor paid any composition in lieu thereof. There were now no public roads in the hamlet which could be repaired by it: *Held*: the above circumstances were insufficient by themselves to establish a custom exempting the occupiers in the hamlet from contribution to the repair of highways without its limits.—*R. v. ROLLETT* (1875), L. R. 10 Q. B. 469; 41 L. J. M. C. 190; 24 W. R. 26; *sub nom. ROLLETT v. CORRINGHAM OVERSEERS*, 32 L. T. 769; 39 J. P. 820, D. C.

**Effect of exemption—Whether total.]—See Nos. 811, 847, *ante*.**

### C. By Statute.

**913. Statute charging particular persons.]—ANON.** (1698) No. 841, *ante*.

**914. Statute creating auxiliary fund.]—Where** a local turnpike Act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the Act:—*Held*: (1) this only made the tolls an auxiliary fund in the hands of the trustees, & the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road; (2) such inhabitants may, after conviction, apply by motion for relief against the trustees under 13 Geo. 3, c. 81, s. 33.—*R. v. NETHERTHONG (INHABITANTS)* (1818), 2 B. & Ald. 179; 106 E. R. 332.

**Annotations:—As to (1) *Refd.*** *R. v. Oxfordshire* (1825), 4 B. & C. 194; *R. v. Preston* (1838), 2 Lew. C. C. 193; *George v. Chambers* (1843), 11 M. & W. 149; *Little Bolton v. R* (1843), 12 L. J. M. C. 101; *R. v. Lordsamere* (1850), 15 Q. B. 689. **Generally, *Mend.*** *Parsons v. St. Matthew's, Bethnal Green, Vestry* (1867), 32 J. P. 55.

**915. —.]—A parish is liable *prima facie* to repair its roads, & it cannot relieve itself by merely showing the existence of an auxiliary fund for repairs. Where, therefore, by a local Act certain comrs. were constituted with powers to compel the inhabitants to repair their footways, roads, etc., & they decline to interfere with the reparations of the carriage-way, which consequently becomes defective, it is the duty of the parish to repair it.—*R. v. HEAVEN* (1813), 1 L. T. O. S. 552; *sub nom. ANON.*, 7 J. P. 498.**

**916. — Turnpike tolls.]—If** a turnpike road be out of repair, the inhabitants are liable to be indicted, although the tolls are appropriated by Act of Parliament to the repairs thereof. In such case they must seek relief from the trustees under Turnpike Roads Act, 1822 (c. 126).—*R. v. PRESTON (INHABITANTS)* (1838), 2 Lew. C. C. 193.

**917. Concurrent liability imposed on others—Construction of local Act.]—(1)** Where the burden of repairing a highway is transferred by a public Act of Parliament from the parish to other persons, if the parish be indicted for not repairing this highway, there is no occasion for a special plea, stating who are bound to repair it, but the

exemption may be taken advantage of under the general issue, of not guilty.

(2) Although a statute enacts, that the paving of a particular street shall be under the care of comrs., & provides a fund to be applied to that purpose, & another statute passed for paving the streets of the parish, contains a clause that it shall not extend to the particular street, the inhabitants of the parish are not exempted from their common law liability to keep that street in repair.—*R. v. ST. GEORGE, HANOVER SQUARE (INHABITANTS)* (1812), 3 Camp. 222, N. P.

**Annotations:—As to (2) *Refd.*** *George v. Chambers* (1843), 11 M. & W. 149; *Little Bolton v. R.* (1843), 12 L. J. M. C. 101; *R. v. Heaven* (1843), 1 L. T. O. S. 552; *R. v. Crick-lade St. Mary* (1850), 15 L. T. O. S. 296; *Parsons v. St. Matthew, Bethnal Green* (1867), L. R. 3 C. P. 56; *Gibson v. Preston Corpn.* (1870), L. R. 5 Q. B. 218; *R. v. Bradfield* (1874), L. R. 9 Q. B. 552; *R. v. Barker* (1890), 25 Q. B. D. 213; *Macclesfield Corpn. v. G. C. Ry.* (1911), 104 L. T. 728.

**918. —.]—By** an Act for more effectually cleansing, lighting & watching, etc., the township of B. it was enacted by sect. 64, "That every person who should be rated or assessed, for the purposes of that Act, in respect of any messuage, building, land, tenement, or hereditament, within the said township of B., should be, in respect of the same messuage, etc., exonerated, released, & discharged from the payment of all rates & assessments whatsoever, & performance of statute duty, or composition for same, for or in respect of the repair & amendment of all or any of the public highways in the township of B., or any costs, charges, or burdens in respect thereof." Upon the trial of an indictment against the inhabitants of the township of B., for the non-repair of a highway, authorised to be made under a former Act & the recited Act, within the township, the jury found specially, that the highway was out of repair; that the township of B. until the passing of the Act above set out, had been used to repair such of the highways within it as would otherwise be repairable by the inhabitants of the parish at large; & that the portion of the road indicted, at the time of making the presentment, was not, by the erection of houses & buildings on each side thereof, made to form a street communicating with a certain public street:—*Held*: the inhabitants of the township were liable to the repair of this highway, notwithstanding the provisions of sect. 64.—*LITTLE BOLTON (INHABITANTS) v. R.* (1843), 12 L. J. M. C. 101; 1 L. T. O. S. 385; 7 J. P. 638.

**919. —.]—A local Act vested the property of & in the several streets, etc., in the town of W. in certain comrs. By sect. 15 it enacted, "that all persons who by law are or shall be . . . chargeable with any rate or assessment towards repairing & amending the several highways within the township of W., intended to be paved, repaired, & amended by the comrs., by virtue of this Act or any part thereof, shall still remain & continue . . . chargeable thereto, in like manner as he or they were before . . . chargeable, etc., & it shall & may be lawful to & for any two or more justices of the peace for the county of S., & they are required & empowered, upon application made to them by the comrs., or by their clerk or surveyor, by their order, yearly to adjudge & determine what . . . sum or sums of money shall be paid to the comrs., or their surveyor or surveyors, as & for a rate," etc. Sect. 19 empowered the comrs. to pave & repair,**

### PART VI. SECT. 5, SUB-SECT. 5.—C.

**m. Change in character of highway system.]—LINCOLN COUNTY & NORTH GRIMSBY TOWNSHIP v. SOUTH GRIMSBY TOWNSHIP** (1922), 68 D. L. R. 464; 63 S. C. R. 161.—CAN.

etc. Sect. 70 limited the amount of the rates to be levied for all the purposes of the Act. The inhabitants of W. were indicted for non-repair of a certain highway, being one of the streets in W., within the limits to which the powers of the comrs. extended, & pleaded not guilty:—*Held*: there was nothing in the local Act that took away their liability at common law.—*R. v. WOLVERHAMPTON (INHABITANTS)* (1845), 9 J. P. 310.

920. ———.]—*R. v. BRIGHTSIDE BIERLOW (INHABITANTS)*, *R. v. ATTERCLIFFE-CUM-DARNAL (INHABITANTS)*, *R. v. TINSLEY (INHABITANTS)*, No. 359, *ante*.

**Transfer of liability—Under Highway Acts.]—***See* Sect. 10, sub-sect. 1, *post*.

**Highways constructed under statute.]—**Sect. 5, sub-sect. 3, B., *ante*.

#### D. Other Cases.

921. Individual liable by tenure.]—*ANON.* (undated), No. 839, *ante*.

922. Individual liable by encroachment.]—*ANON.* (undated), No. 839, *ante*.

923. Under Royal grant—Extent of exemption.]—A grant from the King, exempting the lands granted from the charge of repairing the highways, does not excuse parishioners from the statute duty required by the Highway Acts.—*BRETT v. WHITCHOT* (1886), 3 Mod. Rep. 96; 87 E. R. 61; *sub nom.* *BRETT v. WHITCOCK*, Comb. 10.

924. ———.]—A charter granted by the Crown exempting the tenants of the demesne lands in a certain manor from the payment of *chimaging* or road money, is no excuse for the non-performance of statute duty on the highways.—*R. v. SIVITER* (1835), 1 Har. & W. 370; 5 Nev. & M. K. B. 125; 3 Nev. & M. M. C. 206; 4 L. J. M. C. 108.

925. By non-repair.]—*R. v. CLAXBY (INHABITANTS)*, No. 788, *ante*.

926. Road little used.]—*R. v. CLAXBY (INHABITANTS)*, No. 788, *ante*.

**Extinction of liability generally.]—***See* Sect. 8, *post*.

927. Hamlet formerly assessed to rate in adjoining parish.]—The parish of A. contains several hamlets, all included in the poor rate for the parish, with one set of overseers. M., one of these hamlets adjoining the parish of B., had, so far as living memory extends, been assessed to the property & income tax, land tax & assessed taxes as part of B. The occupiers of land in M. have at various times held the offices of guardian of the poor, overseer, churchwarden & dike-reeve for A., & had never held similar offices in B. M. had time out of mind paid poor rates, church rates, sewer rates & tithes to A. So far as living memory & evidence of reputation went, the occupiers of lands in M. had always been assessed & had contributed to the highway rates of B., & the highways in M. had always been repaired by B. until 1841, when, by private arrangement with the surveyors of the highways of B., the lands in M. ceased to be assessed in that parish; & the highways in M. had still been repaired by the occupiers of lands in M. without any rate, the surveyors of the highways of B. expressly reserving to themselves the right of assessing the lands in M. to the highway rates at any future time:—*Held*: M. was assessable to the highway rate for A., there not being sufficient evidence to warrant the conclusion that M.

was a hamlet repairing its highways separately.—*DAWSON v. WILLOUGHBY (SURVEYOR OF HIGHWAYS)* (1864), 5 B. & S. 920; 34 L. J. M. C. 37; 29 J. P. 38; 11 Jur. N. S. 240; 122 E. R. 1073; *sub nom.* *R. v. DAWSON*, 11 L. T. 597; 13 W. R. 287.

*Annotations*:—*Distd. R. v. Rollett* (1875), L. R. 10 Q. B. 277; *Refd. R. v. Ashby Folville* (1866), 7 B. & S. 277.

### SECT. 6.—HIGHWAYS REPAIRABLE BY INDIVIDUALS.

#### SUB-SECT. 1.—IN GENERAL.

928. General rule.]—REPAIR OF BRIDGES, HIGHWAYS, ETC. CASE, No. 1153, *post*.

#### SUB-SECT. 2.—LIABILITY UNDER STATUTE.

929. Statutory duty to construct road of certain width—Wider road constructed—Dedication.]—By a local Act of Parliament it was enacted that a certain navigation co. should make a good road to the township of T., at least seven yards wide, & should keep same in repair, & should be liable to be indicted for not repairing the same; & it was also provided that they should be entitled to a tonnage of 1*d.*, which they were to apply to the making of the road. By a subsequent Act of Parliament defts., a canal co., were empowered to purchase from the first-mentioned co. the navigation & all the rights to tolls, etc., & were in like manner to be liable to be indicted for non-repair of the road. The road was kept in repair by the first-mentioned co. to the extent of twelve yards wide till the year 1817, when the purchase by defts. took place under the above Act of Parliament, & from that period by defts.:—*Held*: (1) defts. were, under the provisions of the statute, liable to be indicted for non-repair of the road to its full width of twelve yards; (2) a count charging them with a liability to repair *ratione tenuræ* of the land, etc., connected with the navigation, & purchased by them under the powers of the second Act of Parliament, could not be sustained.

*Qu.*: whether there may be a liability not immemorial to repair *ratione tenuræ*. *R. v. SHEFFIELD CANAL CO.* (1819), 13 Q. B. 913; 4 New Mag. Cas. 45; 4 New Sess. Cas. 25; 19 L. J. M. C. 44; 14 J. P. 224; 14 Jur. 170; 110 E. R. 1512.

*Annotation*:—*As to* (1) *Refd. Macclesfield Corpn. v. G. C. Ry.* (1911), 104 L. T. 728.

#### SUB-SECT. 3.—PRESCRIPTIVE LIABILITY.

930. How established—Repairs over long period.]—If there has been an encroachment on the highway, & the person removes it, & repairs that part of the highway which was injured by the encroachment once, & then leaves it to the trustees or parish to repair in future, he shall not be liable in future. But if the proprietor of the adjoining land has for any length of time repaired, it is evidence of his liability, unless he gives positive evidence of encroachment.—*R. v. SKINNER* (1805), 5 Esp. 219, N. P.

931. Inhabitants of another parish—Necessity for consideration.]—*R. v. ST. GILES', CAMBRIDGE (INHABITANTS)*, No. 908, *ante*.

**PART VI. SECT. 6, SUB-SECT. 2.**  
n. *Unformed roads—Whether road company liable to repair.*—Under Road Boards Act, 1882, s. 138, road boards

are not bound to keep in repair roads which have never been formed, but remain in a state of nature, & are not liable for injuries occasioned by defects

in such road to persons who may use them.—*KOWAL ROAD BOARD DISTRICT (INHABITANTS) v. ASHBY* (1891), 9 N. Z. L. R. 668.—N. Z.



**Sect. 6.—Highways repairable by individuals: Sub-**  
3

**932.** ———.—*R. v. BISHOP AUCKLAND (INHABITANTS)*, No. 891, *ante*.

**933.** ———.—**Whether inferred.**—(1) By Act of Parliament, the liability to repair certain highways in a parish was taken from the parish & cast upon certain townships in which the highways respectively were; & the Act gave a form of indictment against such townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act, but, before trial, the Act was repealed without any reference to depending prosecutions. The ct. arrested a judgment given against the township on such indictment. (2) *Qu.*: whether, on indictment against inhabitants of a district, charging them with liability to repair a highway out of the district, it is necessary to prove a specific consideration for such liability; or whether consideration is to be inferred from the fact of repair, without other evidence.—*R. v. DENTON (INHABITANTS)* (1852), 18 Q. B. 761; *Dears. C. C.* 3; 1 E. & B. 509, n.; 21 L. J. M. C. 207; 19 L. T. O. S. 216; 16 J. P. 471; 17 Jur. 453; 118 E. R. 287.

*Annotations*:—*As to* (1) *Refd. R. v. McLain, R. v. Barr* (1922), 91 J. J. K. B. 562. *Generally, Mentd. R. v. Haughton* (1853), 1 E. & B. 501.

**934.** ———.—*R. v. ASHBY FOVLILLE (INHABITANTS)*, No. 897, *ante*.  
*See, also*, No. 973, *post*.

**SUB-SECT. 4.—LIABILITY RATIONE TENURE.**

*A. In General.*

**935. Origin of liability—Grant of land in consideration of repair.**—*ANON.* (1497), Y. B. 12 Hen. 7, fo. 15, pl. 1.

*Annotations*:—*Mentd. Gentleman's Case* (1583), 6 Co. Rep. 11 a; *Richard's & Bartlett's Case* (1581), 1 Leon. 19; *Grinley's Case* (1588), 8 Co. Rep. 38 a; *Thorne v. Tyler* (1612), March, 161.

**936. Necessity for consideration.**—*ANON.* (1481), Y. B. 21 Edw. 4, fo. 38, pl. 4.

**937. Whether liability must be immemorial.**—On an indictment charging a party with a liability to repair a highway *ratione tenure*, deft. gave in evidence an ancient deed, between certain inhabitants of the parish & the former owner of his land, whereby the former gave to the latter that land, in consideration of his repairing an existing highway; the grantee covenanted to repair it, & it was stipulated, that if through his neglect to repair the parish were indicted, there should be a right of re-entry, & the agreement should be void.—*Held*: this deed did not constitute a liability *ratione tenure*, if any could be created after the time of legal memory. *Qu.*: whether a liability to repair a highway *ratione tenure* must be immemorial.

Possibly in the case of a road newly created, a party might, under some circumstances, be held liable for the repairs in respect of tenure of certain lands (*LORD DENMAN, C.J.*).—*R. v. BEEBY* (1839), 8 L. J. M. C. 38; 3 J. P. 241.

**938.** ———.—*R. v. SHEFFIELD CANAL CO.*, No. 929, *ante*.

**939.** ———.—Deft. was indicted for the non-repair of a highway, which it was alleged he was liable to repair *ratione tenure*, in respect of certain lands called Saw-pit Field. To prove this liability, evidence was given of the conviction of W., a former owner & occupier of the same lands, for the non-repair of same highway, showing that in

the year 1801 a presentment had been preferred against him, alleging his liability to repair it *ratione tenure*, to which he pleaded guilty. Evidence was also given of the repair of the highway subsequent to the conviction of W., by the occupiers of the lands, of which the Saw-pit Field formed part; that public notice was given when the Saw-pit Field was offered for sale of the liability to repair the highway in question, & that deft., who purchased the lands after such notice, was now the owner & occupier of the same Saw-pit Field.—*Held*: (1) there was evidence to go to the jury of immemorial usage, & of deft.'s liability to repair the highway *ratione tenure*; (2) (*PARKE, B., ALDERSON, B., PATTESON, J., & COLERIDGE, J.*) deft. was estopped from denying his liability in consequence of the conviction of W., with whom he was a privy in estate; (3) (*PLATT, B.*) the immemorial usage, in respect of which deft. was charged, was not conclusively established, & the question of estoppel, not having been raised at the trial, was not now matter for the consideration of the judges.—*R. v. BLAKEMORE* (1852), 2 Den. 410; 21 L. J. M. C. 60; 16 J. P. 147; 16 Jur. 154; 5 Cox, C. C. 513, C. C. R.; *previous proceedings* (1850), 14 Q. B. 544.

*Annotations*:—*As to* (2) *Consd. R. v. Haughton* (1853), 1 E. & B. 501. *Refd. R. v. Nether Hallam* (1854), 24 L. T. O. S. 109; *Rundle v. Henrie*, [1898] 2 Q. B. 83. *As to* (3) *Refd. R. v. Haughton* (1853), 1 E. & B. 501; *Feverham v. Emerson* (1855), 11 Exch. 385.

**940. Nature of liability.—Whether incumbrance within Settled Land Act, 1882 (c. 38), s. 21 (2).**—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, No. 970, *post*.

*See, now*, Settled Land Act, 1925 (c. 18), s. 73 (1) (2).

*See, generally*, SETTLEMENTS.

*See, also*, No. 973, *post*.

*B. Who are liable.*

**941. Whether lessee for years.**—Lessee for years cannot be charged *ratione tenure*, because that goes with the inheritance.—*ANON.* (undated), 3 Salk. 182; 91 E. R. 761.

**942. Assignee of part of lands bound.**—If a manor be held by tenure of repairing a highway, the alienee of any part of such manor is liable to the whole charge.—*R. v. BUCKLUGH (DUCHESS)* (1704), 1 Salk. 358; 6 Mod. Rep. 150; 91 E. R. 312; *sub nom. R. v. BUCKNALL*, 2 Id. Raym. 801; Holt, K. B. 128; 7 Mod. Rep. 51, 98.

*Annotations*:—*Consd. Baker v. Greenhill* (1842), 3 Q. B. 148; *Esher & Duttons v. C. v. Marks* (1902), 71 L. J. K. B. 309. *Refd. Rider v. Smith* (1790), 3 Term Rep. 766; *R. v. Sutton* (1835), 3 Ad. & El. 597; *R. v. Barnoldswick* (1843), 4 Q. B. 499; *Hunter v. Hunt* (1845), 1 C. B. 300; *Metcalfe v. Hetherington* (1855), 11 Exch. 257. *Mentd. R. v. Old Malton* (1794), 4 B. & Ald. 470, n.; *Pawell v. Salt-bury* (1828), 2 Y. & J. 391; *Delacherois v. Delacherois* (1864), 11 H. L. Cas. 62.

**943.** ———.—A grant of a licence by the Crown to the owner of lands to stop up & inclose for the benefit of himself & his heirs a public highway through his lands, imposing at the same time a condition that the owner should make a new road through his lands, & that he, his heirs & assigns, should keep the new road in repair, establishes against the grantee, who had acted upon the grant by stopping up the old road, an obligation *ratione tenure* to repair the new road, & it is immaterial whether such grant was made before or after the reign of Richard I.; the period of legal memory. In such case the liability of repair is charged upon the heirs & assigns of the lands, & if the lands become divided among several persons the alienee & occupier of each & every

part of the lands is liable to the whole charge. Upon an inquisition taken in 1773 under a writ of *ad quod damnum* the jurors presented that the King should grant to O., the owner of certain lands through which passed an old highway for horses, carts, carriages, & foot passengers, a licence to inclose & stop up the old highway & hold the same when so stopped up to him & his heirs for ever, upon the condition that O. did in his own land make & set out another road equally fit & convenient for horses, carts, carriages, & foot passengers, & that such new road should be for ever thereafter kept in proper repair by O., his heirs & assigns. The old road was stopped up & inclosed, & the new road set out pursuant to the inquisition, & has ever since been used as a highway, although at some period it was stopped up at one end for horses, carts, & carriages, & became a *cul de sac* for traffic of that kind, but it was always used as a highway for foot passengers. No licence from the King pursuant to the terms of the inquisition could be found, & if any such licence was granted it appeared to have been lost. In an action against the owner & occupier of part of the lands formerly belonging to O. for the expenses of repairing the substituted highway on the ground of a liability to repair the same *ratione tenuræ*:—*Held*: (1) a licence from the King incorporating the conditions of the inquisition must be presumed in fact to have been granted; (2) the substituted road was laid out pursuant to such inquisition & licence; (3) the road was still a public highway, notwithstanding the changes in it; (4) deft. was an "assign" of O. within the meaning of the inquisition, & as such "assign," & by reason of his tenure & occupation of the lands, he was liable for the repair of the highway, although he was an assign of part only of the lands formerly belonging to O.—*ESHER & DITTONS URBAN COUNCIL v. MARKS* (1902), 71 L. J. K. B. 309; 86 L. T. 222; 66 J. P. 213; 50 W. R. 330; 18 T. L. R. 333; 16 Sol. Jo. 196.

*Annotation*:—As to (2) & (3) *Consd. Ferrand v. Bingley*, U. C., [1903] 2 K. B. 415.

**944. Whether owner not in occupation.**—An owner of lands who is not the occupier of them cannot be charged *ratione tenuræ* with the repair of a common highway. When a highway repairable *ratione tenuræ* is, under statutory powers, so altered in its nature & course as to be practically destroyed, the liability to repair *ratione tenuræ* ceases. A highway which had been from time immemorial repaired *ratione tenuræ* was paved to the width of nine feet in the centre with stone got from the land charged with the repair. The trustees under a turnpike Act converted the highway into a macadamised road by taking up the old pavement & laying down to the width of fifteen feet in the centre stone brought from places without the county, & they stopped & diverted the course of the highway in parts so as to straighten it. On the expiration of the turnpike trust, deft., the owner of the land charged, who was not in occupation of it, was indicted & convicted for non-repair of the road *ratione tenuræ*:—*Held*: (1) deft., not being the occupier of the land, was not liable; (2) the road, the subject of repair, must be taken to have been destroyed, & the liability to repair *ratione tenuræ* had therefore ceased.—*R. v. BARKER* (1890), 25 Q. B. D. 213; 59 L. J. M. C. 105; 62 L. T. 578; 54 J. P. 615; 6 T. L. R. 328; 17 Cox. C. C. 26, C. C. R.

*Annotations*:—As to (1) *Consd. Rundle v. Hearle*, [1898] 2 Q. B. 83. *Refd. Cuckfield R. D. C. v. Goring*, [1898] 1 Q. B. 865. As to (2) *Refd. Hoath v. Warrington Overseers*, [1894] 2 Q. B. 108; *Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309.

1—VOL. XXVI.

**945.** —[—By Local Government Act, 1894 (c. 73), s. 25 (2), "Where a highway repairable *ratione tenuræ* appears . . . not to be in proper repair, & the person liable to repair the same fails when requested so to do . . . to place it in proper repair, the district council may place the highway in proper repair, & recover from the person liable to repair the highway the necessary expenses of so doing":—*Held*: an owner of lands who was not the occupier of them was not "the person liable to repair the highway" within the sect.—*CUCKFIELD RURAL DISTRICT COUNCIL v. GORING*, [1898] 1 Q. B. 865; 67 L. J. Q. B. 539; 78 L. T. 530; 62 J. P. 358; 46 W. R. 511; 14 T. L. R. 362; 12 Sol. Jo. 471, D. C.

*Annotation*:—*Apprvd. & Foll'd. Daventry R. D. C. v. Parker*, [1900] 1 Q. B. 1.

**946.** —[—By Local Government Act, 1894 (c. 73), s. 25 (2), "Where a highway repairable *ratione tenuræ* appears . . . not to be in proper repair, & the person liable to repair the same fails when requested so to do . . . to place it in proper repair, the district council may place the highway in proper repair, & recover from the person liable to repair the highway the necessary expenses of so doing":—*Held*: an owner of lands who was not the occupier of them was not "the person liable to repair the highway" within the sect.—*DAVENTRY RURAL DISTRICT COUNCIL v. PARKER*, [1900] 1 Q. B. 1; 69 L. J. Q. B. 105; 81 L. T. 103; 63 J. P. 708; 48 W. R. 68; 16 T. L. R. 5, C. A.

*Annotation*:—*Refd. Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 648.

*Compare* No. 2703, *post*.

#### C. Proof of Liability.

**947. Admissibility of evidence—Award under submission by former tenant.**—Upon the trial of an indictment for not repairing a highway, which it is alleged deft. is bound to repair *ratione tenuræ*, an award made under a submission by a former tenant for years of the premises can be received neither as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*. *R. v. COTTON* (1813), 3 Camp. 441; 2 Mood. & R. 353, n.

*Consd. R. v. Bedfordshire* (1855), 4 E. & B. 535. *Refd. Richards v. Bassett* (1830), 8 L. J. O. S. K. B. 289; *Evans v. Rees* (1839), 10 Ad. & El. 151.

**948.** —Record of previous proceedings.—In an indictment against A., a parishioner of B., for not repairing a road to which he was charged to be liable *ratione tenuræ*, of certain lands in B.:—*Held*: the record of a previous trial wherein the parish of B. were defts., & being indicted for the non-repair of the same road, had pleaded that A. was liable *ratione tenuræ*, & had obtained a verdict thereon in their favour, was not admissible in evidence as matter of reputation against A.—*R. v. FRANKLYN* (1839), 3 J. P. 452.

**949.** —Reputation.—Evidence of reputation is not admissible to show a liability in the occupiers of land to repair a road, *ratione tenuræ*.—*R. v. WAVERTHREE (INHABITANTS)* (1811), 2 Mood. & R. 353, N. P.

*Annotation*:—*Expl'd. R. v. Bedfordshire* (1855), 4 E. & B. 535.

*See, generally, EVIDENCE*, Vol. XXII., pp. 53 *et seq.*

**950. Sufficiency of evidence.**—*R. v. HUCKERIDGE* (1891), 1 Mod. Rep. 48; 87 E. R. 255.

**951.** —Repairs by defendant & his predecessors.—Deft. was the occupier of two adjoining fields through which ran a public footpath crossing the fence between the two fields by means of

**Sect. 6.—Highways repairable by individuals: Subsect. 4, C., D. & E.]**

a stile. Deft. & his predecessors in occupation had occasionally done slight repairs to the footpath & the stile; but there was no evidence that he or they had ever been required by the highway authority to do so. Plffs., who was using the footpath as a member of the public, fell in getting over the stile, in consequence of the stile being out of repair, & was injured. He sued deft., charging that he was liable to repair *ratione tenuræ*.—*Held*: the fact of the repairs done by deft. & his predecessors, being consistent with such repairs having been done by them for their own benefit, was no evidence of any liability to repair *ratione tenuræ*. *Qu.*: whether an action will lie against a person liable to repair a public way *ratione tenuræ* for special damage suffered by a member of the public in consequence of the way being out of repair.—*RUNDLE v. HEARLE*, [1898] 2 Q. B. 83; 67 L. J. Q. B. 741; 78 L. T. 561; 46 W. R. 619; 14 T. L. R. 440, D. C.

**952. What court must consider.**—In doubtful cases the jury are to look to the utility of the road to the public, in order to determine whether a party is bound to repair *ratione tenuræ*. An adjoining occupier occasionally doing repairs for his own convenience to go & come, is no more like that sort of repair which makes a man liable *ratione tenuræ*, than the repair by an individual of a road close to his door is to the repair of the road outside his gate (*HULLOCK, B.*).—*R. v. ALLANSON* (1827), 1 Lew. C. C. 158; 168 E. R. 990.

*Annotation*:—*Refd.* *Rundle v. Hearle*, [1898] 2 Q. B. 83.

**D. Exemption from Highway Rates.**

**953. General rule.**—The occupier of certain land in a hamlet maintaining its own highways, which was part of a township maintaining its own poor, which was part of a parish, was liable *ratione tenuræ* to repair a highway within its hamlet, & in consideration thereof was exempt from the repair of any other roads within it. The whole township was, with others, formed into a highway district under Highway Act, 1862 (c. 61), & Highway Act, 1861 (c. 101), the quarter sessions directing, in accordance with sect. 7 of the former, that no separate waywarden should be elected for the hamlet, & that the township should be subject to the same liabilities in respect of all the highways within it which were before maintained by the hamlet, & that one waywarden should be elected for the township as a whole:—*Held*: the exemption from highway rates by reason of the liability to repair the one highway in the hamlet was not taken away. *R. v. HEATH* (1866), L. R. 1 Q. B. 218; 7 B. & S. 285; 35 L. J. M. C. 113; 13 L. T. 609; 30 J. P. 182; 14 W. R. 388.

*Annotations*:—*Expld.* *Heath v. Weaverham Township Overseers*, [1894] 2 Q. B. 108. *And*, *Lonsdale v. Lowther Overseers* (1896), 60 J. P. 297. *Refd.* *Dalton Overseers v. N. E. Ry.*, [1900] A. C. 345; *Ferrand v. Bingley U. C.*, [1903] 2 K. B. 445. *Mentd.* *Ord v. Ord*, [1923] 2 K. B. 432.

**954.** —.]—Applts. had from time immemorial repaired a certain highway *ratione tenuræ*, & had in consequence been exempt from contributing to the repair of other highways in the district. In 1782 the highway was placed under the control of turnpike trustees, who materially altered its nature & course; but on the expiration of the turnpike trust in 1862 applts., believing that they were still liable to do so, continued to repair the highway. In 1869 the Ct. of Q. B. decided that applts. were not liable to be rated for the repair of highways in the district; but the fact of the alteration of

the highway by the turnpike trustees was not brought to the attention of the ct. In 1892 the highway was declared a main road, & applts. thereupon ceased to repair it. The question having arisen whether they were liable to contribute to a rate for the repair of the highways in the district:—*Held*: their exemption from such a rate depended on their liability to repair the highway *ratione tenuræ*, & both had come to an end on the alteration of the highway by the turnpike trustees.—*HEATH v. WEAVERHAM TOWNSHIP OVERSEERS*, [1894] 2 Q. B. 108; 63 L. J. M. C. 187; 70 L. T. 729; 58 J. P. 557; 42 W. R. 478; 10 T. L. R. 414; 38 Sol. Jo. 400; 10 R. 274, D. C.

*Annotations*:—*Distd.* *N. E. Ry. v. Dalton Overseers*, [1899] 1 Q. B. 1026. *Consd.* *Ferrand v. Bingley U. C.*, [1903] 2 K. B. 445. *Refd.* *Dalton Overseers v. N. E. Ry.*, [1900] A. C. 345. *Mentd.* *Ord v. Ord*, [1923] 2 K. B. 432.

**955.** — **Whether liability alone creates exemption.**—The existence of a liability *ratione tenuræ* to repair a certain highway does not of itself show that there is an exemption from liability to contribute to the repairs of other highways in the same highway district; there must be other evidence that the exemption exists in order to prove a legal exemption within Highway Act, 1835 (c. 50), s. 33.—*FERRAND v. BINGLEY URBAN COUNCIL*, [1903] 2 K. B. 445; 72 L. J. K. B. 734; 89 L. T. 333; 67 J. P. 36; 52 W. R. 77; 19 T. L. R. 592; 47 Sol. Jo. 691; 1 L. G. R. 845; *sub nom.* *BINGLEY URBAN DISTRICT COUNCIL v. FERRAND*, 67 J. P. 370, D. C.

**956. Effect of exemption.—Extends to portion of general rate applicable to highways.**—In a hamlet forming part of a township all the highways were repairable by the occupiers of lands *ratione tenuræ*, & highway rates were not leviable by reason of the exemption in Highway Act, 1835 (c. 50), s. 33. A railway co. occupied lands in the hamlet, & prior to the after-mentioned order, were liable *ratione tenuræ* to repair a portion of a highway therein. An order was made by justices under Highway Act, 1862 (c. 61), s. 35, by which it was declared that all the highways in the hamlet should be parish highways, & be repaired by the highway board of the district in which the hamlet was situated. The order fixed the sums to be paid by the respective occupiers of lands previously liable to repair *ratione naturæ* "in full discharge of all claims thereafter in respect of the repair & maintenance of the highways" as provided by the Act. These sums were nominal in amount. They were duly paid. The co. were subsequently rated in respect of their lands in the hamlet for expenses incurred in the repair of highways within the district, including those in the hamlet:—*Held*: the order did not operate to deprive the railway co. of their previously existing exemption from highway rates, & the co. were exempt from payment of so much of the rate as was levied in respect of the repair of highways in the hamlet.—*DALTON OVERSEERS v. NORTH EASTERN RY. CO.*, [1900] A. C. 345; 69 L. J. Q. B. 650; 82 L. T. 693; 64 J. P. 612; 16 T. L. R. 419, H. L.; *affg.* S. C. *sub nom.* *NORTH EASTERN RY. CO. v. DALTON OVERSEERS*, [1899] 1 Q. B. 1026, C. A.

**957. Highway comprised in highway district.—Whether exemption lost.**—*R. v. HEATH*, No. 953, *ante*.

**958.** — **Form of precept to overseers.**—In the parish of W. an estate called B. was exempt from highway rate on the ground that the owner was liable to repair the roads thereon *ratione tenuræ*, but B. was included in the poor rate of the parish of W. An order forming a highway district in 1862, included "the parish of W." in the district,

& no mention was made of B. as a separate highway parish. The highway board made a precept for a contribution on the "waywarden of the parish of W., B. farm excepted." No separate waywarden had ever been appointed for B. :—*Held*: under Highway Act, 1862 (c. 61), s. 33, the precept should have been made on the overseers of the parish of W.—*CARTER v. WAVERHAM HIGHWAY BOARD* (1866), 30 J. P. 341.

**959. Termination of exemption—Highway comprised in highway district.]—***R. v. HEATH*, No. 953, *ante*.

**960. — By termination of liability.]—***HEATH v. WEAVERHAM TOWNSHIP OVERSEERS*, No. 954, *ante*.

**961. — Effect of Local Government Act, 1894 (c. 73).]**—Appl't. was liable to repair certain highways in the parish of *L. ratione tenuræ*, & it was admitted that, down to the passing of above Act, he was legally exempt from the payment of the highway rate :—*Held*: his exemption continued, & above Act made no difference in this respect.—

*LOWTHER OVERSEERS* (1896), 60 J. P. 297.

**962. — Highway declared parish highway.]—***DALTON OVERSEERS v. NORTH EASTERN RY. CO.*, No. 956, *ante*.

Exemption from highway rates, generally, *see* **RATES & RATING**.

#### *E. Discharge and Termination of Liability.*

**963. Discharge of indictment—Whether certificate that road "now in repair" sufficient.]—**A deft. in an indictment for the non-repair of a highway is not entitled to be discharged from the indictment upon the production of a certificate of two justices & affidavits, which merely state that "the road is now in repair"; they should show something done since the finding of the jury.—*R. v. FRAMPTON* (1814), 3 L. T. O. S. 131; 8 J. P. Jo. 310.

**964. Termination of liability—Road destroyed—By encroachment of sea.]—**On indictment for non-repair of a highway, alleging liability *ratione tenuræ*, it appeared by special verdict: that deft. held lands adjoining the sea; that an ancient highway had passed over the lands, & that, from time immemorial, except as after mentioned, deft. & those whose estate, etc., had restored & repaired so much of the way as passed over the lands: that the sea had from time to time encroached upon the highway, so that a portion of the land over which it went was covered by the sea & impassable, wherefore deft. & his predecessors had from time to time gradually removed the highway, & appropriated other parts of the lands for the site thereof, so that the public had the uninterrupted use of it; & that the road had always been repaired by deft. & his predecessors as or in lieu of so much of the ancient highway: that the portion of way now alleged to be out of repair was part of the ancient highway so passing over the lands & used by the public as aforesaid, though passing over a different part of such lands from that formerly occupied by the road & since by the sea: that in Mar. 1812, before the preferring of the indictment, the sea encroached upon the part of road now complained of as out of repair, & rendered it ruinous, etc., as in the indictment stated, & that deft. has not restored same, but a portion thereof has, ever since the month of Mar., had the earth & soil washed away, & is thereby made impassable: that the residue thereby became, & is, too narrow for passage, & now stands at the edge of a precipitous bank seventy feet deep, &

forming an angle of forty-five degrees to the horizon; & that it would cost a very great sum of money to make a road over the space last occupied by the highway :—*Held*: deft.'s liability had ceased: &, the quarter sessions having given judgment for the Crown upon the special verdict, this ct. reversed the judgment.—*R. v. BAMBER* (1813), 5 Q. B. 279; 1 Dav. & Mer. 387; 13 L. J. M. C. 13; 2 L. T. O. S. 121; 8 J. P. 121; 114 E. R. 1254; *sub nom.* *BAMBER v. R.*, 8 Jur. 309.

*Annotations*:—*Distd. R. v. Greenhow* (1876), 1 Q. B. D. 703. *Appl. Kent County Council v. Sandgate U. D. C.* (1897), 61 J. P. 517. *Refd. R. v. Hornsea* (1854), 18 J. P. 131.

**965. — — — Alteration in nature & course.]—***R. v. BARKER*, No. 911, *ante*.

**966. — — — What amounts to destruction.]—**Upon the trial of an indictment for the non-repair of a highway, it appeared that the highway ran along the slope of a hill several hundred feet above the level of a valley beneath. Two landslips occurred on the slope of the hill, comprising many acres of land, & part of the highway was carried away into the valley below, & its place filled up with earth, stones, & other debris. The debris was at one point twenty-five feet above, & at another two feet below, the level of the old road, & occupied the line or track of the highway. At the point where it was twenty-five feet above the level of the old road it had been ascertained by boring that for a depth of thirty & a half feet from the surface there was nothing but soil, shale, & stones, & that there was no trace of the old metalled road, but the line of it was known & admitted. Evidence was given that it was practicable to form a road along the old track of a similar character to the adjoining parts of the old road at a cost of £311 :—*Held*: the ct. having power to draw inferences of fact, there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it.—*R. v. GREENHOW (INHABITANTS)* (1876), 1 Q. B. D. 703; 45 L. J. M. C. 141; 35 L. T. 363; 41 J. P. 7, D. C.

*Annotations*:—*Appl. Amesbury Grdns. v. Wiltshire J.J.* (1883), 10 Q. B. D. 480; *Sandgate U. D. C. v. Kent County Council* (1898), 79 L. T. 425. *Refd. Acton District Council v. London United Tramways*, [1909] 1 K. B. 68.

**967. — — — New road substituted for old.]—***R. v. SURGASHALL* (1854), 23 L. T. O. S. 78.

**968. — — — Character of road altered.]—**An ancient highway was in 1705 turned into a turnpike trust which expired in 1870. During the trust, the occupiers of certain farms were expressly declared to continue liable to keep in repair parts of the highway, being reputed to be liable *ratione tenuræ* to do so. The old highway, however, was only a horse & packway of three feet wide in some parts, while the turnpike road was a cart & carriage way of fifteen yards wide :—*Held*: though the turnpike Act kept alive the tenants' liability, yet, when that Act expired, the alteration of the highway which had taken place, extinguished the original liability of the tenants, & the township was now alone liable for the repair.—*R. v. PICKERING TOWNSHIP* (1877), 41 J. P. 561, D. C.

**969. — — — Highway materially altered.]—***HEATH v. WEAVERHAM TOWNSHIP OVERSEERS*, No. 954, *ante*.

**970. — — — By agreement with local authority—Under Public Health Act, 1875 (c. 55), s. 148.]—**By above sect. urban authorities were empowered by agreement with any person liable to repair a street or road to take on themselves the maintenance, repair, cleansing or watering of any such street or road on such terms as they & such person might agree on. By Local Government Act,

**Sect. 6.—Highways repairable by individuals: Sub-sect. 4, E.; sub-sect. 5. Sects. 7 & 8: Sub-sects. 1, 2 & 3. Sect. 9.]**

1801 (c. 73), s. 25, that power was transferred to rural district councils: *Held*: under Public Health Act, 1875 (c. 55), s. 148, a rural district council were entitled to agree with a person liable to repair a highway *ratione tenuræ* to take on themselves in perpetuity in consideration of a money payment the liability for the maintenance & repair of the highway, & the effect of such agreement would be to effectually free & for ever discharge the land & the owner & occupier thereof from that liability. *Qu.*: whether a liability to repair a highway *ratione tenuræ* on settled land is an incumbrance within Settled Land Act, 1882 (c. 38), s. 21 (ii).—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1911] 1 Ch. 618; 80 L. J. (Ch. 361; 105 L. T. 12; 75 J. P. 316; 27 T. L. R. 356; 55 Sol. Jo. 483; 9 L. G. R. 719.

#### SUB-SECT. 5. LIABILITY RATIONE CLAUSURÆ.

**971. General rule.]**—*HENN'S CASE*, No. 507, *ante*.  
**972.** [The owner of the land over which there is an open road may inclose the land; but he must leave a sufficient way, & repair it at his own charge.—*DUNCOMB'S CASE* (1634), Cro. Car. 366; 1 Roll. Abr. 390; 79 E. R. 919.

*Annotations:—* **Expld.** *R. v. Ramsden* (1858), E. B. & E. 940. **Consd.** *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 96. **Held.** *R. v. Stoughton* (1870), 2 Saund. 160; *R. v. Stretford* (1705), 2 Ld. Raym. 1169.

**973.** — — — Where a highway lies over an open field, & the owner of the field turns the way to another part of the field for his own convenience, or encloses the field for his own benefit, & leaves a sufficient way besides, he is bound to repair & maintain that way at his own charge, & he must make it passable, though it was foundrous before; & if the way is not sufficient, any passenger may break down the inclosure & go over the land, & justify it till a sufficient way is made, & in this case the jury are only to inquire if it is the ancient way, if it is inclosed for the profit or the owner of the soil, & if it is foundrous; & it being proved that it was impossible to make the way because of the soil.—*ANON.* (undated), 3 Salk. 182; 91 E. R. 764.

**974. To what roads liability extends.—Whether roads set out under inclosure Act.]**—The repair of a road newly laid out under an inclosure Act, is to be borne by those to whom the former highway was chargeable; & not by the owner of an inclosure made in pursuance of the statute.—*R. v. FLECKNOW (INHABITANTS)* (1758), 2 Keny. 261; 1 Burr. 461; 96 E. R. 1170.

*Annotations:—* **Consd.** *R. v. Ramsden* (1858), E. B. & E. 919. **Held.** *Esher & Dittons v. C. v. Marks* (1902), 71 L. J. K. B. 309.

*See, generally,* COMMONS, Vol. XI., pp. 78 *et seq.*

**975. Highway of modern origin.]**—The liability to repair a highway *ratione clausuræ* is only on the occupier of the lands inclosed, & not on the owner.

The present rule for entering a verdict for the Crown should be charged . . . because the high-

way is not immemorial, & because the land inclosed is not shown to have been used for passage, & because deft. is not the occupier of that land (*ERLE, J.*).—*R. v. RAMSDEN* (1858), E. B. & E. 949; 27 L. J. M. C. 296; 31 L. T. O. S. 327; 23 J. P. 196; 5 Jur. N. S. 169; 120 E. R. 763.

**976. Extent of liability.—Inclosure on one side only.]**—*STEEL v. PRICKETT*, No. 513, *ante*.

**977. To whom liability extends.—Whether owner not in occupation.]**—*R. v. RAMSDEN*, No. 975, *ante*.

**978. Duration of liability.]**—*R. v. GREAT BROUGHTON (INHABITANTS)* (1844), 2 L. T. O. S. 369; 8 J. P. Jo. 211.

#### SECT. 7.—TRUSTS FOR REPAIR OF HIGHWAYS.

**979. Application of funds.—Roads falling within area of different authorities.]**—*MIDDLESEX COUNTY COUNCIL v. WILLESDEN & HENDON URBAN DISTRICT COUNCILS*, No. 170, *ante*.

**980. Termination of trust.—Transfer of road to local authorities.]**—Testator bequeathed £3,000 upon trust to build galleries in a church & to construct a causeway, & directed that £10 a year should be laid aside for the repairs of the galleries & the road as there should be occasion, & as the trustees should think fit, & gave the residue after these things were performed to other objects. An additional sum of £40 a year out of the funds was subsequently ordered by the Ct. of Ch. to be applied to the repairs of the road. The road had recently come under the control of a county council & a district council, so that the obligation to repair it rested on these bodies:—*Held*: this circumstance did not put an end to the trust, & that so much of the £80 a year as was available for the repairs of the road ought to be paid to the councils. *A.-G. v. DAY*, [1900] 1 Ch. 31; 69 L. J. Ch. 8; 81 L. T. 806; 64 J. P. 88.

*Annotation:—* **Apld.** *Re Hall's Charity*, Seven Courts, v. Charity Trustees & Worcester-shire County Council 76 J. P. 9.

#### SECT. 8.—EXTINCTION OF LIABILITY TO REPAIR.

##### SUB-SECT. 1.—HIGHWAY STOPPED UP OR ALTERED.

**981. Alteration of character of road.—Road repairable by agreement.]**—*LONDON CORPN. v. BARNES* (1806), 12 T. L. R. 135, C. A.

**Road repairable ratione tenuræ.]**—*See* Sect. 6, sub-sect. 4, E., *ante*.

**982. — — — Public footpath converted into private road.]**—*REYNOLDS v. BARNES*, No. 874, *ante*.

Stopping up of highways, generally, *see* Part XII., *post*.

##### SUB-SECT. 2.—PHYSICAL DESTRUCTION OF HIGHWAY.

**983. Total destruction of part.—By encroachment of sea.]**—An indictment charged that certain

exercise any control over it: *Held*: defts. were not liable for the non-repair of the road. *R. v. PERKIN COUNTY* (1884), 6 O. R. 195.—*CAN.*

#### PART VI. SECT. 8, SUB-SECT. 2.

**983 i. Total destruction of part.—By encroachment of sea.]**—A portion of a road had been completely submerged by water, so that restoration would

#### PART VI. SECT. 8, SUB-SECT. 1.

**a. Termination of liability.—By-law divesting control of road.]** A road ran between several township in defts. county, & was constructed by a joint stock co. In 1866 defts. purchased the right of the road co. in the road at a sheriff's sale under an execution against the co., & received a deed from the sheriff. A bye-law had been

authorising the purchase, but through inadvertence was not signed or . . . but the purchase was recognised in subsequent bye-laws, & defts. took possession of & exercised exclusive jurisdiction over the road, expended some \$2,500 in its repair, & continued to deal with it as their own property until June 8, 1881, when they passed a bye-law divesting themselves of the road, after which defts. ceased to

part of a highway was out of repair. Part of the road had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, & the surface of the existing road was in good repair up to where same had been so destroyed, at which part the road was terminated by a perpendicular cliff, caused by successive encroachments:—*Held*: there was no obligation on the parish to provide an available carriage road down to the beach, the encroachments of the sea having destroyed the road, so that the subject of repair was not in existence.

The indictment says that there is a highway, & that it is out of repair; but the case finds distinctly that that part of the road which the indictment alleges to be out of repair has, in fact, been washed away by the sea, so that the subject of repair is not in existence. All that exists of the road is in good repair. The judgment of the Ct. must be for costs. (MAULE, J.).—*R. v. HORNSEA (INHABITANTS)* (1854), Dears. C. C. 291; 2 C. L. R. 596; 23 L. J. M. C. 59; 22 L. T. O. S. 337; 18 J. P. 135; 18 Jur. 315; 2 W. R. 274; 6 Cox, C. C. 299, C. C. R.

*Annotations*.—*Folld.* Kent County Council v. Sandgate U. D. C. (1897), 61 J. P. 517 (*see* (1898), 15 T. L. R. 59). *Refd.* *R. v. Worthing & Lancing Turnpike Road Trustees* (1854), 23 L. T. O. S. 169; Arnold v. Holbrook (1873), 28 L. T. 23; *R. v. Greenhow* (1876), 1 Q. B. D. 703. *Mentd.* *R. v. Lewis* (1857), 7 Cox, C. C. 106.

**984. Part of road carried away—By landslide.**—*R. v. GREENHOW (INHABITANTS)*, No. 966, *ante*.  
**Road repairable ratione tenuræ.**—*See* Nos. 914, 964, *ante*.

#### SUB-SECT. 3.—HIGHWAY DECLARED UNNECESSARY.

*See* Highway Act, 1864 (c. 101), s. 21.

**985. Procedure.**—The words “like proceedings” in Highway Act, 1864 (c. 101), s. 21, include all the proceedings contained in Highway Act, 1835 (c. 50), s. 85, for the purpose of procuring the stopping up of a highway, & also those proceedings designated by the general name of appeal to quarter sessions, given by sect. 88 of the same Act.—*R. v. SURREY J.J.* (1869), L. R. 5 Q. B. 87; 39 L. J. M. C. 49; 34 J. P. 199; 18 W. R. 166.

*Annotations*.—*Consd.* *R. v. Maule* (1871), 41 L. J. M. C. 47. *Mentd.* *R. v. Smith* (1873), L. R. 8 Q. B. 146; *R. v. Kent J.J.* (1901), 73 L. J. K. B. 538.

Stopping up of highways, generally, *see* Part XII., *post*.

#### SECT. 9.—APPORTIONMENT OF DIVIDED LIABILITY TO REPAIR.

**986. Form of order.**—(1) By 34 Geo. 3, c. 64, when the boundary of two parishes lay along the centre of a highway, justices were empowered, on information of the fact, to summon the surveyors of the respective parishes, hear the parties & their witnesses, & finally determine the matter by order, apportioning the highway between the parishes for the purpose of repair. Forms of information, summons & order were given. By an order under this Act, the justices recited an informa-

tion laid before them that one side of a certain highway was in, & repairable by, parish H., & the other side in, & repairable by, parish W., praying an apportionment: that they had summoned the surveyors, who attended, & that they had examined witnesses: & they ordered that the highway should be apportioned between H. & W., dividing it by a transverse line. The order contained no direct finding that the sides of the highway were respectively in H. & W.; but the statute form was correctly followed. On indictment for non-repair of the part allotted to H.:—*Held*: the justices must be taken to have considered the question, whether or not part of the highway was in H., & to have decided by their order that it was; & the fact could not be questioned on trial of an indictment, the subject matter being within the jurisdiction of the justices, & their finding of the fact conclusive.

(2) An order directing an indictment for non-repair of a road, under Highway Act, 1835 (c. 50), ss. 94, 95, must show, on the face of it, that it was made at a special session for the highways held within the division in which the road is situate. If it do not, it is void; & an order for costs, made, under sect. 95, by the judge who tried the cause, will be set aside.—*R. v. HICKLING (INHABITANTS)* (1845), 7 Q. B. 880; 2 New Sess. Cas. 117; 14 L. J. M. C. 177; 15 L. J. M. C. 23; 5 L. T. O. S. 285; 6 L. T. O. S. 123; 9 J. P. 820; 9 Jur. 1075; 1 Cox, C. C. 243; 9 J. P. Jo. 757; 115 E. R. 719.

*Annotations*.—As to (1) *Refd.* *R. v. Perkins* (1849), 14 Q. B. 229. As to (2) *Refd.* *R. v. Heytesbury* (1863), 8 L. T. 315.

*See, also*, No. 987, *post*.

**987. Jurisdiction of King's Bench Division—On case stated.**—The Highway Act, 1835 (c. 50), s. 58, enacts that, where the boundaries of parishes pass across or through the middle of a common highway, justices in special sessions may, on complaint, summons & hearing, apportion the future liability to repair between the parishes: proviso, that, in the case of such highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted. Two justices made an order of apportionment under sect. 58, in the form given by the sched. 11, to the statute, which form does not contain any express finding as to boundary. On appeal to the session against this order, evidence was heard on the question, whether or not the highway was upon a parochial boundary; applts. denied the jurisdiction of the two justices, because, as they contended, the highway did not appear to be on such boundary: resps. argued that, even if it were not so, the justices had jurisdiction under the proviso. The sessions confirmed the order, but stated a case, setting forth the facts in evidence on the question of boundary, & the objection taken to the jurisdiction, & adding that, if the Ct. of Q. B. should be of opinion that, under the circumstances stated, the road could be divided, etc., by the order of justices under the provisions of the statute, the order of sessions was to be confirmed; if not, both orders to be quashed:—*Held*: (1) upon the case so stated, this Ct., though the order of justices was made in the statutory

he necessary, & no ordinary reparation could suffice:—*Held*: the road authority were not required by law to do the work.—*McCORMICK v. PLECK TOWNSHIP* (1890), 20 O. R. 288.—*CAN.*

**983 II.** ———.—Where the

destruction of a highway is caused by the gradual encroachment arising from natural causes, the water occupying the former location of the highway, whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, & available

for purposes of navigation, there is no liability on the part of the municipality by virtue of its duty to keep highways in repair, to replace the highway.—*CUMMING v. DUNDAS TOWN* (1907), 9 O. W. R. 107; 13 O. L. R. 381.—*CAN.*

**Sect. 9. — Apportionment of divided liability to repair.** *Sect. 10: Sub-sect. 1 & 2. Sect. 11: Sub-sect. 1 & 2. Part VII. Sect. 1.]*

form & confirmed at sessions, might go into the whole question raised by the case; namely, whether there was evidence of a boundary intersecting the highway, or, if not, whether, upon the evidence, the two justices appeared to have had jurisdiction under the proviso; (2) the case did not come within the enactment of sect. 58, as the evidence did not show a boundary intersecting the highway. & the proviso did not apply. Orders quashed. *R. v. PERKINS* (1849), 14 Q. B. 229; 3 New Mag. Cas. 235; 19 L. J. M. C. 105; 14 L. T. O. S. 250; 14 Jur. 362; 13 J. P. Jo. 750; 117 E. R. 91.

**988. Several parishes abutting on one street.]**—An Act of Charles II., creating a new parish of A, in the metropolis, described the boundary as the houses abutting on a street. The other side of the street was in the parish of M., & there was evidence that in perambulating the parish boundaries of M., the middle of the street was regarded as the boundary of M.:—*Held*: the boundary of the new parish extended beyond the houses abutting on the highway to the *medium filum* of the highway. *Qu.*: whether as between several parishes abutting on a street, the expenses of paving, etc., are to be divided according to the linear frontage or according to actual expense?

In a conveyance of a close the expression "abutting on a highway" commonly carries with it the right to the soil *ad medium filum viae* (EULE, C.J.). *R. v. STRAND BOARD OF WORKS* (1864), 4 B. & S. 551; 33 L. J. Q. B. 299; 11 L. T. 183; 28 J. P. 532; 12 W. R. 828; 122 E. R. 506, Ex. Ch. *Annotation*:—*Reid*. C. L. Ry. v. London City Land Tax Commr., [1911] 2 Ch. 467.

## SECT. 10. — TRANSFER OF LIABILITY FROM INDIVIDUALS TO INHABITANTS AT LARGE.

### SUB-SECT. 1.—UNDER HIGHWAY ACTS.

**Dedication & adoption — Under Highway Act, 1835 (c. 50), s. 23.]**—*See Sect. 5, sub-sect. 3, C., ante.*

**Highway converted into parish highway — Under Highway Act, 1862 (c. 61), s. 35.]**—*See No. 950, ante.*

**989. Adoption of existing private road — Under Highway Act, 1862 (c. 61), s. 38—Consent of "occupiers" — Whether persons having right of way included.]**—Persons entitled to a right of passage, by way of easement or licence, over a driftway or other private road are not "occupiers" of the way within above sect., & their consent is not necessary to an application to justices for a declaration converting the way into a public highway.—*R. v. SOMERS*, [1906] 1 K. B. 326; 54 W. R. 402; 50 Sol. Jo. 112; *sub nom.* *R. v. SOMERS*. *Ex p.* GENERAL ESTATES CO., 75 L. J. K. B. 144; 94 L. T. 194; 70 J. P. 37; 22 T. L. R. 137; 4 L. G. R. 181, D. C.

### SUB-SECT. 2.—UNDER PUBLIC HEALTH ACTS.

**990. Agreement for making new road — Under Public Health Act, 1875 (c. 55), s. 146—Whether compliance with Public Health Act, 1875 (c. 55), s. 150, necessary.]**—BROMLEY LOCAL BOARD v. LANSBURY (1894), *Times*, Dec. 5, D. C. *Annotation*:—*Reid*. Folkestone Corpn. v. Marsh (1905), 94 L. T. 511.

**991. Agreement for repair — Under Public Health Act, 1875 (c. 55), s. 146—Whether agreement for adoption & dedication included.]**—TUNBRIDGE WELLS IMPROVEMENT COMRS. v. SOUTH BOROUGH LOCAL BOARD, No. 242, *ante*.

**992. — — — Necessity for seal.]**—TUNBRIDGE WELLS IMPROVEMENT COMRS. v. SOUTH BOROUGH LOCAL BOARD, No. 242, *ante*.

**993. — — — Effect of agreement — Highway formerly repairable *ratione tenuræ*.]**—*Re* STAMFORD & WARRINGTON (EARL), PAYNE v. GREY, No. 970, *ante*.

**994. Additions to existing highway — Expenses of making up—Liability of frontages—Public Health Act, 1875 (c. 55), s. 150.]**—RICHARDS v. KESSICK, No. 102, *ante*.

**995. — — — — —.]**—PORTSMOUTH CORPN. v. HALL, No. 106, *ante*.

**996. Declaration that private road a highway — Under Public Health Act, 1875 (c. 55), s. 152—Conditions precedent to declaration.]**—In order that a local authority may declare a street, not repairable by the inhabitants at large of their district, to be a highway so that it may become repairable by such inhabitants, it is necessary that each of the works specified in above sect. shall, at the time of declaration, have been executed upon the street to the satisfaction of such authority. Local authorities have not, under above sect., any discretion as to which of the works mentioned in the sect. they will require to be executed. Their discretion is limited to their being satisfied with the efficiency of each description of work when done. *Scmble*: kerbing a road does not answer the requirement in above sect. that the road must be flagged, "flagged" meaning paved with flagged stones. Wooden paving does not come within the meaning of any of the requirements of the sect.—*A.-G. v. BIDDER* (1881), 47 J. P. 203.

*Annotation*:—*Reid*. Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496.

**Extra Metropolitan streets.]**—*See, generally*, Part XIII., Sect. 2, *post*.

## SECT. 11.—LIABILITY FOR COLLATERAL REPAIRS.

### SUB-SECT. 1.—FENCES AND SUPPORTS.

**997. Erection of guard fences — Fences not in existence before.]**—Evidence that a parish did not put guard fences at the side of a road is not receivable on an indictment which charges that the King's subjects could not pass as "they were wont to do," if no such fences existed before.—*R. v. WHITNEY* (1835), 7 C. & P. 208; *subsequent proceedings*, 3 Ad. & El. 69.

*Annotation*:—*Reid*. Cornwell v. Metropolitan Sewers Comrs. (1855), 10 Exch. 771.

**998. — — — Construction of local Act.]**—ROTHERHAM CORPN. v. FULLERTON, No. 1169, *post*.

Liability for guarding excavations adjoining highways, *see* BOUNDARIES, Vol. VII., pp. 283 *et seq.*

**999. Repair of existing fences.]**—Defta. under their statutory powers constructed a canal & crossed a highway, which they carried over their canal by means of a bridge, to which they made a raised approach along the highway & fenced it off from the rest of the highway. The fences had since fallen into disrepair, so as to constitute a public nuisance. By their Act of Parliament



passed in 1829, the bridges were vested in defts., & sect. 26 provided that deft. co. should not be liable to repair any part of the road approaching any bridge over the canal after such roads had been first made & used for one year, & then put into good & sufficient repair by deft. co., beyond or further than the extremity of the wing walls of any such bridge, but nothing therein contained should be construed to exonerate deft. co. from the future repair of all such bridges & the wing walls, ramparts, & side banks thereof:—*Held*: the Act of Parliament drew a clear distinction between the bridges, as such, which were vested in defts., & the approaches to the bridges, which were not vested in defts., & which they were now relieved from all liability to keep in repair, & defts. were therefore not liable to repair the fences. *Semble*: the obligation lay on the county council.—*A.-G. v. OXFORD CANAL NAVIGATION* (1903), 72 L. J. Ch. 285; 88 L. T. 250; 67 J. P. 130 51 W. R. 386; 19 T. L. R. 277; 47 Sol. Jo. 317; 1 L. G. R. 282, C. A.

**1000. Wall supporting highway.]**—Where a servitude of support to a highway by a wall has been acquired, the owner of the highway, & not the owner of the wall, in the absence of express stipulation to that effect in the instrument, if any, creating the easement, is bound to repair the wall when out of repair & insufficient to support & maintain the highway. *Semble*: such stipulation covenant or obligation cannot be inferred merely from the fact that the wall has been on several occasions repaired by the owner of the wall or his predecessors in title.—*STOCKPORT & HYDE DIVISION OF MACCLESFIELD HUNDRED, HIGHWAY BOARD v. GRANT* (1882), 51 L. J. Q. B. 357; 46 L. T. 388; 46 J. P. 437.

**1001. — Whether wall forms part of highway—Question of fact.]**—*R. v. LORDSMERE (INHABITANTS)*, No. 892, *ante*.

**1002. Sea wall & groynes—Necessary for protection of road.]**—*SANDGATE URBAN DISTRICT COUNCIL v. KENT COUNTY COUNCIL*, No. 65, *ante*.

## SUB-SECT. 2.—CELLARS, GRATINGS, ETC.

**1003. Grating over area.]**—*ROBBINS v. JONES*, No. 1590, *post*.

**1004. Cellar under pavement—Covered by paving stones only—Whether within Metropolis Management Act, 1855 (c. 120), s. 102.]**—By above Act, sect. 96, all pavements are vested in & are under the management & control of the vestry of the parish in which they are situate, & by sect. 102 all vaults, arches, & cellars made either before or after the commencement of above Act under any street, & all openings into same in any such street, shall be repaired & kept in proper order by the owners & occupiers of the houses to which same respectively belong. Applt. was the owner of a house which in front of it had an area & cellars. The cellars were formed of brick walls, one of which was the outer wall of the area, & the other ran parallel with such outer wall at a distance of eleven feet nine inches. There were also two thin partition walls at right angles to these brick walls, separating the cellars of each house. Extending from the outer wall of the area to the wall which ran parallel with it were large flagstones, the ends of which rest on the walls in question; they formed a covering to the cellars, which without them would be open at the top. The outer or upper surface of these flagstones had been used by the public as a footway from the time they had been laid down, & had been worn out by the traffic over them: *Held*: the cellar in front of applt.'s house was not a cellar within the meaning of sect. 102, which applied to cellars which were a complete construction in themselves, arched over & with roofs independent of the pavement, & the vestry of the parish were bound to repair the flagstones as part of the pavement.—*HAMILTON v. ST. GEORGE, HANOVER SQUARE* (1873), L. R. 9 Q. B. 42; 43 L. J. M. C. 41; 20 L. T. 428; 38 J. P. 405; 22 W. R. 86.

*Annotation*:—*Reid*. White v. Hindley L. B. (1875), L. R. 10 Q. B. 219.

**1005. Sewer grid.]**—*WHITE v. HINDLEY LOCAL BOARD*, No. 1322, *post*.

## Part VII.—Enforcement of Duty to Repair.

## SECT. 1.—MANDAMUS.

**1006. When granted.]**—The ct. will not entertain an application for a *mandamus* to repair a road. So held, where the question was, which of two parties was liable to the repair, under local Acts of Parliament.—*R. v. OXFORD & WITNEY TURNPIKE ROADS TRUSTEES* (1840), 12 Ad. & El. 427; 4 Per. & Dav. 151; 6 Jur. 210, n.; 113 E. R. 873. *Annotation*:—*Reid*. *A.-G. v. Staffordshire County Council*, [1905] 1 Ch. 336.

**1007. —.]**—A railway co., in pursuance of their Act, caused a county bridge to be pulled down, whereby the county were absolved from the duty of repairing the road approaches thereto. The co. having rebuilt the bridge, entered into an

agreement with the trustees of the road to repair such road approaches to the new bridge. The road being out of repair, & the co. neglecting to repair it, a *mandamus* was applied for to compel them to do the necessary repairs: *Held*: a *mandamus* would not, under the circumstances, lie against the co. — *Ex p. EXETER ROAD TRUSTEES* (1852), 19 L. T. O. S. 190; 16 Jur. 609; *sub nom. RE EXETER & CREDITON RY. CO., Ex p. EXETER ROADS TRUSTEES*, 16 J. P. 411.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 291 *et seq.*

**1008. For what purposes granted.]** *A.-G. v. STAFFORDSHIRE COUNTY COUNCIL*, No. 797, *ante*. *See, generally*, CROWN PRACTICE, Vol. XVI., pp. 291 *et seq.*

## PART VII. SECT. 1.

**1006 i. When granted.]**—A *mandamus* will not be granted directing a county council to expend money on the repair of a road where the effect would be to compel the expenditure on roads of a sum in excess of that permitted by Local Government (Ireland) Act, 1898, s. 27.—*R. (HEWSON) v. WICKLOW*

COUNTY COUNCIL, [1908] 2 I. R. 101.—*IR.*

*p. Whether appropriate remedy.]*—*Re MOULTON & CANBOROUGH TOWNSHIP CORPNS. & HALDING COUNTY CORPN.* (1885), 12 A. R. 503.—*CAN.*

*q. —.]*—A ratepayer, whose lands adjoined a road, demanded from the county & district councils that they

should put it in proper repair. This demand not having been complied within, he applied to the King's Bench for a *mandamus*, to command the district & county councils to put the road in proper repair:—*Held*: *mandamus* was the appropriate remedy.—*R. v. CLARE COUNTY COUNCIL*, [1904] 2 L. R. 569; 38 L. T. 178, 233.—*IR.*



## SECT. 2.—INDICTMENT.

## SUB-SECT. 1.—IN GENERAL.

**1009. In respect of what ways.—Private way.]—**

If the comrs. under an inclosure Act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, it not concerning the public.

The road in question, being described to be a private road, does not concern the public, nor is of a public nature, but merely concerns the individuals who have a right to use it. The question is not varied by the circumstance that many individuals are liable to repair, or that many others are entitled to the benefit of it; each party injured may bring his action against those on whom the duty was thrown. The circumstance of this road having been set out under a public Act of Parliament, does not make the non-repair of it an indictable offence; many public Acts are passed which regulate private rights; but it is never conceived that an indictment lies on that account for an infringement of such rights (*per CUR.*).—*R. v. RICHARDS* (1800), 8 Term Rep. 634; 101 E. R. 1588.

*Annotation: Refd. R. v. Kitchener* (1873), 22 W. R. 131.

— *See No. 1091, post.*

— *Churchway.] See No. 1035, post.*

**1010. — Way along sea wall.]** (1) On an indictment for the non-repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged way used to pass.

(2) Where a parish are acquitted on such an indictment, on the ground of there being no highway, the ct. is not bound to award costs under Highway Acts, 1835 (c. 50), s. 95. A judge who tries *ad nisi prius* an indictment for non-repair, removed by *certiorari*, has no power under that sect. to award costs. *R. v. PAUL* (INHABITANTS) (1840), 2 Mood. & R. 307, N. P.

*Annotations: As to (1) Refd. R. v. Hornsea* (1851), 18 J. P. 135; *R. v. Greenhow* (1876), 1 Q. B. D. 703.

*See, also, CRIMINAL LAW, Vol. XV., p. 797, No. 8012.*

**1011. Jurisdiction of justices to order Local Government Act, 1894 (c. 73).]** *R. v. SHIPLEY PARISH COUNCIL*, No. 1016,

SUB-SECT. 2.—BY AND AGAINST WHOM  
PREFERRED.

**By whom preferred.]—***See CRIMINAL LAW, Vol. XIV., pp. 202 et seq.*

**Against whom preferred Inhabitants at large.]**  
*See No. 1019, post.*

**1012. Parish.]—**Parish to be indicted for not repairing a highway, & not the overseers.—*R. v. DIXON & HOLLIS* (1098), 12 Mod. Rep. 198; 88 E. R. 1260.

**1013. — — — Parish in two counties.]** If a parish lies in two counties, the indictment for not repairing the highways must be laid in the county where the ruinous road lies.—*R. v. WESTON* (1770), 4 Burr. 2507; 98 E. R. 314.

*Annotations:—Consd. R. v. Great Broughton* (1771), 5 Burr. 2700. *N.F. R. v. Clifton* (1794), 6 Term Rep. 498. *Refd. R. v. Bridgewater* (1839), 10 Ad. & El. 711.

## PART VII. SECT. 2, SUB-SECT. 2.

**r. Against whom preferred —Grantees of Crown.]—**Grantees of the

Crown of public highways are indictable for default in repairing such highways.—*R. v. C. P. 634.*—**CAN.**

**1014. — — —.]—**(1) If a parish be situate part in one county & the rest in another, & a highway lying in one part be out of repair, an indictment against the inhabitants of that part only is bad. The indictment must be against the whole parish.

[In *R. v. Weston*, No. 1013, *ante*], LORD MANSFIELD said that "the indictment must be confined to the county"; if by that expression his Lordship meant that the indictment must be preferred in that county where the particular road lay where the offence of not repairing happened, undoubtedly he spoke correctly; but if he thought that the indictment could only be preferred against the person or persons who lived within the jurisdiction of the ct. where the indictment was preferred, I think he was mistaken. For it is admitted that in the instance I put of a person who is bound *ratione tenuræ* to repair a road, living out of the jurisdiction of the county sessions where the road is situate, he must be indicted in that county (LORD KENYON, C.J.).

(2) On an indictment against a parish for not repairing a road, it is not necessary for the prosecution to serve every individual in the parish with process; he may compel the appearance of any two who live within the county upon whom the whole fine may be levied & the rest of the inhabitants must reimburse those two under the general Highway Act [13 Geo. 3, c. 78] (LORD KENYON, C.J.). *R. v. CLIFTON* (INHABITANTS) (1794), 5 Term Rep. 498; 101 E. R. 280.

*Annotation:—Refd. R. v. Bridgewater* (1839), 10 Ad. & El. 711.

**1015. — Urban sanitary authority.]—**An indictment against a municipal corpn. for non-repair of a highway alleged that the highway was in decay, & that the corpn., "acting by the council as the sanitary authority for the urban district," ought to repair & amend the same, etc.; but there was no allegation to show how debts were liable, nor did the indictment conclude with the words "against the form of the statute."

At the trial the judge intimated his willingness to make any amendment within his power; but no amendment was in fact made. A verdict having been found for the Crown: *Held*: (1) the indictment was bad, & debts were entitled to judgment *non obstante veredicto*; (2) even assuming the necessary amendments to be made, debts were entitled to judgment, there being nothing in Public Health Act, 1875 (c. 55), to make the urban sanitary authority liable to indictment for non-repair, in the same sense as that in which the parish or other persons liable *ratione tenuræ* were liable.—*R. v. POOLE CORPN.* (1887), 19 Q. B. D. 602; 58 L. J. M. C. 131; 57 L. T. 485; 52 J. P. 84; 36 W. R. 239; 16 Cox, C. C. 323, D. C.

*Annotations:—As to (2) Refd. R. v. Wakefield Corpn.* (1888), 20 Q. B. D. 810; *Cowley v. Newmarket L. B.* (1890), 55 J. P. 51; *Oliver v. Horsham L. R.* *Thompson v. Brighton Corpn.* (1893), 63 L. J. Q. B. 181; *R. v. Biggleswade L. B. C.* (1900), 64 J. P. 442.

**1016. — Parish council.]—**(1) Notwithstanding sect. 6 of Local Govt. Act, 1894 (c. 73), & the definition of "vestry," contained in sect. 75 (2) of that Act a parish council is not liable to be indicted for the non-repair of highways. *Qu.*: whether the inhabitants of a parish still remain liable to be indicted for the non-repair of the highways within such parish, or whether the common law liability of the inhabitants to indict-

**s. — Road company.]—**A road co., incorporated under 16 Vict. c. 190 & R. S. O. 1877, c. 152, are not subject to indictment for not keeping their

ment for non-repair has been extinguished altogether by Local Govt. Act, 1894 (c. 73).

(2) Sects. 94 & 95 of Highway Act, 1835 (c. 50), conferred upon justices the power in certain events to order an indictment for non-repair of a highway to be preferred "against the inhabitants of the parish or the party to be named in such order," & the costs of a prosecution instituted under those sects. are, by sect. 95, payable in any event "out of the rate made & levied in pursuance of this Act in the parish in which such highway shall be situate":—*Held*: the provision with regard to costs does not apply where the highway in question is under the control of a district council.

*Qu.*: whether, since the passing of Local Government Act, 1894 (c. 73), the justices have any jurisdiction to order an indictment for non-repair of a highway.—*R. v. SHIPLEY PARISH COUNCIL* (1897), 13 T. L. R. 486; 18 Cox, C. C. 531.

**1017. Where laid County where road situate.**—*R. v. WESTON*, No. 1013, *ante*.

**1018.** — — — — — *R. v. CLIFTON* (INHABITANTS), No. 1014, *ante*.

**1019. Necessity for naming individuals—inhabitants.**—*WALKER v. MEASURE* (1610), 2 Roll. Abr. 79.

**1020.** — — — — — *R. v. BURN IN EASINGWOLD* (OWNERS & OCCUPIERS) (1778), cited 3 Q. B. at p. 226; 114 E. R. 191.

**1021.** — — — — — *Road repairable ratione tenuræ.*—*R. v. BURN IN EASINGWOLD* (OWNERS & OCCUPIERS) (1778), cited 3 Q. B. at p. 226; 114 E. R. 191.

### SUB-SECT. 3. FACTS TO BE ALLEGED AND PROVED.

*See, generally*, Indictments Act, 1915 (c. 90); CRIMINAL LAW, Vol. XIV., pp. 202 *et seq.*

**1022. Description—Length & breadth.** Deft. was indicted for stopping the King's highway in H., without setting forth any boundaries or abutments in the way, leading from such a town to such a town, yet adjudged good; for a highway shall be intended to go throughout the kingdom, but it is otherwise if the indictment had been for stopping a private way.—*ANON.* (1626), 3 Salk. 183; 91 E. R. 765; *sub nom.* *HAISELL'S CASE*, Noy, 90; Lat. 183; 2 Roll. Abr. 81.

*Innovations*:—*Dttd.* *R. v. East Lifford* (1756), Say. 301. *Consd.* *Rouse v. Bardin* (1790), 1 Hy. Bl. 351. *Reld.* *Wilkinson v. Gaston* (1846), 9 Q. B. 137.

**1023.** — — — — — (1) Where it did not appear that any part of the road was in the parish indicted for not repairing it: *Held*: the indictment was bad.

(2) *Qu.*: whether likewise if the breadth does not appear.—*R. v. ALL SAINTS & ST. MARY* (INHABITANTS) (1735), Cunn. 159; *loc temp.* Hard. 105; 91 E. R. 1125; *subsequent proceedings, sub nom.* *R. v. ALL SAINTS, DERBY* (INHABITANTS) (1739), 2 Stra. 1110.

**1024.** — — — — — It is not necessary to set out the length or breadth of a nuisance, in an indictment for the nuisance.

It has been said that as the length & breadth of the nuisance [non-repair of a highway] are not set out with precision, this ct. cannot judge whether a proper fine was set; but this ct. will presume, that the ct. of quarter sessions did set a fine adequate to the length & breadth of the nuisance proved (*FOSTER, J.*).

According to some old cases, too much precision was, in my opinion, heretofore required in setting out the length & breadth of the nuisance in an indictment (*WILMOT, J.*).—*R. v. EAST LIDFORD* (INHABITANTS) (1756), Say. 301; 96 E. R. 887.

**1025.** — — — — — In 1891 a highway was closed by order of quarter sessions & a new highway was substituted for it. The certificate of the justices stated that the new highway was twelve yards wide, whereas in fact it was fourteen or fifteen yards wide. The new highway fell into disrepair. An order was then made under Highways & Locomotives Act, 1878 (c. 77), s. 10, & an indictment was preferred against the highway authority, defts. Notices were served on the frontagers by the highway authority under Public Health Act, 1875 (c. 55), s. 150, after the date of the order. The width of the road was not specified in the indictment. The jury found that the old road was a highway repairable by the inhabitants at large before 1835:—*Held*: on such finding judgment could be entered for the Crown. *R. v. CROMPTON URBAN DISTRICT COUNCIL* (1902), 80 L. T. 762; 66 J. P. 506; 20 Cox, C. C. 213, D. C.

**1026. Mode of user.**—*R. v. HATFIELD* (INHABITANTS), No. 55, *ante*.

**1027. Termini.**—In an indictment for non-repair of a highway, it is not necessary to state the termini; but, if they are stated, they must be proved. *R. v. ST. WEONARD'S* (INHABITANTS) (1831), 6 C. & P. 582.

*Annotation* *Reld.* *R. v. Stevenon* (1843), 1 Car. & Kir. 55.

**1028.** — — — — — (1) Indictment against a parish stated that, from time whereof the memory of man is not to the contrary, there was a Queen's common highway, leading from T. to E., used for all the hege subjects, etc.; that part of the same Queen's common highway, situate, etc., in the said parish, on, etc., & continually, etc., was & yet is out of repair; & that the inhabitants of the said parish ought to repair, etc. On the trial it appeared that the highway had been made within living memory: *Held*: no variance; for that, in an indictment against a parish, it was not material whether the way was immemorial or not; & the antiquity of the road was not so averred in the indictment as to become an essential part of the description.

(2) It appeared further that the way from T. to E. referred to in the indictment led from T. into the turnpike road from B. to C., then lay, for a short distance along that road, & then branched off to E. This was the direct way between T. & E.: *Held*: the way was properly described as from T. to E. *R. v. TURWESTON* (INHABITANTS) (1850), 16 Q. B. 109; 4 New Sess. Cas. 416; 20 L. J. M. C. 46; 16 L. T. O. S. 233; 11 J. P. 754; 15 Jur. 650; 4 Cox, C. C. 349; 117 E. R. 820.

*See, also*, No. 24, *ante*.

**1029.** — — — — — *Must be proved where stated.*—*R. v. ST. WEONARD'S* (INHABITANTS), No. 1027, *ante*.

**1030.** — — — — — *Averment of immemorialty Surplusage.*—*R. v. TURWESTON* (INHABITANTS), No. 1028, *ante*.

**1031. Situation of highway in district indicted.**—*R. v. ALL SAINTS & ST. MARY* (INHABITANTS), No. 1023, *ante*.

**1032.** — — — — — It [the highway] must be alleged to lie in the parish, otherwise the parish is not

road in repair, where the liability to repair is admitted: the special remedies given by the Act must be resorted to.

But where the dispute is, whether the part out of repair is part of defts. road, an indictment will lie.—*IL. r.*

*ORFOWA & GLOUCESTER ROAD CO.* (1878), 12 U. C. R. 478. **CAN.**

5.

bound to repair, & therefore, this presentment is clearly bad (LORD MANSFIELD, L.J.).—*R. v. HARTFORD (INHABITANTS)* (1779), 1 Cowp. 111; 98 E. R. 991.

**1033.** —.—.]—In an indictment for the non-repair of a highway, it must be affirmatively stated that the road is within the district which is bound to repair it. Stating a road to be out of repair "from & through" a place, excludes the terminus. *R. v. UPTON-ON-SEVERN (INHABITANTS)* 6 C. & P. 133; 2 Nev. & M. M. C. 153, N. P.

**1034.** —.—.]—*R. v. WAVERTON (INHABITANTS)*, No. 1013, *post*.

**1035. How liability arises.]**—An indictment against a borough for not repairing a way to a church, must state how bound to repair. *R. v. WARWICK CORPN.* (1682), 2 Show. 201; 89 E. R. 890.

**1036.** —.—.]—A presentment under 13 Geo. 3, c. 78, s. 24, against a smaller district than a parish, must state expressly how they are liable to the repair of roads. *R. v. PENDERLEYN (INHABITANTS)*, (1788), 2 Term Rep. 513; 100 E. R. 277.

*Annotation: Refd. R. v. Kingsmoor* (1823), 2 B. & C. 190.

**1037. ——— Liability to repair all highways with certain exceptions Highway must be shown to be not excepted.]** *R. v. LIVERPOOL CORPN.*, No. 890, *ante*.

**1038. Immemorial liability of township—Road otherwise repairable by parish.]** *R. v. KING-MOOR (INHABITANTS)*, No. 887, *ante*.

**1039.** —.—.—.]—(1) An indictment against a township for non-repair of a highway is not bad in law, if it aver a custom for the township to repair all public highways within it, not adding the words "which, but for such custom, would be repairable by the parish at large." For the unqualified allegation may be proved true.

(2) If there are any roads repairable *ratione tenuræ* or otherwise, it is for defts. to show it as a matter of evidence.

(3) If defts. mean to assert that any individuals are liable to repair the road in question *ratione tenuræ*, or otherwise (if it can be), they must plead that matter specially (LORD DENMAN, C.J.).—*R. v. HEAGE (INHABITANTS)* (1811), 2 Q. B. 128; 1 Gal. & Day. 518; 10 L. J. M. C. 115; 6 Jur. 367; 111 E. R. 51.

**1040.** —.—.—.]—An indictment against a township for the non-repair of a highway must aver that the road in question was a road which, but for the custom [an immemorial custom to repair], would have been repaired by the parish.

You cannot aid a deficient indictment by evidence (ALDERSON, B.). *R. v. COLLING* (1817), 9 L. T. O. S. 180; 2 Cox, C. C. 181.

**1041. Averment of liability to repair.]**—*R. v. ST. PANCRAZ (INHABITANTS)*, No. 1052, *post*.

**1042. Averment of non-repair.]**—*R. v. STRATFORD (OR STRETTFORD) (INHABITANTS)*, No. 1145, *post*.

**1043. ———.]**—An indictment for non-repair of a highway by the township of W., alleged in the first count that "a certain part of a highway, situate in W., leading from, etc., & containing in length one thousand three hundred & fifty-six yards, etc., in the township aforesaid, was ruinous & in decay," & that the inhabitants of the said

township were liable to repair it. The second count alleged that the parish was divided into townships, whereof W. was one, & that the inhabitants of W. had immemorially repaired such & so many of the highways situate within it as would otherwise be repairable by the parish at large, & "that the said part of the same common highway hereinbefore mentioned to be ruinous, etc., as aforesaid, was a highway which but for the said prescription would be repairable by the said parish at large, & that by reason of the premises the inhabitants of W. aforesaid ought to repair the same part of the said highway so being ruinous, etc., as aforesaid, when & so often as it hath & shall be necessary," & that defts. had not repaired same. Defts. were found not guilty on the first count & guilty on the second:—*Held*: the second count contained a sufficient reference to the first count, & after verdict, it sufficiently averred that the part of the road in question was out of repair, & that it was situate in the township of W.—*R. v. WAVERTON (INHABITANTS)* (1851), 17 Q. B. 502; 2 Den. 340; 21 L. J. M. C. 7; 18 L. T. O. S. 136; 15 J. P. 817; 16 Jur. 16; 5 Cox, C. C. 400; 117 E. R. 1396.

**1044. Averment of previous repair.]**—On an indictment against a township for non-repair of a common & ancient highway, it was proved that the lane had always been used as a common highway, but it was admitted that the township had never repaired this particular highway, & that it had been repaired by private persons occasionally:

*Held*: the highway being in use previous to Highway Act, 1835 (c. 50), s. 23, proof of repair by the township was not necessary to support a conviction.—*R. v. NEWBOLD (INHABITANTS)* (1869), 19 L. T. 656; 33 J. P. 115; 17 W. R. 295; 11 Cox, C. C. 231, C. C. R.

#### SUB-SECT. 4.—APPEARANCE.

**1045. Inhabitants.]**—*R. v. CLEPTON (INHABITANTS)*, No. 1014, *ante*.

**1046. ———.]**—*R. v. STAINHALL (INHABITANTS)* (1858), 1 F. & F. 363, N. P.

*Annotation: Refd. R. v. Haslemere* (1862), 7 L. T. 382.

**1047. Corporate body.]**—A corp. aggregate, or a railway co., are liable to be indicted for breaches of duty, such as the non-repair of bridges, which it is their duty to repair. If they are indicted in Queen's Bench they can appear by attorney, but if they are indicted at the assizes. *Semble*: they cannot appear there by attorney, but should apply for a writ of *certiorari*, & appear by attorney in Queen's Bench; & if they do not, there may be a distress *ad infinitum* against them.—*R. v. BIRMINGHAM & GLOUCESTER RY. CO.* (1840), 9 C. & P. 469; *subsequent proceedings* (1842), 3 Q. B. 223.

*Annotation: Apld. R. v. Stainhall* (1858), 1 F. & F. 363.

**1048. ———.]**—When two defts., members of a corporate body, entered into their recognisances to appear & plead to an indictment for non-repair of a highway, the judge ordered them to be discharged from such recognisances on the ground that they were entered into *per incuriam*.—*R. v. BURY IMPROVEMENT COMRS.* (1870), 11 Cox, C. C. 641.

*Sec, generally, CORPORATIONS, Vol. XIII., p. 421.*

#### PART VII. SECT. 2, SUB-SECT. 3.

##### 1041. Averment of liability to repair.]

—It is sufficient in an indictment for not repairing, to allege that defts. "ought of right" to repair, etc.,

without setting forth the particular ground of liability.—*R. v. ST. JOHN* (1828), N. B. Dig. 228.—*CAN.*

## SUB-SECT. 5.—EVIDENCE.

## A. In General.

## 1049. Similar liability of neighbouring township.]

—R. v. BARNOLDSWICK (INHABITANTS), No. 891, *ante*.

## 1050. Acts of predecessor.]—R. v. RAMSDALE (1851), 15 J. P. Jo. 723.

1051. Highway repaired by adjoining township—Insufficiency of consideration.]—R. v. ARDLEY (INHABITANTS), No. 898, *ante*.

*See, also*, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

## Admissibility of evidence—On particular pleas.]—

*See* Sect. 2, sub-sect. 6, *post*.

## B. Record of Previous Proceedings.

1052. Conviction—Whether conclusive—Of liability to repair.]—(1) An indictment against a parish for not repairing one side of the road, the other side lying in another parish, ought to state that each parish was liable to repair *ad medium filum viæ*, & not merely that a certain part of the road in breadth 15 feet was out of repair.

(2) A record of conviction on an indictment against a parish for not repairing a road is conclusive evidence of the liability of that parish to repair.—R. v. ST. PANCRAS (INHABITANTS) (1791), Peake, 280, N. P.

*Annotations* :—As to (2) *Consd.* R. v. Haughton (1853), 1 E. & B. 501. *Refd.* R. v. Derbyshire (1842), 6 Jur. 483; R. v. Blakemore (1852), 2 Den. 410.

## 1053. ———— Judgment by default.]—

*Semble* : judgment by default upon an indictment for non-repair of a highway, is not conclusive evidence against the parish of a liability on their part to repair such highway. R. v. WHITNEY (INHABITANTS) (1835), 3 Ad. & El. 69; 1 Har. & W. 117; 4 Nev. & M. K. B. 591; 3 Nev. & M. M. C. 417; 4 L. J. M. C. 86; 111 E. R. 339.

*Annotations* :—*Refd.* R. v. Haughton (1853), 1 E. & B. 501. *Mentd.* R. v. Lancaster County (1868), 32 J. P. 711.

1054. ———— Conviction of former owner.]—R. v. BLAKEMORE, No. 930, *ante*.

1055. ———— Conviction of parish—Effect on township.]—If to an indictment for not repairing a highway against a parish consisting of three townships, viz. A., B., & C. there is a plea on the part of C. that each of the three townships has immemorially repaired its own highways separately; the records of indictments against the parish generally, for not repairing highways situate in A. & B. with general pleas of not guilty & convictions thereupon, are *prima facie* evidence to disprove the custom for each township to repair separately; but evidence will be admitted that these pleas of not guilty were pleaded by inhabitants of A. & B. without the privity of the inhabitants of C.—R. v. EARDISLAND (1810), 2 Camp. 491.

*Annotations* :—*Consd.* R. v. Haughton (1853), 1 E. & B. 501. *Refd.* R. v. Ecclesfield (1818), 1 B. & Ald. 348.

1056. ———— That highway in township convicted.]—(1) Indictment for non-repair of a highway, against the inhabitants of the township of H., averring them to be liable by prescription to repair such highways in the township as the inhabitants of the parish, but for the prescription, would have been liable to repair, with averment that the highway was in the township. Plea: Not guilty. Prosecutors gave in evidence a record of a presentment by a justice, under 13 Geo. 3, c. 78, on his own view, that the road in question was out of repair; averring that it was in the township of H., & that the inhabitants of that township ought to repair it: the record showed a plea of guilty by two inhabitants of the township of H.,

a conviction before the sessions, & a sentence of fine:—*Held*: this conviction was conclusive evidence, against H., that the road was in that township; & though the presentment might be bad on error for not showing how the township was liable, the conviction, being before a competent tribunal & being unreversed, was not the less an estoppel.

(2) By a local & personal Act (since repealed) it was recited that the highway in question was in the township of D.: *Held*: the recital in the Act was not conclusive, & consequently did not open the estoppel. R. v. HAUGHTON (INHABITANTS) (1853), 1 E. & B. 501; 22 L. J. M. C. 89; 20 L. T. O. S. 247; 17 J. P. 585; 17 Jur. 455; 1 W. R. 164; 6 Cox, C. C. 101; 118 E. R. 523.

*Annotations* :—As to (1) *Apld.* R. v. Maybury (1861), 4 F. & F. 90. *Refd.* *Fevershan v. Emerson* (1855), 11 Exch. 385; *Petrie v. Nuttall* (1856), 25 L. J. Ex. 200; R. v. Hutchings (1881), 6 Q. B. D. 300; *Wakefield Corp. v. Cooke*, [1903] 1 K. B. 417. As to (2) *Refd.* *Morsey Docks & Harbour Board v. Cameron, Jones v. Mersey Docks & Harbour Board* (1865), 20 C. B. N. S. 56; *Merttens v. Hill*, [1901] 1 Ch. 842; *Great Torrington Commons Conservators v. Moore Stevens* (1903), 73 L. J. Ch. 124.

1057. ———— Against contrary recital in statute.]—R. v. HAUGHTON (INHABITANTS), No. 1056, *ante*.

1058. ———— Against award of Inclosure Commissioners.]—Upon the trial of an indictment against parish A. for the non-repair of a highway, it appeared that A. had always repaired the road in question, which passed over waste ground in the parish of B., & connected together two separate portions of A. In 1785, the inhabitants of A. submitted to an indictment for non-repair of the same road, & paid a fine. In 1788, Inclosure Comrs. acting under a statute for inclosing the commons, moors, & waste grounds within the parish of B., made an award, whereby they set out the road in question as situate in B. & to be repaired by B. No dispute as to the boundary of the two parishes was brought before the Comrs., nor did they assume to settle any question of boundary; but they acted under the power conferred upon them, of setting out public & private roads over the moors, commons, & waste grounds in B. After the award, as before, the inhabitants of A. continued to repair:—*Held*: (1) the former conviction was conclusive evidence against A. that the road was situate in that parish; (2) the Comrs., having no jurisdiction to set out a road not situate in B., their award did not shift the liability from A. to B.—R. v. NETHER HALLAM (INHABITANTS) (1851), 3 C. L. R. 91; 24 L. T. O. S. 109; 19 J. P. 165; 6 Cox, C. C. 435.

1059. ———— Of neighbouring parish—Admissible to prove highway.]—R. v. BRIGHTSIDE BIERLOW (INHABITANTS), R. v. ATTERCLIFFE-CUM-DARNAL (INHABITANTS), R. v. TINSLEY (INHABITANTS), No. 359, *ante*.

1060. ———— For non-repair of particular road—Whether admissible to prove liability as to all roads.]—R. v. LORDSMERE (INHABITANTS), No. 892, *ante*.

*See, further*, ESTOPPEL, Vol. XXI., pp. 159 *et seq.*; EVIDENCE, Vol. XXII., pp. 280 *et seq.*

1061. Admissions of former occupier—In previous award—Whether binding on owner.]—R. v. COTTON, No. 947, *ante*.

*See, further*, ESTOPPEL, Vol. XXI., pp. 187 *et seq.*; EVIDENCE, Vol. XXII., pp. 138 *et seq.*

1062. Order of justices apportioning highway—Whether conclusive of boundary.]—R. v. HICKLING (INHABITANTS), No. 986, *ante*.

*See, further*, EVIDENCE, Vol. XXII., pp. 297 *et seq.*

*Sect. 2.—Indictment: Sub-sect. 5, C.; sub-sects. 6, 7 & 8, A. & B.]*

*C. Reputation.*

**1063. When admitted—To prove highway—Map—Made upon information from deceased inhabitant.]**—On the trial of an indictment for the non-repair of a highway, a map of the parish, produced from the parish chest, which map was made under an inclosure Act (which was a private Act, not printed), is not receivable in evidence to show the boundaries of the parish, without proof of the inclosure Act; but it being proved by the surveyor who made the map thirty-four years before the trial, that he laid down the boundaries of the parish from the information of an old man, then about sixty, who went round & showed them to him: *Held*: on this proof, the map would have been receivable as evidence of reputation, if it had been also proved that the old man was dead at the time of the trial, but that it was not receivable at all without proof of his death.—*R. v. MILTON (INHABITANTS) (1813), 1 Carr. & Kir. 58.*

**1064. — — — Reports of deceased surveyor.]**—*NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN., No. 361, ante.*

*See, further, EVIDENCE, Vol. XXII., pp. 123 et seq.*

**SUB-SECT. 6.—PLEAS OF DEFENDANTS.**

**1065. General plea “Not guilty”—What evidence may be given Whether limited to evidence that road in repair.]**—*R. v. YARTON (INHABITANTS) (1663), 1 Sid. 140; 82 E. R. 1018; sub nom. R. v. YARENTON (INHABITANTS), 1 Keb. 277, 408, 511.*

**1066. — — —.]**—A parish indicted for non-repair of highways cannot, under a plea of not guilty, show that another parish, person, or precinct is bound to repair, for, if that be the case, it must be pleaded; but where a private person is indicted for not repairing, he may give in evidence that another is to repair, because he is not bound of common right as the parish is.

Indictment of a particular precinct or person for non-repair must show a liability by prescription or tenure.

If you plead not guilty it goes to the repair or not repair; but if you will discharge yourself you must do it by prescription, or *ratione tenuræ*, & say, that such a one *ratione tenuræ*, or such part of the parish, has always used time out of mind, etc. (*HALE, C.J.*). *R. v. ST. ANDREWS, HOLBOURN (1671), 3 Keb. 301; 1 Mod. Rep. 112; 80 E. R. 772; sub nom. ST. ANDREW'S HOLBOURN PARISH CASE, Freeman. K. B. 521; sub nom. ANON. 3 Salk. 183; 1 Vent. 256.*

*Annotations:—Refd. R. v. Norwich City (1719), 1 Stra. 177. Mentd. R. v. Haddock (1737), Andr. 137.*

**1067. — — —.]**—Indictment on 2 & 3 Ph. & M. c. 5, on not guilty, no evidence but repair.

The better opinion hath been, that you can give nothing in evidence upon not guilty, but that the ways are in repair (*HOLT, C.J.*).—*R. v. TERREL (1691), Comb. 312; 90 E. R. 498.*

**1068. — — —.]**—Evidence on indictment for not repairing highways. Upon an indictment against a parish for not repairing a highway, they can give nothing in evidence upon a not guilty, but that the way is in repair; but if it be against a particular person, he may give evidence, that others ought to repair it.—*R. v. IRETON (INHABITANTS) (1696), Comb. 396; 90 E. R. 551.*

**1069. — — — Transfer of liability by statute.]**—*R. v. ST. GEORGE, HANOVER SQUARE (INHABITANTS), No. 917, ante.*

**1070. — — — Right to repair.]**—Several persons were held entitled to costs under 5 Will. & Mar. c. 11, as prosecutors of an indictment, removed by *certiorari*, for not repairing a highway, one as constable of the manor within which the highway lay, the others as parties grieved, they having used the way for many years in passing & repassing from their homes to the next market town, & being obliged, by reason of the want of repair, to take a more circuitous route. Upon indictment against a parish for not repairing a highway, the right to repair may come in question, so as to entitle the parish to remove it by *certiorari*, though the parish plead not guilty only.—*R. v. TAUNTON, ST. MARY (INHABITANTS) (1815), 3 M. & S. 465; 105 E. R. 685.*

*Annotations:—Consd. R. v. Surrey JJ. (1870), L. R. 5 Q. B. 466. Refd. R. v. Monks Kirby (1852), 16 J. P. 324. Mentd. R. v. Middlesex JJ. (1832), 3 B. & Ad. 938; R. v. Nicholson (1899), 68 L. J. Q. B. 1031.*

**1071. — — — Evidence of liability of others—Indictment of parish.]** *R. v. ST. ANDREWS, HOLBOURN, No. 1066, ante.*

**1072. — — —.]**—*R. v. IRETON (INHABITANTS), No. 1068, ante.*

**1073. — — — Indictment of individual.]**—*R. v. ST. ANDREWS, HOLBOURN, No. 1066, ante.*

**1074. — — —.]**—*R. v. IRETON (INHABITANTS), No. 1068, ante.*

**1075. — — —.]**—*B. R. [King's Bench],* has concurrent jurisdiction with the sessions about repairing bridges.

If a man would discharge himself upon a particular account, he must plead it specially, but not where common right is his defence. If a man is charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue (*EXHE, J.*).—*R. v. NORWICH (CITY) (1719), 1 Stra. 177; 93 E. R. 458.*

*Annotations:—Refd. R. v. Cumberland County (1795), 6 Term Rep. 194; R. v. New Sarum (1815), 7 Q. B. 941; R. v. Southampton (1886), 17 Q. B. D. 421. Mentd. R. v. Cowle (1759), 2 Burr. 834.*

**1076. — — —.]**—*R. v. HEAGE (INHABITANTS), No. 1039, ante.*

**1077. — — —.]**—*R. v. LURGARSHALL (1851), 2 W. R. 411; 18 J. P. Jo. 278.*

**1078. — — —.]**—*R. v. LORDSMERE (INHABITANTS), No. 892, ante.*

**1079. — — — Evidence of non-liability.]**—*R. v. ST. ANDREWS, HOLBOURN, No. 1066, ante.*

**1080. — — —.]**—On a presentment against parishioners for non-repair of a common highway, defts. may plead the general issue, & give in evidence that the highway is in repair; but cannot show that they are not bound to repair, unless it is specially pleaded.—*HORNSEY (INHABITANTS) CASE (1691), 1 Mod. Rep. 38; 87 E. R. 248; sub nom. R. v. HORNSEY (INHABITANTS), Carth. 212; Holt, K. B. 338; 12 Mod. Rep. 13; 1 Show. 270, 291.*

*Annotation:—Refd. R. v. Norwich City (1719), 1 Stra. 177.*

**1081. — — —.]**—*R. v. NORWICH (CITY), No. 1075, ante.*

**1082. Indictment of tenant of lands encroached—What must be traversed—Tenure.]**—If a man is presented for not repairing a highway by reason of tenure of lands incroached, the tenure ought to be traversed, & not the incroachment.—*R. v. STROUGHTON (1670), 2 Saund. 157; 185 E. R. 896; sub nom. R. v. STAUGHTON, 2 Keb. 665; 1 Sid. 461.*

*Annotations:—Refd. Ex p. Armitage (1756), Ansb. 294; Lyme Regis Corpn. v. Henley (1832), 3 B. & Ad. 77; R. v. Heage (1841), 2 Q. B. 123; R. v. Isle of Ely (1850),*

14 Jur. 956; *R. v. Ramsden* (1858), 5 B. & E. 919; *Dawes v. Hawkins* (1860), 8 C. B. N. S. 848. *Mentd.* *R. v. Warden of the Fleet* (1700), 1 Eq. Cas. Abr. 120; *Freeman v. Read* (1863), 4 B. & S. 174; *Yeo v. Tatem, The Orient* (1871), L. R. 3 P. C. 696.

**1083.** — **Incroachment.]** — *R. v. STOUGHTON*, No. 1082, *ante*.

**1084. Plea asserting liability on others—Must specify part repairable by each.]**—To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; & that part of the highway indicted was within the township of G., etc., & that the residue, etc., was within the township of L., etc., & that the respective parts ought to be repaired by the inhabitants of the respective townships, etc., is bad; without specifying what part of the highway lay within one township, & what part within the other. — *R. v. BRIDGKIRK (INHABITANTS)* (1809), 11 East, 301; 103 E. R. 1021.

*Annotations:* — *Consd.* *R. v. Ecclesfield* (1818), 1 B. & Ald. 348. *Refd.* *R. v. Heage* (1811), 10 L. J. M. C. 115.

**1085.** — **Whether consideration must be shown.]**—*R. v. ECCLESFIELD (INHABITANTS)*, No. 836, *ante*.

**1086.** — **Must show what party other than defendants liable.]**—Indictment, alleging that a public highway within a parish is out of repair, & that the parish ought to repair it. Plea, that the highway lies in a township within the parish; that the inhabitants of the township have been accustomed, & ought, to repair all public highways within it which otherwise would be repairable by the parish at large; that the parishioners never have repaired the said highway; & that, by reason of the premises, the township ought to repair, & the parish ought not to be charged. Replication, traversing the custom for the township to repair all public highways within it which would otherwise, etc. Verdict for defendants. Judgment arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, & so did not show what party other than defendants was liable to repair. Judgment for the Crown *non obstante veredicto*, refused. *R. v. EASTINGTON (INHABITANTS)* (1836), 5 Ad. & El. 765; 2 Har. & W. 373; 1 Nev. & P. K. B. 193; 6 L. J. M. C. 17; 111 E. R. 1355.

**1087. Plea asserting liability of particular district—Admission that road a highway.]**—To an indictment for not repairing a highway, a plea that the inhabitants of a particular district ought to repair it, is an admission that the way is a highway. — *R. v. BROWN* (1710), 11 Mod. Rep. 273; 88 E. R. 1030.

*Annotation:* — *Mentd.* *R. v. Lloyd* (1733), 2 Barn. K. B. 378.

#### SUB-SECT. 7.—CERTIORARI.

**1088. Removal for trial Corporate body Indicted at assizes.]**—*R. v. BIRMINGHAM & GLOUCESTER RY. CO.*, No. 1017, *ante*.

**1089.** — **—**—*R. v. NORFOLK COUNTY COUNCIL* (1909), 73 J. P. Jo. 528, D. C.; *subsequent proceedings* (1910), 26 T. L. R. 269.

—*See, also.* CROWN PRACTICE, Vol. XVI., pp. 406, 410, 411, 453, Nos. 2535, 2632, 2635, 2689, 3245.

**Writ to quash proceedings.]**—*See* CROWN PRACTICE, Vol. XVI., p. 424, No. 2839.

#### SUB-SECT. 8.—TRIAL AND APPEAL.

##### A. In General.

**Compromise—Legality of agreement.]**—*See* CONTRACT, Vol. XII., p. 260, No. 2127.

— **No action maintainable on agreement to compromise.]**—*See* CONTRACT, Vol. XII., p. 260, No. 2127.

**1090. Reference of indictment—Legality of.]**—When the subject-matter of an indictment of a public nature was referred before trial, & it was agreed that a verdict in conformity with the award should be entered on the application of either party:—*Held:* the indictment itself was virtually referred; the reference was illegal, & an attachment for not paying the costs directed to be paid by the award ought not to issue. — *R. v. BLAKEMORE* (1850), 14 Q. B. 511; 16 L. T. O. S. 233; 4 Cox, C. C. 352; 14 J. P. Jo. 733; 117 E. R. 210.

**1091.** — **—**—*R. v. WADHURST* (1861), *Times*, Mar. 21.

##### B. Judgment and Fine.

**1092. Fine How calculated—Length & width of road.]** *R. v. EAST LIDFORD (INHABITANTS)*, No. 1021, *ante*.

**1093.** — **Sum requisite for repair.]**—*R. v. CLAXBY (INHABITANTS)*, No. 788, *ante*.

**1094.** — **Nominal sum.]** An indictment against a parish for not repairing, will not be quashed on an affidavit that the way is now in repair, but deft. must plead guilty & pay a nominal fine.

As you admit by your application [to quash the indictment] the liability to repair, & that the road was out of repair, you should take a rule nisi, why defendants should not be discharged, on pleading guilty & paying a small fine (BAYLEY, J.). — *R. v. LINCOMBE* (1816), 2 Chit. 211.

**1095.** — **—** Upon a verdict of guilty being returned against the inhabitants of a parish for the non-repair of a road, & a rule being obtained to impose a substantial fine: upon its appearing afterwards that the road had been substantially repaired, the ct. made the rule absolute for a nominal fine of 6s. 8d. & discharged the indictment. *R. v. MORTON, DORSET (INHABITANTS)* (1850), 15 L. T. O. S. 117; 14 J. P. Jo. 320.

**1096.** — **—** *R. v. LIVERPOOL CORPN.* (1859), 23 J. P. Jo. 85.

**1097.** — **Appropriation of To repairs unexecuted at time of conviction.]** A fine upon a conviction for non-repair of a highway cannot, under Highway Act, 1835 (c. 50), s. 90, be applied to the cost of repairs already completed, but only to the repair of defects existing at the time. — *R. v. BARNARD CASTLE (INHABITANTS)* (1841), Arn. & H. 146; 10 L. J. M. C. 53; 5 J. P. 275; 5 Jur. 799; *previous proceedings* (1810), 12 Ad. & El. 428, n.

*Annotation:* — *Refd.* *R. v. Oxford & Witney Turnpike Roads Trustees* (1810), 12 Ad. & El. 127.

**1098.** — **Levied on inhabitant not liable to contribute—Repayable out of rate levied on district liable—Mandamus.]** If a parish, consisting of two districts, which are bound to repair separately, be convicted for not repairing the road in one of the districts, the other district having no notice of the indictment, the ct. will consider it as being substantially the conviction of the one district, & if the fine be levied on an inhabitant of the other, will grant a special *mandamus* for a rate to be levied on the district bound to repair the indicted part of the road. — *R. v. TOWNSHEND* (1780), 2 Doug. K. B. 420; 99 E. R. 270.





**1118. Suspension of judgment.]—***R. v. WANDSWORTH (INHABITANTS)*, No. 417, *ante*.

**1119. ———.]—***R. v. SUTTON*, No. 1110, *ante*.  
*See, also*, No. 1721, *post*.

#### *D. Costs.*

*See Costs in Criminal Cases Act, 1908 (c. 15); & generally, CRIMINAL LAW, Vol. XV., p. 615, Nos. 6427–6434.*

### SECT. 3.—STATUTORY REMEDIES.

#### SUB-SECT. 1.—HIGHWAYS IN GENERAL; COMPLAINT TO JUSTICES.

**1120. Report of person ordered to view—Whether binding on justices.]—**When an information is laid under Highway Act, 1835 (c. 50), s. 94, that a highway is out of repair, & the magistrates, pursuant to that sect., appoint a viewer who reports it out of repair, the magistrates at the special sessions are not bound by that report, but may exercise their discretion whether they will convict the surveyor or not.—*R. v. WILTSHIRE J.J.* (1840), 8 Dowl. 717.

*Annotation: Refd. R. v. Arnould, (etc., Berkshire J.J. (1857), 22 J. P. 545.*

**1121. Jurisdiction of justices—Form of order.]—**Where justices in special sessions make an order under Highway Act, 1835 (c. 50), ss. 94, 95, directing an indictment for the non-repair of a highway to be preferred against the inhabitants of a parish, the duty or obligation to repair having been denied by the surveyor on behalf of the inhabitants of the parish on the hearing of a summons under sect. 94, such order must show on the face of it that the special session is held within the special sessions' division in which the highway is situate; &, if this be omitted, any order of quarter sessions on defts. for the costs of such prosecution is wholly void, even though it should appear by recital on the record of quarter sessions that the special sessions were held within the proper division, & though in fact they were so held.—*R. v. MARTIN* (1843), 2 Q. B. 1037, n.; 1 Dav. & Mer. 386; 13 L. J. M. C. 45; 2 L. T. O. S. 167; 8 J. P. 408; 8 Jur. 30; 114 E. R. 403.

*Annotations:—Refd. R. v. Hickling (1845), 6 L. T. O. S. 123. Mentd. R. v. Buckinghamshire J.J. (1815), 1 L. T. O. S. 341; R. v. Heyop (1840), 8 Q. B. 517; Wray v. Toke (1848), 12 Q. B. 492.*

**1122. ———.]—***R. v. HICKLING (INHABITANTS)*, No. 986, *ante*.

**1123. ———.]—Whether express averment necessary.]—**(1) A judge's order for costs of the prosecution of an indictment for non-repair of a highway under the general Highway Act, 1835 (c. 50), s. 45, should state on the face of it, out of what fund the costs are to be paid; & where it did not do so, the ct. set the order aside. *Semble*: it should also state the amount.

(2) *Semble*: it need not appear by express averment, if it may be gathered by reasonable implication, that the highway in respect of which the indictment is preferred, is within the division, for which the justices in special sessions were sitting, who ordered the indictment to be preferred.—*R. v. WATFORD (INHABITANTS)* (1847), 4 Dowl. & L. 598; 1 Saund. & C. 336; 9 L. T. O. S. 59; 11 Jur. 332; 2 Cox, C. C. 219.

*Annotation:—As to (1) Refd. R. v. Eardisland (1854), 3 E. & B. 960.*

**1124. ———.]—Conditions necessary.]—**(1) To give justices jurisdiction to make an order for the repair of a highway, or to indict the parish where the liability to repair is denied, two facts must exist—

the road in question must be a highway, & it must be out of repair.

(2) Where the liability of a parish to repair a road has been denied, & an indictment preferred under Highway Act, 1835 (c. 50), ss. 94, 95, & a verdict of not guilty found in favour of the parish, the justices are not bound to direct a second indictment on a fresh information before them, under the sects.—*Ex p. BARTLETT* (1860), 3 E. & E. 253; 30 L. J. M. C. 65; 121 E. R. 436; *sub nom. R. v. SOMERSETSHIRE J.J.*, 3 L. T. 316; 25 J. P. 21; *sub nom. Ex p. BENNETT*, 6 Jur. N. S. 1190; 9 W. R. 54.

*Annotations:—As to (1) Consd. R. v. Farrer (1866), L. R. 1 Q. B. 558. Refd. Loughborough Highway Board v. Curzon (1886), 2 T. L. R. 263.*

**1125. ———.]—To order indictment—Whether discretionary.]—**An indictment for non-repair of a highway was preferred by G. against the parish at the quarter sessions in pursuance of an order of three justices at a special sessions for highways. The parish pleaded, & the jury found, that the occupier of farm A. was liable to repair *ratione tenure*. G. applied for his costs of the prosecution under Highway Act, 1835 (c. 50), s. 95, but the sessions refused to give them, on the ground that G., one of the magistrates who made the order for preferring the indictment, was the owner of farm A. Before the order was given, G. had summoned the surveyor of the parish before the special sessions. No question was made but that the road was a highway & out of repair. The surveyor simply denied the liability of the parish to repair it, but did not suggest who was liable, & thereupon L. & the two other justices signed the order: *Held*: when the surveyor of the parish simply denies the liability of the parish to repair a highway within it which is out of repair, it is imperative on the special sessions under the above sect. to order an indictment to be preferred. *R. v. SURREY J.J.* (1852), Bail. Ct. Cas. 70; 21 L. J. M. C. 195; 16 Jur. 641; *sub nom. Re ARINGER (INHABITANTS)*, *R. v. SURREY J.J.*, 19 L. T. O. S. 171; 16 J. P. 407.

*Annotations:—Refd. R. v. Arnould, (etc., Berkshire J.J. (1857), 22 J. P. 545; R. v. Farrer (1866), L. R. 1 Q. B. 558.*

**1126. ———.]—**Under Highway Act, 1835 (c. 50), s. 95, if a party charged before magistrates with liability to repair a highway which is out of repair deny the liability, the magistrates must direct an indictment to be preferred. They have no discretion as to this: &, if they refuse, a *mandamus* will be issued commanding them to make the order, although evidence was tendered, before the magistrate, to show that the alleged highway was set out under an Inclosure Act, & had not been declared, in compliance with 41 Geo. 3, c. 109, s. 9, to be complete; & although the same facts are deposited to in answer to the application for the *mandamus*. *R. v. ARNOLD* (1857), 8 E. & B. 550; 27 L. J. M. C. 92; 22 J. P. 545; 4 Jur. 162; 120 E. R. 205; *sub nom. R. v. BERKS J.J.*, 30 L. T. O. S. 149; 6 W. R. 61.

*Annotations:—Distd. Ex p. Bartlett (1860), 3 E. & E. 253; R. v. Farrer (1866), L. R. 1 Q. B. 558.*

**1127. ———.]—Parish acquitted on previous indictment.]—***Ex p. BARTLETT*, No. 1124, *ante*.

**1128. ———.]—Limited to admitted highway—Necessity for preliminary inquiry.]—**Where, on the hearing of a summons against the surveyors of a parish for the non-repair of a highway, the surveyors deny the duty of the parish to repair, on the ground that the alleged highway is not a highway, the justices cannot proceed to make an order under Highway Act, 1835 (c. 50), s. 95, that an indictment be preferred, without making any inquiry as to whether the road be a highway.—



*Sect. 3.—Statutory remedies: Sub-sects. 1 & 2, A. & B.; sub-sect. 3.]*

*R. v. ASKERTON PARISH* (1865), 5 New Rep. 305; 11 L. T. 706; 13 W. R. 339; *sub nom.* *R. v. JOHNSON*, 34 L. J. M. C. 85; 29 J. P. 517; 11 Jur. N. S. 407.

*Annotations:—Distd. R. v. Farrer* (1866), L. R. 1 Q. B. 558. *Refd. Loughborough Highway Board v. Curzon* (1886), 2 T. L. R. 263.

**1129.** — — — — —.]—The jurisdiction of justices under Highway Act, 1862 (c. 61), s. 19, is limited to admitted highways: & justices have no jurisdiction to order an indictment to be preferred where it is *bonâ fide* denied by the parties charged that the road is a highway, & the liability to repair the road, if it is a highway, is not denied. — *R. v. FARRER* (1866), L. R. 1 Q. B. 558; 7 B. & S. 551; 35 L. J. M. C. 210; 14 L. T. 515; 30 J. P. 469; 12 Jur. N. S. 622; 14 W. R. 777; 10 Cox, C. C. 261.

*Annotations:—Apd. R. v. Odell* (1869), 21 L. T. 556. *Distd. R. v. Chesire JJ.* (1883), 50 L. T. 183. *Refd. Loughborough Highway Board v. Curzon* (1886), 16 Q. B. D. 565.

**1130.** — — — — —.]—The justices have no jurisdiction under Highway Act, 1862 (c. 61), s. 18, to order a highway board to repair a highway if the waywarden of the parish deny the fact that such road is a highway; & although the denial, if not made *bonâ fide*, will not oust their jurisdiction if they are satisfied that the road is really a highway, yet their decision that the denial is not made *bonâ fide* is not conclusive, & may be reviewed by this ct.—*R. v. ODELL (INHABITANTS)* (1869), 21 L. T. 556; 34 J. P. 531.

**1131.** — — — — —.]—*Ex p. WALKER* (1899), 43 Sol. Jo. 333, D. C.

**1132. Who must be indicted Inhabitants.]**—A prosecutor had obtained a summons under Highway Act, 1835 (c. 50), s. 91, calling on the parish surveyors to show cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, & the magistrates, under sect. 95 of the Act, ordered an indictment against the inhabitants of the parish, which was preferred & was tried as a traverse on the Crown side of the assizes, & defts. found guilty. — *R. v. YARKHILL (INHABITANTS)* (1839), 9 C. & P. 218.

**1133. Not highway authority.]** Where proceedings are taken before justices for the non-repair of a highway in a parish forming part of a highway district under Highway Act, 1862 (c. 61), a *bonâ fide* admission by the waywarden of the parish that the road is a highway which the parish is bound to repair is binding on the highway board, & it is not competent for them after such an admission to deny these facts so as to oust the jurisdiction of the justices.

It was argued that the expression, "or the party charged therewith," in sect. 19 of the Act of 1862, being large enough to include the highway board, was meant to apply to it, & had rendered the board indictable under that Act. But a careful consideration of the enactments shows that this is not so. Highway Act, 1835 (c. 50), s. 95, directed a summons to issue against the surveyor, if the parish was alleged to be liable, against the party chargeable, if the liability was alleged to be in some one else; & sect. 95 directed that if the liability to repair were disputed by the surveyor on behalf of the parish the justices should order an indictment against the parish—if it were disputed by any other party (which means the party summoned as liable) an indictment should be preferred against him. Sect. 19 of the Act of 1862 alters the

procedure in case of parochial liability by substituting the board & the waywarden (upon each of whom had devolved a part of the duties of the surveyor) as the parties to be summoned instead of the surveyor. It does not deal with the case of any other party alleged to be chargeable as to whom no alteration was necessary. But sect. 19 alters the jurisdiction of the ct. before whom the indictment is tried as to costs, & sect. 19 accordingly deals with both cases—that of an indictment against the parish & that of an indictment against some other person alleged to be liable. The two possible cases of liability dealt with are those of the inhabitants, who are clearly treated as still the persons liable to indictment, notwithstanding the existence of the highway board, & (where the parish is not liable), the person who may be so. The contrast is certainly not between the inhabitants of the parish & the highway board. This is a very material consideration in dealing with the subsequent legislation, because by the Act of 1862 all independent action in the matter of repairs was taken from the parish, & yet the liability to indictment—and the sole liability to indictment—as well as the right of the elected representative of the parish to admit or deny on behalf of the parish both the fact of the road being a highway & the liability of the parish to repair were preserved (WILLS, J.). *LOUGHBOROUGH HIGHWAY BOARD v. CURZON* (1886), 16 Q. B. D. 565; 55 L. J. M. C. 122; 54 L. T. 168; 50 J. P. 101; 34 W. R. 319; 2 T. L. R. 263, D. C.; *affd.*, 17 Q. B. D. 344, C. A.

*Annotations:—Refd. R. v. Poole Corpn.* (1887), 19 Q. B. D. 602. *Mentd. Payne & Wright* (1892), 61 L. J. M. C. 114.

**1134.** — — — — —.]—(1) Justices have no power to make an order under Highway Act, 1835 (c. 50), s. 95, or under Highway Act, 1862 (c. 61), s. 19, that an indictment should be preferred against a rural district council, for non-repair of a highway, & an indictment preferred on such order is bad.

(2) *Seemle*: an indictment preferred by order of justices should contain an averment that it is so preferred.—*R. v. BIGGLESWADE RURAL DISTRICT COUNCIL* (1900), 61 J. P. 142.

**1135. Order to repair disobeyed—Second order to pay expenses to person named—Appeal from second order Grounds of appeal.]**—A complaint having been made to justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view & report on the state of the roads in question. The report was duly made, & the justices, upon the evidence & admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; & the justices appointed such land surveyor to put the highway in repair, & ordered the board to pay the expenses. At several hearings before the justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to quarter sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal: that the justices had no jurisdiction to make the order; that the order was contrary to law; that the order was contrary to the evidence; that the justices wrongfully admitted evidence of witnesses other than the person appointed by them under Highway Act, 1862 (c. 61), s. 18; that at the time of the making of the order the highways had been put into a state of complete & effectual repair; that the sum mentioned in the order to be spent in putting the roads into repair was excessive; that the highway

board was & is not liable to repair the highways, & that the liability to repair the highways was at all the hearings before the justices recited in the order, & also at the time of the hearing when the order was made, & at the time of the making thereof, disputed. Upon the appeal it was contended on behalf of the board that the roads in question were not highways, & the order was quashed on that ground:—*Held*: (1) the highway board were entitled to appeal to quarter sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways, because they were estopped by their admissions before the justices, because their grounds of appeal gave no notice that the point would be taken, & because the question was not open to them when the order appealed against was made; (2) the quarter sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. —*ILLINGWORTH v. BULMER EAST HIGHWAY BOARD* (1883), 52 L. J. Q. B. 680; 48 J. P. 37, D. C.; *affd.* (1884), 53 L. J. M. C. 60, C. A.

**1136. Effect of Highways & Locomotives Amendment Act, 1878 (c. 77), s. 10—Whether procedure altered.**—The procedure under Highway Act, 1835 (c. 50), has not been impliedly repealed by Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 10 (*per CUR.*). —*R. v. MORSE* (1901), 48 Sol. Jo. 525, D. C.

#### SUB-SECT. 2.—HIGHWAYS REPAIRABLE BY INHABITANTS AT LARGE.

##### A. Complaint by County Council.

See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 10.

**1137. Default of highway authority—Order by county council to repair—Whether mandamus lies to compel order—Bonâ fide denial that road is highway.**—Complaint having been made under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 10, to a county authority that the highway authority of a highway area within their jurisdiction had made default in repairing certain highways within their jurisdiction, the county authority were, after due inquiry & report by their surveyor, of opinion that it was *bonâ fide* denied by the highway authority that the ways were highways, & thereupon held that according to *R. v. Farrer*, No. 1129, *ante*, they had no jurisdiction to make an order:—*Held*: by the terms of the sect. it was the duty of the justices to make an order, & a *mandamus* must issue ordering them so to do.—

*R. v. CHESHIRE JJ.* (1883), 50 L. T. 483; 48 J. P. 262, D. C.

*Annotation*:—*Distd. Ex p. Johnson* (1886), 2 T. L. R. 619.

**1138. ————— Justices satisfied that road not highway.**—On an application for a *mandamus* to justices to make an order under Highways & Locomotives Act, 1878 (c. 77), s. 10, for the repair of a certain road:—*Held*: the justices, having been satisfied that the way was not a public highway, though this had not been disputed before them, had rightly refused to make the order. —*Ex p. JOHNSON* (1886), 2 T. L. R. 619, D. C.

**1139. ————— Justices not satisfied that road is highway.**—*R. v. DORSET COUNTY COUNCIL* (1902), 67 J. P. 19, D. C.

**1140. Indictment—Against whom preferable.**—Highways & Locomotives Act, 1878 (c. 77), creates a new mode of testing the liability of the authority responsible for the repair of highways, instead of the old procedure by indictment against the parish, & an indictment for non-repair of a highway will lie against an urban sanitary authority acting as the highway authority by virtue of sect. 10 of that Act. —*R. v. WAKEFIELD CORPN.* (1888), 20 Q. B. D. 810; 57 L. J. M. C. 52; 52 J. P. 422; 36 W. R. 911; 16 Cox, C. C. 439, D. C.

**1141. Form of order Repair “to satisfaction of surveyor”—Surplusage.**—Defts. were indicted under Highways & Locomotives (Amendment) Act, 1878 (c. 77), for the non-repair of a certain highway. The order made by the county council upon defts., directed the repairs to be done to the satisfaction of the county surveyor. It was objected that an order in these terms was not warranted by the sect., & therefore vitiated the indictment: *Held*: anything in the order inconsistent with sect. 10 of the Act should be ignored, & the objection was accordingly overruled. —*R. v. SOUTHPORT CORPN.* (1900), 65 J. P. 181.

##### B. Complaint by Parties or other Council.

**1142. Inquiry by county council Right of rural district council to be heard.**—*R. v. HUNTINGDONSHIRE COUNTY COUNCIL* (1902), County Council Times Supplement 44; cited in Halsbury's Laws of England, Vol. XVI. p. 150, n.

#### SUB-SECT. 3.—HIGHWAYS REPAIRABLE RATIONE TENURÆ.

See Local Government Act, 1891 (c. 73), s. 25 (2).

**1143. Repair by county council—Recovery of expenses—Jurisdiction of county court.**—*BARNSTAPLE RURAL DISTRICT COUNCIL v. RUDD* (1897), 103 L. T. Jo. 11.

## Part VIII.—Powers, Duties and Liabilities of Highway Authorities.

### SECT. 1.—POWERS AND DUTIES.

#### SUB-SECT. 1.—IN GENERAL.

**1144. Effect of Highway Act, 1835 (c. 50).—Whether powers transferred.]**—Above Act does not vest in any board constituted under it any of the powers which may have been possessed by any of the preceding boards or authorities.—*CROFT v. RICKMANSWORTH HIGHWAY BOARD* (1888), 39 Ch. D. 272; 58 L. J. Ch. 14; 60 L. T. 34; 4 T. L. R. 706, C. A.

*Annotations:—Mentd. Meader v. West Cowes L. B.*, [1892] 3 Ch. 18; *Croysdale v. Sunbury-on-Thames U. C.*, [1898] 2 Ch. 515; *A.-G. Copeland*, [1902] 1 K. B. 690.

#### SUB-SECT. 2.—WIDENING AND IMPROVEMENT OF HIGHWAYS.

**1145. Liability of local authority for narrow road.]**—An indictment for not repairing a highway, stating that it was "so narrow, dirty & clayey, that people could not pass," is insufficient.—*R. v. STRATFORD (OR STRETFORD) (INHABITANTS)* (1705), 11 Mod. Rep. 50; 2 Ld. Raym. 1169; 88 E. R. 883; *sub nom. R. v. STRATTON (INHABITANTS)*, *Fortes*, Rep. 253.

*Expld. R. v. Devon* (1825), 4 B. & C. 670.

**1146. Statutory powers—Removal of fence in front of house.]**—A surveyor of highways is not authorised under Highway Act, 1772 (c. 78), ss. 6 & 64, to remove a fence in front of a house for the purpose of widening the road, which in that part was not more than twenty-four feet in breadth unless the fence be on the highway.—*LOWEN v. KAYE* (1825), 4 B. & C. 3; 3 Dow. & Ry. M. C. 170; 6 Dow. & Ry. K. B. 20; 3 L. J. O. S. K. B. 123; 107 E. R. 900.

*Annotation:—Fold. Evans v. Oakley* (1843), 7 J. P. 660.

**Utilisation of burial ground.]**—*See BURIALS*, Vol. VII., pp. 555 et seq.

**Prevention of obstructions to view at corners.]**—*See Roads Improvement Act*, 1925 (c. 68), s. 4.

**1147. Compulsory acquisition—Whether limited to land actually required.]**—Defts., being the Local Board of Health for Bristol, were empowered by an order of the Secretary of State confirmed by Act of Parliament, to take certain lands & houses specified in the schedule, for the

purpose of widening & improving a street; & served the usual notices to treat under the Lands Clauses Act upon plffs. Plffs. filed their bill to restrain defts. from taking more of the property comprised in the schedule than was actually required for the purpose of widening the street:—*Held: defts. required this property for the improvement of the town, from which no profit or compensation was obtained, they were not confined, like railway cos., to the narrow limits of the property actually required for the purpose specified, but were at liberty to purchase all the property included in the schedule.*—*QUINTON v. BRISTOL CORPN.* (1874), L. R. 17 Eq. 524; 43 L. J. Ch. 783; 30 L. T. 112; 38 J. P. 516; 22 W. R. 431.

*Annotations:—Consd. Bristol Grdns. v. Bristol Corpn.* (1887), 18 Q. B. D. 549; *Donaldson v. South Shields Corpn.* (1899), 79 L. T. 685. *Refd. Conron v. L. C. C.*, [1922] 2 Ch. 283.

**1148. Surface of road improved—Inhabitants benefited—Incidental benefit to particular class.]**—A borough corpn. as highway authority, expended a large sum of money upon altering & paving a road, which was thereby permanently improved. The corpn. *bono fide* decided that it would be right & proper so to alter & improve the road under the powers conferred on them by Public Health Act, 1875 (c. 55), s. 149; but they decided to do the work at the particular time when it was done in order that the Automobile Club might be induced to use this road for proposed motor trials and races:—*Held: the ct. could not interfere with the exercise by the corpn. of their powers under the Act, & a writ of certiorari ought not to be granted for the purpose of disallowing the expenditure.*—*R. v. BUGHTON CORPN., Ex p. SHOOSMITH* (1907), 96 L. T. 762; 71 J. P. 265; 23 T. L. R. 410; 51 Sol. Jo. 409; 5 L. G. R. 584, C. A.

**1149. Compensation—Right of owner to subtraction of bank—Partial removal of bank by roadside.]**—Surveyor of highway is liable in case to reversioner, for subtraction of a portion of his bank by the road side, although the property is the better for what the surveyor has done.—*ALSTON v. SCALES* (1832), 9 Bing. 3; 2 Moo. & S. 5; 1 L. J. M. C. 95; 131 E. R. 515.

*Annotation:—Refd. Holliday v. St. Leonard, Shoreditch, Vestry* (1861), 11 C. B. N. S. 192.

(1876), 39 U. C. R. 313.—*CAN.*

*d. -- Width of highway—In Manitoba R. S. C.*, 1906 (c. 99), s. 9.—In authorising the surveyor to survey a road through plff's property, the Surveyor-General had directed him to make the road 99 feet wide. This was done & an Order-in-Council approved the survey & transferred & vested the road in the Province of M. for a public highway. The road was only 66 feet wide for many years prior to the survey:—*Held: the Surveyor-General had no authority to make the road of a greater width than it had been & the approval of the survey by the Dominion Govt. could not deprive deft. of any land, & he was not bound to move his fence back so as to make the road wider than 66 feet.*—*ST. VITAL RURAL MUNICIPALITY v. MAGER* (1909), 19 Man. L. R. 293.—*CAN.*

*e. ———.—Rowland v. City of Edmonton* (1915), 31 W. L. R.

### PART VIII. SECT. 1, SUB-SECT. 1.

**1. Effect of Highway Act.]**—Looking to the context & general scope of the Highway (Scotland) Act, 1771 & to the fact that the powers therein conferred were to be exercised for the benefit of the public, the words in sect. 1 though permissive in form, were in effect imperative.—*GRAY v. ST. ANDREWS & CUPAR D. CO.*, [1911] S. C. 268; 48 Sc. L. R. 409.—*SCOT.*

**a. Distinction between English & Colonial Law.]**—The Govt. of a new country, when forming for the first time a practicable road upon land which has been dedicated as a highway, is not bound by the rules which govern private persons who interfere with the surface of an ancient highway, as that term is understood in England. They are not bound to make the surface absolutely safe, nor are they liable for accidents which are due to mere imperfections in the road, or to non-repair they are only bound to exercise,

in the construction of the roadway, such care to avoid danger to persons using it as is reasonable in the circumstances.—*MILLER v. McKEON* (1905), 3 C. L. R. 50.—*AUS.*

**b. Municipal corporation—Duty to repair.]**—Where a municipal authority assumes the duty of constructing or repairing a street, they must take care & leave the work they do upon it in such condition as not to be dangerous to any one who may use it.—*CLARKE v. TOWN OF PORTLAND* (1879), 19 N. B. R. 189.—*CAN.*

### PART VIII. SECT. 1, SUB-SECT. 2.

**c. Statutory powers—To level, raise, or lower streets.]**—The power given by Municipal Act, 1873, s. 425, ss. 1, to improve repair, widen, & alter streets, includes the power, when necessary for these purposes to level, raise, or lower the streets.—*LEWIS v. CITY OF TORONTO CORPN.*

**1150. — Assessment by jury—Necessity for notice to owners.]**—Under a turnpike Act the trustees had power to turn roads through private grounds, making satisfaction to the owners; & if they could not agree, they were enabled on giving notice to the owners, to summon a jury to ascertain the damage & to order such sum, so ascertained to be paid to the owners. This ct. quashed an inquisition of the jury & an order of the trustees under this Act, because it did not appear on the face of the proceedings that any notice had been given to the owners of the land.—*R. v. BAGSHAW* (1797), 7 Term Rep. 363; 101 E. R. 1022.

*Annotations:—*Consid. *R. v. Norwich & Watton Road Trustees* (1836), 5 Ad. & El. 563; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610. *Reid. R. v. Swansea Harbour Trustees* (1881), 6 Q. B. D. 376.

**1151. — — — — —]**—Where the value of several interests is to be assessed by the jury impanelled under Turnpike Act, 1822 (c. 126), s. 85, an inquisition finding one gross sum only, is invalid. An inquisition having been taken, & the jury having returned their verdict:—*Held*: it was not premature to remove that inquisition by *certiorari* before the trustees had made any order upon it.

*Semble*: the notice required to be given to the parties interested previous to the summoning of the jury, should appear in the inquisition.—*R. v. NORWICH & WATTON ROAD TRUSTEES* (1836), 5 Ad. & El. 563; 2 Har. & W. 385; 1 Nev. & P. K. B. 32; 6 L. J. K. B. 41; 111 E. R. 1278.

*Annotations:—**Reid. R. v. Bristol & Exeter Ry.* (1838), 11 Ad. & El. 202, n.; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610.

**1152. — — — — — Validity—Several Interests assessed at lump sum.]**—*R. v. NORWICH & WATTON ROAD TRUSTEES*, No. 1151, *ante*.

#### SUB-SECT. 3. AS TO DITCHES AND DRAINS.

**1153. Cleaning & keeping open—Whether liability on authority or adjoining owner—At common law.]**—He who has the land adjoining, ought of common right without prescription to scour & cleanse the ditches, next to the way to his land. But he who has land adjoining without prescription, is not bound to repair the way. So of a common river, of common right, all who have ease & passage by it, ought to cleanse & scour it; for a common river is as a common street. But he who has land adjoining to the river is not bound to cleanse the river, unless he has the benefit of it, *scilicet* a toll, or a fishing, or other profit.—*REPAIR OF BRIDGES, HIGHWAYS, ETC., CASE* (1609), 13 Co. Rep. 33; 77 E. R. 1442.

*Annotation:—**Reid. Paine v. Partrich* (1691), Carth. 191.

**1154. — — — — —]**—It is the duty at common law of the owner of land next adjoining a highway so to scour & cleanse such ditches on his land as

adjoin the highway as to prevent them from causing a nuisance to the highway by their foulness, & the highway authority can, notwithstanding the remedy afforded by Highway Act, 1835 (c. 50), s. 67, bring an action against the owner for an injunction restraining the continuance of the nuisance.—*A.-G. v. WARING* (1899), 63 J. P. 789.

**1155. — — — — — Under general Turnpike Act, 1822 (c. 126).]**—Above Act, s. 113, enacts "that ditches, etc. of a sufficient depth & breadth for the keeping of turnpike roads dry, & carrying off the water from the same shall be made, scoured, cleansed, & kept open, & sufficient trunks, tunnels, etc., shall be made & laid where carriage ways or footways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupiers of such lands or grounds"; & imposes a penalty in default. The trustees of a turnpike road under a private Act of Parliament made a road with ditches on either side through applt.'s land; on one side of the road was a bank, portions of which slipped down & filled up the ditch on that side, so that water which came from applt.'s land could not be carried off:—*Held*: applt. could not be convicted under above sect. for not cleansing & keeping open the ditch, as the words "occupiers of the adjoining lands" applied only to the latter part of the sect.—*MERIVALE v. EXETER TURNPIKE ROAD TRUSTEES* (1868), L. R. 3 Q. B. 149; 9 B. & S. 70; 37 L. J. M. C. 40; 18 L. T. 83; 32 J. P. 165; 16 W. R. 702.

*Annotation:—**Reid. Gully v. Smith* (1883), 53 L. J. M. C. 35.

— — — — — **Statutory powers.]—***See SEWERS & DRAINS.*

#### SUB-SECT. 4.—AS TO HEDGES AND TREES.

*See, generally*, Highway Act, 1835 (c. 50), s. 65; Public Health Act, 1925 (c. 71), s. 23.

**1156. Compulsory powers of cutting or lopping—To what trees applicable.]**—Magistrates have no power, under Highway Act, 1835 (c. 50) to cut down trees which may damage the highway, if planted for ornament & shelter. *FROMPTON v. TIFFIN* (1838), 2 Jur. 986.

**1157. — — — — —]**—At a special sessions for the highways, an order was made reciting a complaint by the surveyor under Highway Act, 1835 (c. 50), that the owner had refused & neglected to cut, prune, or plash certain hedges, "whereby the sun & wind were excluded from a certain carriage-way or cart-way contrary to the Act," etc.; that the owner had appeared & the offence was proved; & the justices did thereby order the owner "to cause the said hedges to be cut, pruned or plashed, & the said obstruction complained of, to the injury or damage of the said highway, removed within ten days from the service hereof." The order was served on the owner who cut some part of the

he sued the corp., alleging that it was their duty to have maintained a proper crossing from his house to the street.—*Held*: there was no such duty, & the action could not be maintained.—*McCarthy v. OSHAWA VILLAGE CORPN.* (1890), 19 U. C. R. 245.—CAN.

33; 50 S. C. R. 520; 8 W. W. R. 20; 21 D. L. R. 33.—CAN.

**1. — — — — — To sell part of highway—Diminished in width.]**—A road diminished in width is a road partially stopped, & the local bodies diminishing the width have power to sell the land so acquired.—*RESELWYN COUNTY COUNCIL* (1887), 5 N. Z. L. L. C. A. 163.—N.Z.

**2. Initiation of improvements—Duty of authority.]**—A municipality having jurisdiction over a highway is under obligation to initiate such improvements, as owing to the nature of the locality, the amount of travel & the expense involved may reasonably be demanded.—*LUCK v. CALGARY*,

*WHEATLEY v. CALGARY* (1916), 33 W. L. R. 935; 10 W. W. R. 37.—CAN.

**3. Failure to provide road of statutory width.]**—*GRAY v. ST. ANDREW & CUPAR D. CO.* (1911) S. C. 266; 48 Sc. L. R. 409.—SCOT.

#### PART VIII. SECT. 1, SUB-SECT. 3.

**4. Neglect to make proper crossing—Over ditch—Whether corporation liable.]**—Pltf., laid a plank from his door across the ditch to the street, by which he was in the habit of crossing; the ditch was deep there, & he might, by going down the sidewalk a short distance, have crossed where it was shallow. In crossing by the plank at night he fell off & broke his leg; &

#### PART VIII. SECT. 1, SUB-SECT. 4.

**1. Compulsory powers of cutting & lopping.]**—Under Municipal Act, 1897, s. 574, m. 4, municipal corps. have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but it is a matter which should be dealt with by bye-law, as indicated by s. 575 of above Act.—*Re ALLEN & CO*

**Sect. 1.—Powers and duties: Sub-sects. 4, 5, 6 & 7.]**

hedges, but the surveyor, thinking the order was not properly obeyed, summoned him before two justices, who imposed a penalty on him, & after ten days the surveyor himself cut the hedges:—*Held*: (1) the order was bad in part, because it did not specify in what manner or to what extent the owner was to cut the hedges; but it would have been good if it had directed the owner to cut the hedges in such a manner that the highway might not be prejudiced by the shade thereof, & the sun & wind not excluded from it: (2) the order was good in part so as to justify the surveyor in cutting the hedges, in order to remove any actual obstructions to the highway from the branches of the thorns & bushes; but, so far as it related to the trees, the order was defective, because it did not negative that they were planted for ornament, or shelter to a hop-ground, etc., which trees are excepted in sect. 65 of the Act; & therefore, a new trial in an action for trespass by the owner against the surveyor, should be awarded to inquire whether the surveyor did more than he was entitled to do by the valid part of the order.

Surveyors cannot act unless there has been a previous default of the party in obeying a valid order. It is no answer to say that the party might have appealed from it, & that, if he did not, third persons might act as if he had acquiesced; so to hold would in effect be to deprive parties of part of the time for appeal allowed by the Act, namely, fourteen days, the surveyors being authorised to act at the expiration of the first ten.

(3) The order stated, that A., being the owner of a certain farm, had neglected to cut, etc., the trees & hedges on his said farm, & which were on the side of the carriage-way, etc.:—*Held*: a sufficient statement that A. was owner of the land next adjoining the carriage-way.

It was also objected to the order, that it was altogether void for the want of a statement that plff. was the owner of the land next adjoining to the road; but the statement, that the trees were growing on plff.'s farm & on the side of the road, is equivalent to it; they could not be growing on the road-side unless they were close to it, according to the strictest construction of the law. *JENNEY v. BROOK* (1844), 6 Q. B. 323; 1 New Sess. Cas. 323; 1 New Mag. Cas. 101; 13 L. J. Q. B. 376;

*NAPANKE TOWN* (1902), 22 C. L. T. 412; 1 O. W. R. 634; 4 O. L. R. 582.

**CAN.**  
**m. Power to deal with herbage.]**—The powers of care management & control of roads vested in road boards by statute confer upon them the right to deal with the herbage.—*KNIGHT & McLENNAN v. NATIONAL MORTGAGE & AGENCY CO. & ASHTON*, [1920] N. Z. L. R. 748. **N.Z.**

**PART VIII. SECT. 1, SUB-SECT. 5.**

**n. In general.]**—It is not the mere existence of ice & snow on a sidewalk that creates liability in a corp'n. so long as there is no danger; but a dangerous condition resulting from ice & snow it is the duty of the municipality to provide against. There must be a reasonable time to put the sidewalks in repair after they become dangerous, if they become so suddenly.—*TOURNEY v. MIDDLING HAT (CITY)* (1913), 23 W. L. R. 880; 10 O. L. R. 691; 4 W. W. R. 176.—**CAN.**

**o. —.]**—A municipality on which is imposed the obligation to keep its streets in repair must take reasonable precautions to keep side-

walks free from dangerous accumulation of snow & ice & is liable for damages caused by failure to do so. Its duty is not discharged by notifying owners pursuant to a bye-law to clean the sidewalk in front of their properties.—*SLANEY v. CITY OF SYDNEY*, [1920] 1 W. W. R. 168; 50 D. L. R. 351; 59 S. C. R. 232.—**CAN.**

**p. Non-removal of snow & ice on highway.]**—Plff., a resident inhabitant of the town of P., whilst proceeding along one of the sidewalks of the town, attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow, where there was a slight declivity in the sidewalk, & in doing so slipped & fell, thereby injuring herself.—*Held*: there was no proof of such accumulation of snow as indicated negligence on the part of defts., & there being no evidence of negligence in the construction of the sidewalk, the corp'n. were not liable.—*BLEAKLEY v. PRESCOTT CORPN.* (1886), 12 A. R. 637.—**CAN.**

**q. —.]**—A snow drift had formed on a gravel road. Owing to the thawing & freezing of the snow, ruts had formed in it, which made it

8 J. P. 484; 8 Jur. 781; 115 E. R. 124, Ex. Ch.; previous proceedings, *sub nom.* *BROOK v. JENNEY* (1841), 2 Q. B. 265.

*Annotation:—Generally, Mentd.* *Walker v. Horner* (1875), 45 L. J. M. C. 34.

**1158. — Extent of power—"Lopping."]**—"Lop," as used in Highway Act, 1835 (c. 50), s. 65, means to cut off the branches laterally, & the sect. does not authorise justices or the surveyor to cut off the tops of any trees.—*UNWIN v. HANSON*, [1891] 2 Q. B. 115; 60 L. J. Q. B. 531; 65 L. T. 511; 55 J. P. 602; 39 W. R. 587; 7 T. L. R. 488, C. A.

**1159. — Against whom exercisable—"Owner."]**—The word "owner" in Highway Act, 1835 (c. 50), s. 65, means the person in actual occupation. An order of justices under sect. 65 for lopping trees overhanging a highway made on a summons served only on the occupying tenant of the land abutting on the highway:—*Held*: valid, & in form sufficient.—*WOODARD v. BILLERICAY HIGHWAY BOARD* (1879), 11 Ch. D. 214; 48 L. J. Ch. 535; 43 J. P. 224; 27 W. R. 593

**1160. — Form of order—Must show work required.]**—*JENNEY v. BROOK*, No. 1157, *ante*.

**1161. — Must show that trees subject to order.]**—*JENNEY v. BROOK*, No. 1157, *ante*.

**1162. — Ownership of adjoining land.]**—*JENNEY v. BROOK*, No. 1157, *ante*.

**1163. — Power of authority to cut—On default by owner.]**—*JENNEY v. BROOK*, No. 1157, *ante*.

**1164. — Recovery of expenses — When mandamus will issue.]**—The ct. will not grant a rule *nisi* for a *mandamus* to compel justices to issue their warrant to levy expenses of cutting a hedge, pursuant to Highway Act, 1835 (c. 50), s. 65, unless it appears that a demand has been made of the expenses from the person sought to be charged, & that the justices were informed of that demand.—*Ex p. WHITMARSH* (1840), 8 Dowl. 131; 4 Jur. 823.

**Power to plant trees.]**—*See Roads Improvement Act, 1925* (c. 68), s. 1.

**SUB-SECT. 5.—REMOVAL OF SNOW AND OTHER OBSTRUCTIONS.**

*See Highway Act, 1835* (c. 50), s. 26.

**Removal of snow—By tramway company—Snow heaped up on highway.]**—*See TRAMWAYS & LIGHT RAILWAYS.*

unsafe for waggons. Plff. was passing over it in a waggon, when the wheel going down threw him out. Defts. afterwards cleared away the snow there. The road was good except for the snow, & there was heavy snow storm & sleighing after the accident.—*Held*: there was evidence of negligence on the part of defts. in not keeping the road in repair, & defts. were liable.—*CASWELL v. ST. MARY'S & PROOF LINE JUNCTION ROAD CO.* (1869), 28 U. C. R. 247.—**CAN.**

**r. —.]**—Plff., while walking along a sidewalk in T., on a frosty day, stepped on a piece of ice, slipped & fell, & received an injury.—*Held*: the mere existence of the piece of ice was no evidence of actionable negligence on the part of the authorities & the bye-law passed by the corp'n. imposing a duty upon others to keep the sidewalks clear of snow & ice, did not create a liability upon themselves.—*RINGLAND v. TORONTO (CITY)* (1873), 23 C. P. 93.—**CAN.**

**s. —.]**—*CUZNER v. CALGARY* (1888), 1 Terr. L. R. 162.—**CAN.**

**t. —.]**—*FORWARD v. TORONTO CORPN.* (1888), 15 O. R. 370.—**CAN.**

— Whether "maintenance"—Liability of county council for expense.]—See No. 1213, *post*.  
Obstructions generally.]—See Part IX., Sect. 1, sub-sect. 1, *post*.

SUB-SECT. 6.—CLEANSING OF HIGHWAYS.

1165. Removal of mud.]—R. v. STRATFORD (OR STRETTFORD) (INHABITANTS), No. 1145, *ante*.

1166. Refuse not removed.]—SAUNDERS v. HOT-BORN DISTRICT BOARD OF WORKS, No. 1325, *post*.  
See, generally, PUBLIC HEALTH.

SUB-SECT. 7.—FENCING HIGHWAYS.

1167. Duty to fence—Road trustees.]—If trustees under a Road Act turn a road through an inclosure, & make the fences at their own expense, & repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the Act to that effect.—R. v. LLANDILO ROAD COMRS. (1788), 2 Term Rep. 232; 100 E. R. 126.

1168. — Highway authority—Road & ditch liable to floods—Existing fence removed—Misfeasance.]—A fence had been formerly erected,

by the then existing highway authority, to protect the public using a highway which was dangerous, owing to its liability to be flooded by a stream that ran by the side of the road. The stream was diverted but the ditch where the former bed of the stream had been was still liable to be filled in time of flood & the water then flowed over the road. After the fence had been in existence for a number of years, defts. adopting the report of their surveyor that the fence was in bad repair, that it was no longer necessary, & that all that was required was the erection of a short length at each end, ordered that the work should be done. The fence was removed, & three weeks later & before any new fence had been put up the road was flooded. A man driving along the road drove into the ditch & was drowned. In an action by his administratrix to recover damages for his death, the jury found that the removal of the fence under the circumstances & in the way in which it had been done, was inconsistent with reasonable regard for the safety of persons using the road. On appeal:—*Held*: defts. were liable.—WHYLER v. BINGHAM RURAL COUNCIL, [1901] 1 K. B. 45; 70 L. J. Q. B. 207; 83 L. T. 652; 61 J. P. 771; 17 T. L. R. 23, C. A.

*Annotations*:—*Reid*. A.-G. & Warwickshire County Council v. Oxford Canal Navigation (1903), 88 L. T. 250; Short v. Hammersmith Corpn. (1910), 101 L. T. 70.

a. —.]—Snow had been left on a sidewalk of a street in St. J. for a considerable time, & a ridge of ice had been formed with sloping sides. Pltf., slipped upon the ice & was injured. In an action against the city for negligence:—*Held*: there was evidence which should have been submitted to the jury to find whether defts. had been guilty of negligence by allowing the snow & ice to accumulate on the sidewalk, & to remain there an unreasonable time, so as to render it unsafe for people to walk upon, the duty of the city being to keep the streets in a reasonable state of repair & safety.—KINNEALY v. ST. JOHN CORPN. (1890), 30 N. B. R. 46.—CAN.

b. —.]—ORGAN v. TORONTO (CITY) (1893), 21 O. R. 318.—CAN.

c. —.]—A sidewalk, either from improper construction or from age & long use, had sunk down so as to allow water to accumulate upon it whereby ice was formed:—*Held*: allowing the ice to form & remain on the street was a breach of the statutory duty to keep streets in repair in consequence of which the corp. was liable.—CORNWALL TOWN CORPN. v. DEROCHE (1895), 21 S. C. R. 301.—CAN.

d. —.]—Where pltf., instead of taking the way provided for access to & from his premises, left it & proceeded to his destination upon a track belonging to defts., which, to his knowledge, was not a street or way completed for use or opened for public travel, no invitation or inducement being held out by defts. to the public to travel upon it, & on which he, owing to irregularities on its surface, fell & was injured:—*Held*: he could not recover damages for his injury; nor upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow & ice, & sustained the injury upon the adjoining land.—NOVAK v. TORONTO (CITY) (1896), 27 O. R. 651; 24 A. R. 109.—CAN.

e. —.]—CITY OF KINGSTON CORPN. v. DRENNAN (1897), 27 S. C. R. 46.—CAN.

f. —.]—MCQUILLAN v. ST. MARY'S MUNICIPAL COUNCIL (1899), 31 O. R. 401; 20 C. L. T. 42.—CAN.

g. —.]—DAVIES v. R. (1900), 6 Exch. C. R. 341.—CAN.

h. —.]—INGE v. TORONTO CORPN. (1901), 31 S. C. R. 323; 21 C. L. T. 365.—CAN.

k. —.]—*Held*: neglect to remove snow was a mere non-feasance for which the corp. were not liable at the suit of a private individual.—MCCREA v. ST. JOHN (1903), 36 N. B. R. 141.—CAN.

l. —.]—Pltf. in travelling on a highway came to a place where the road was impassable on account of drifted snow. At the side of the road between the ditch & a farm fence was a temporary track made by the travelling public, which was safe while the frost lasted & the snow was hard:—*Held*: it was the duty of defts. to have opened a way through the drift sufficient to enable vehicles such as the wagon in which pltf. was travelling to have passed in safety along this highway; & defts. had notice that the highway was out of repair; & pltf. was entitled to recover.—HOGG v. BROOKE TOWNSHIP (1901), 21 C. L. T. 171; 7 O. L. R. 273; 3 O. W. R. 120.—CAN.

m. —.]—YATES v. WINDSOR (1912), 22 O. W. R. 608; 3 O. W. N. 1513; 3 D. L. R. 891.—CAN.

n. —.]—GERMAN v. OTTAWA (CITY) (1917), 56 S. C. R. 80; 39 D. L. R. 669.—CAN.

o. —.]—Upon the sidewalk of the principal street in a town, in front of two vacant buildings, there was an accumulation, of considerable depth, of snow & ice all through the winter of 1916-17. A sloping ridge, from 8 to 12 inches high in the centre, was formed; & on the evening of Mar. 23, 1917, the surface was slippery after a thaw & drizzling rain, followed by freezing. An employee of the town corp. testified that he had put sand on the sidewalk on the day of the accident, but did not say that he had put any sand on the slope. Pltf. slipped upon the slope, fell, & was injured:—*Held*: defts., the town corp. were liable to pltf. in damages for her injury.—ASHTON v. NEW LISKEARD TOWN (1919), 45 O. L. R. 113; 15 O. W. N. 380; 47 D. L. R. 725.—CAN.

p. —.]—FLETCHER v. CITY OF

CALGARY, [1921] 2 W. W. R. 680; 16 Alta. L. R. 475.—CAN.

q. —.]—WILSON v. PROGRESS MUNICIPAL DISTRICT, [1921] 2 W. W. R. 121; 16 Alta. L. R. 265; 59 D. L. R. 113.—CAN.

r. —.]—O'KEEFE v. EDINBURGH CORPN., [1911] S. C. 18.—SCOT.

s. *Slaw on highway—Causing destruction of motor-car.*—SMITH v. STOKES MUNICIPAL DISTRICT NO. 343 (1922), 68 D. L. R. 20; [1922] 2 W. W. R. 901.—CAN.

PART VIII. SECT. 1, SUB-SECT. 6.

t. *Removal of noxious weeds—(Growing in streets.)* In the absence of appointment of an inspector under R. S. O. c. 202, no duty is cast on the council to cut down noxious weeds growing in the streets.—OSBORNE v. KINGSTON (CITY) CORPN. (1893), 23 O. R. 382.—CAN.

PART VIII. SECT. 1, SUB-SECT. 7.

1167 i. *Duty to fence—Road trustees.*—It is a question of circumstances whether an unfenced road with a drop of eight or nine feet at one side is so dangerous as to impose on the road trustees the duty of fencing the road either at common law or under Turnpike Roads Act, 1831.—FRANK v. ROTHESLEY MAGISTRATES (1892), 19 R. (Cl. of Sess.) 817; 29 Sc. L. R. 840.—SCOT.

1167 ii. —.]—WATSON v. SCOTT (1838), Macfarlane, 146.—SCOT.

a. *Highway authority.*—Defts. neglected to have a railing or guard along an embankment leading down to a bridge on one of their leading highways, in a populous township:—*Held*: it was the duty of defts. to fence or guard the place in question.—TOM v. TOWNSHIP OF WHITBY CORPN. (1874), 35 U. C. R. 195; 37 U. C. R. 100.—CAN.

b. —.]—LUCAS v. MOORE CORPN. (1879), 3 A. R. 602.—CAN.

c. —.]—KING v. KING MUNICIPALITY (1886), 19 N. B. P. (7 R. & G.) 68; 7 C. L. T. 119.—CAN.

d. —.]—There is no liability on the part of the couns. for the park to the public using the highways in the Queen Victoria Niagara Falls Park by reason of the absence

## Sect. 1.—Powers and duties: Sub-sects. 7, 8, 9

**1169. Power to require adjoining owner to fence—Construction of local Act.]—**By sect. 81 of a local Act, "If the corpn. are of opinion that danger to the public is likely to ensue by reason of land abutting on streets not being fenced, the owner of any such land shall, when required by the corpn., & to their satisfaction, sufficiently fence off the land from the street, & shall afterwards keep such fence in good repair to the satisfaction of the corpn., & if he fails so to fence or repair as aforesaid within fourteen days after notice for that purpose given to him by the corpn., the corpn. may fence or repair, as the case may be, & charge him with the expenses of so doing, & recover same as expenses under Public Health Act, 1875 (c. 55)":—*Held*: this Act did not apply to fences by the side of a road which had been a turnpike highway, but applied only to new streets, where there were no fences & which in the opinion of the corpn. were dangerous to the public.—*ROTHERHAM CORPN. v. FULLERTON* (1881), 50 L. T. 364.

**Liability of adjoining or adjacent owner to fence.]—***Sec. generally, BOUNDARIES, Vol. VII., pp. 283 et seq.; 287 et seq.*

**Statutory duty.]—***Sec. BOUNDARIES, Vol. VII., pp. 293 et seq.*

## SUB SECT. 8.—RESTRICTION OF TRAFFIC.

**1170. Securing horseways & foot causeways by posts, blocks or stones—Position of—Highway Act, 1835 (c. 50), s. 24.]—***Held*: above sect. contemplated the erection of posts, etc., against footways, causeways, & bridleways by the side of carriage-ways, for the purpose of protecting them against injury or damage by waggons, etc., but did not contemplate the erection of posts, etc., at the extremities of such ways, for the purpose of protecting the causeways, bridleways, & footways from trespassers.—*ELLIS v. WOODBRIDGE*

(1860), 8 C. B. N. S. 290; 29 L. J. M. C. 183; 2 L. T. 237; 25 J. P. 231; 6 Jur. N. S. 4017; 8 W. R. 437; 141 E. R. 1177.

**1171. Footway blocked by post—To keep out cattle—Duty to light.]—**Defts. the highway & lighting authority had erected a post at the entrance & in the centre of a footpath to prevent cattle straying up the footpath, & near the post they placed a lamp, which they were in the habit of lighting at nights. Pltf. was passing along the footpath at night, when the lamp was out or not lighted, & in consequence of the darkness came against the post & suffered injuries:—*Held*: an action lay against defts.—*LAMLEY v. EAST RETFORD CORPN.* (1891), 55 J. P. 133, C. A.

**Annotations.]—***Ald. McClelland v. Manchester Corpn.*, [1912] 1 K. B. 118. *Consd. Carpenter v. Finsbury B. C.*, [1920] 2 K. B. 195; *Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132. *Reid. Sheringham U. D. C. v. Halsey* (1904), 68 J. P. 395; *Papworth v. Batterssea B. C.* (1913), 12 L. G. R. 308.

**1172. Restriction during repairs—Under Towns Improvement Clauses Act, 1847 (c. 34), s. 79—Extent of liability.]—**Above sect. prescribes certain precautions to be taken during the construction & repair of sewers, streets, & houses. The sect. does not mean that the traffic in the street is to be entirely stopped during the execution of such works but merely that bars & chains or other protection should be placed so as to prevent vehicles & persons, etc., from passing over the place where the works are being executed.—*WOODALL v. NUTTALL* (1891), 50 J. P. 150; 8 T. L. R. 68, C. A.

**1173. Bye-law restricting use of trailers—Whether binding on Crown.]—**The rule that the Crown is not bound by a statute unless expressly named, or unless it so appears by necessary implication, applies to a servant of the Crown when acting within the scope of his authority. Where, therefore, a county council, under Locomotives Act, 1898 (c. 29), s. 6, which empowered them to make bye-laws prohibiting or restricting the use of locomotives on highways, but contained no reference therein to the Crown, made a bye-law

or insufficiency of a fence, railing, or barrier on the edge of the cliff, there being no statutory obligation in that behalf imposed on them.—*GRAHAM v. QUEEN VICTORIA NIAGARA FALLS PARK COMRS.* (1896), 23 O. L. 1.—*CAN.*

**o. — — —.]—**Pltf. was walking in a city street, when, stopping towards a doorway leading into a tavern, fell into an area in the sidewalk used by the tavern keeper, by the permission of the municipality, for the purpose of putting beer into his cellar & then open & being used for such purpose. A keg had been placed at each of the outside corners of the opening to warn passers-by:—*Held*: the municipality were liable for negligence in leaving the opening without an adequate guard.—*HOMEWOOD v. HAMILTON (CITY)* (1901), 1 O. L. R. 266; 21 C. L. T. 208.—*CAN.*

**f. S. O. — —.]—**By Municipal Act, R. S. O. 1897, s. 611, no liability is imposed on a municipal corpn. by reason of want of repair of railway crossings through there being too high a grade & the omission to fence, the obligation therefor being under Dominion Railway Act, 51 Vict. c. 29, s. 188, imposed on the railway co.—*HOLDEN v. YARMOUTH TOWNSHIP* (1903), 23 C. L. T. 181; 5 O. L. R. 579; 2 O. W. R. 130.—*CAN.*

**g. — — —.]—**The failure of defts. to place guard-rails on the sides of a road at a place where it was narrow from 11 to 17 feet wide, with banks sloping down on both sides, was a breach of defts.' statutory

duty to keep the road in repair.—*PLANT v. NORMANBY & MINTO* (1905), 25 C. L. T. 398; 6 O. W. R. 31; 10 O. L. R. 16.—*CAN.*

**h. — — —.]—***BARCLAY v. ANCASTER TOWNSHIP* (1913), 24 O. W. R. 60; 4 O. W. N. 761; 10 D. L. R. 363.—*CAN.*

**k. — — —.]—***ACKERSVILLER v. PERTH* (1915), 7 O. W. N. 435; 8 O. W. N. 331; 32 O. L. R. 423; 33 O. L. R. 598; 22 D. L. R. 666.—*CAN.*

**l. — — —.]—**Along the side of a highway, the boundary between two townships, an open ditch or drain had been constructed, for the purpose of draining lands. The drain was not a municipal work, undertaken by the two township corporations. It was constructed upon the highway under the authority of Municipal Drainage Act; it ran alongside the highway for more than 50 miles:—*Held*: the corpn. were not bound to erect & maintain a fence or guard-rail along the course of the drain.—*ANDERSON v. ROCHESTER TOWNSHIP & MERKES* (1919), 44 O. L. R. 301; 15 O. W. N. 269, 453.—*CAN.*

**m. — — —.]—**M. was driving a motor car upon a highway in the township, when the car became uncontrollable & ran off the road into a gully, killing M. The place was a dangerous one, & there was no fence or other guard:—*Held*: defts., the township corpn., were liable for their negligence in not erecting & maintaining a fence or guard-rail at this

place.—*McCORMICK v. CALEDON TOWNSHIP* (1923), 55 O. L. R. 93.—*CAN.*

**n. — — —.]—**If a local body constructs a narrow, steep road with a steep embankment on one side & a high bank on the other, there is no such duty on the part of the local body to fence the road as would make the omission to fence actionable in the case of injury resulting from horses becoming frightened & unmanageable, without fault of the driver, & dragging a vehicle over the unfenced bank.—*WAIKARAPA NORTH COUNTY COUNCIL v. SPACKMAN* (1892), 10 N. Z. L. R. 589.—*N.Z.*

**o. — — —.]—**A claim of damages is competent against a county council for injuries arising from their neglect of duty in failing to keep a road sufficiently fenced.—*STRACHAN v. ABERDEEN DISTRICT COMMITTEE OF ABERDEEN COUNTY COUNCIL* (1894), 21 L. (Ct. of Sess.) 915; 31 Sc. L. R. 761; 6 Sc. L. T. 86.—*SCOT.*

**p. Alteration of grade of road—Duty to put up parapet.]—**Where a railway co. altered, at a railway crossing, the grade of a road owned by a road co., & the alterations were subsequently ratified & adopted by the road co. collecting tolls:—*Held*: by such adoption & acceptance, they were to be treated as responsible for any injury resulting from the omission to fulfil a duty arising out of such altered state of the highway, e.g. to put up a parapet.—*WHITMARSH v. GRAND TRUNK RT. CO. OF CANADA* (1858), 7 C. P. 373.—*CAN.*



that "A person in charge of a locomotive on any highway shall not use the locomotive to draw more than three unloaded wagons with or without any wagon solely used for carrying water for such locomotive" & a civilian driver of a locomotive, hired by the Army Service Corps & used in His Majesty's service, acting under the directions of a warrant officer of that corps, drew five unloaded wagons on a public highway, & in so driving knocked down a lamp-post:—*Held*: that he could not be convicted of an offence against the by-law.—*CHARE v. HART* (1918), 88 L. J. K. B. 833; 120 L. T. 443; 83 J. P. 54; 17 L. G. R. 233, D. C.

Bye-laws, generally, *see* CORPORATIONS, Vol. XIII., pp. 325 *et seq*; LOCAL GOVERNMENT; PUBLIC HEALTH.

Control of traffic, generally, *see* STREET & AERIAL TRAFFIC

#### SUB-SECT. 9.—AS TO ROADSIDE WASTE AND MARGINS.

*See* Public Health Act, 1875 (c. 55), s. 110; Local Government Act, 1888 (c. 41), s. 11 (1); Local Government Act, 1894 (c. 73), s. 26.

1174. Roadside wastes—What are.—Within Local Government Act, 1888 (c. 41), s. 11.—Strips of grass bordering the metalled part of a main road are "roadside wastes," within above Act. The herbage on such strips is not vested in the county council by sect. 11, sub-sect. 6, of that Act.

C. was tenant for life of the manor which included the waste land adjoining the highways in the parish of S. The metalled part of a main road through S. was bordered by strips of grass with some timber on them. The county council sold the grass by the sides of the main road to T. for a year. At the instance of C. & his tenants, an injunction was granted to restrain the county council from cutting & removing the grass, timber, & other growths from the sides of the main road.—*CURTIS v. KESTIVEN COUNTY COUNCIL* (1890), 45 Ch. D. 504; 60 L. J. Ch. 103; 63 L. T. 513; 39 W. R. 199.

*Annotations*:—*Reid*. *Harrison v. Rutland*, [1893] 1 Q. B. 142; *Pryor v. Petro* (1891), 70 L. T. 331; *Harvey v. Truro R. C.* (1903), 72 L. J. Ch. 705.

1175. Vesting of—In county council.—*CURTIS v. KESTIVEN COUNTY COUNCIL*, No. 1174, *ante*.

Reinstatement after encroachment—Costs of district council.—It being the duty of every district council, under Local Government Act, 1894 (c. 73), s. 26, to prevent any unlawful encroachment on any roadside waste within their district, they are entitled to abate such encroachments by reinstating the waste as it was before, & to recover the expenses of so doing by action from the person guilty of the encroachment.—*LOUTH DISTRICT COUNCIL v. WEST* (1896), 65 L. J. Q. B. 535; 60 J. P. 600; 12 T. L. R. 477; 40 Sol. Jo. 602, D. C.

*Annotations*:—*Mentd.* *The Ella*, [1915] P. 111; *Collis v. Amplett* (1917), 62 Sol. Jo. 37.

Ownership.—*See, generally*, COPYHOLDS, Vol. XIII., p. 13, Nos. 44, 45.

Right of passage over.—*See* Part V., *ante*.

Power to lay out grass margins.—*See* Roads Improvement Act, 1925 (c. 68), s. 1.

#### SUB-SECT. 10.—PROTECTION OF PUBLIC RIGHTS OF WAY.

1177. Removal of obstruction—Whether council acting judicially.—A local board discharging duties

in relation to the protection of public rights of way under Local Government Act, 1894 (c. 73), s. 26 (1), is in the same position as a private individual protecting his own property, & is not acting judicially. Consequently, where an action was brought against a local board to restrain the removal of posts erected on a public footpath by the owners of the adjoining property for the purpose of preventing the footpath from being used for vehicular traffic, & the statement of claim alleged that a member of the board had used his influence with the board for his own private interest, & that in consequence thereof plffs. had failed to induce the board to take steps to prevent the user of the footpath for vehicular traffic:—*Held*: the real issue was whether or not the posts constituted an obstruction to the public right of way, & the allegations in the statement of claim were irrelevant, & ought to be struck out.—*MURRAY v. EPSOM LOCAL BOARD*, [1897] 1 Ch. 35; 68 L. J. Ch. 107; 75 L. T. 579; 61 J. P. 71; 45 W. R. 185; 13 T. L. R. 113; 41 Sol. Jo. 157.

1178. Action to restrain—Relevancy of pleading.—*MURRAY v. EPSOM LOCAL BOARD*, No. 1177, *ante*.

1179. By private individual—Power of council to contribute to costs of defence.—By Local Government Act, 1894 (c. 73), s. 26 (1), it is the duty of every district council to protect all public rights of way, & to prevent as far as possible the stopping or obstruction of any such right of way; & by sub-sect. 3 a district council may, for the purpose of carrying the sect. into effect, institute or defend any legal proceedings, & generally take such steps as they deem expedient:—*Held*: a district council might, under the powers conferred by the sect. contribute to the costs of the defence of an action brought against a private individual who had removed an obstruction in the assertion of an alleged public right of way.—*R. v. NORFOLK COUNTY COUNCIL*, [1901] 2 K. B. 288; 70 L. J. K. B. 575; 17 T. L. R. 437; *sub nom.* *R. v. NORFOLK COUNTY COUNCIL*, *Ex p.* GREEN, 84 L. T. 822; 65 J. P. 454; 49 W. R. 543; 45 Sol. Jo. 468.

*Annotation*:—*Distd.* *Thornhill v. Weeks*, [1915] 1 Ch. 106.

1180. Threat to exercise by servants or agents—Remedy of owner.—If a district council, acting under Local Government Act, 1894 (c. 73), s. 26, assert that there is a public right of way over plffs.' close & threaten & intend to exercise it by their servants or agents, an action for a declaration & injunction will lie against them.

*Qu.*: whether the mere assertion that there is a public right of way & the mere provision of legal assistance for the defence of private individuals, who prior to the assertion & without any reference to the district council have exercised the alleged right on their own behalf & been sued in trespass accordingly, would without more give rise to any cause of action against the district council.—*THORNHILL v. WEEKS*, [1913] 1 Ch. 438; 82 L. J. Ch. 209; 108 L. T. 802; 77 J. P. 231; 57 Sol. Jo. 477; 11 L. G. R. 362.

*Annotation*:—*Consd.* *Thornhill v. Weeks* (No. 3), [1915] 1 Ch. 106.

1181. Provision of legal assistance—To private individual asserting public right—Whether authorised.—*R. v. NORFOLK COUNTY COUNCIL*, No. 1179, *ante*.

1182. Whether cause of action.—*THORNHILL v. WEEKS*, No. 1180, *ante*.

1183. Whether a threat to exercise—Pleading.—Plff. claimed a declaration of title & an injunction to restrain certain persons from



**Sect. 1.—Powers and duties: Sub-sects. 10 & 11, A., B. & C.]**

trespassing on his lands, & they pleaded a public right of footway over his lands. The district council then passed a resolution under Local Government Act, 1894 (c. 73), s. 3, to defend the action. Thereupon *pltf.* added them as co-defts. & by his amended statement of claim alleged that they threatened & intended to exercise the alleged right of way. The district council, with the view of avoiding liability for the costs of the action, by their defence denied that they threatened or intended to exercise the right of way, & pleaded that they neither asserted nor denied the existence of the right of way:—*Held*: this defence did not infringe any rule of pleading & was not embarrassing, & the liability (if any) of the district council for costs would be determined at the trial of the action.—**THORNHILL v. WEEKS** (No. 2), [1913] 2 Ch. 404; 82 L. J. Ch. 485; 109 L. T. 146; 11 L. G. R. 1182, C. A.

**Annotation.**—*Fold.* Thornhill v. Weeks (No. 3), [1915] 1 Ch. 106.

**1184. — Assertion unsuccessful—Declaration against public authority.**—An action was brought by certain landowners against private individuals for removing obstructions to an alleged public right of way. The district council having passed & acted on a resolution to defend the action under Local Government Act, 1894 (c. 73), s. 20, were themselves made defts., & a declaration that there was no public right of way was asked against them. On an application by the district council to be struck out as defts., *pltf.*s. were allowed to amend by alleging that the district council threatened & intended to use the alleged public right of way by their servants or agents. The district council then put in a defence stating that they neither claimed nor denied that the public right of way claimed by their co-defts. in fact existed, & they denied any threat or intention to use it by their servants or agents, but though really innocent of any such threat or intention, they in fact conducted the whole defence on the main issue, namely, the existence of the public right of way, up to the trial, & failed to establish it:—*Held*: *pltf.*s. were entitled to a declaration with costs against all defts. including the district council. **THORNHILL v. WEEKS** (No. 3), [1915] 1 Ch. 106; 81 L. J. Ch. 282; 111 L. T. 1007; 78 J. P. 151; 12 L. G. R. 597.

**1185. — Liability for costs.**—**THORNHILL v. WEEKS** (No. 3), No. 1184, *ante*.

**1186. Action for declaration of public right—Whether Attorney-General a necessary party.**—*Pltf.* council asked for a declaration as to a public right of way & for consequential relief. *Def.* by his defence, admitted the claim as to part, but denied it as to another part, & submitted that the action was not maintainable, the A.-G. not being a party. The action was subsequently settled, judgment being taken on agreed minutes, the defence being withdrawn. At the hearing it was submitted on behalf of *pltf.*s. that the action was rightly constituted:—*Held*: this was so, & in the circumstances the A.-G. was not a necessary

party.—**NEWTON ABBOT RURAL DISTRICT COUNCIL v. WILLS** (1913), 77 J. P. 333.

*See, generally, CONSTITUTIONAL LAW, Vol. XI., p. 513.*

## SUB-SECT. 11.—LIGHTING HIGHWAYS AND STREETS.

### A. In General.

**1187. Liability for failure to light—Power to light discretionary.**—The trustees of a public road, who were empowered & required by Act of Parliament to place lamps along the road, if they should think necessary, & to make contracts for the cleansing of the road, & to take a night-toll for the purpose of enabling them to light & watch the same, were held not liable in an action upon the case for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings, left on the road-side, after cleansing the road, without any lights.—**HARRIS v. BAKER** (1815), 4 M. & S. 27; 105 E. R. 745.

**Annotations.**—*Consd.* Hall v. Smith (1824), 2 Bing. 156. *Distd.* Parnaby v. Lancaster Canal Co., Lancaster Canal Co. v. Parnaby (1839), 11 Ad. & El. 223. *Expld.* Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256. *Consd.* Cowley v. Newmarket L. B. (1890), 55 J. P. 54. *Expld.* Sheppard v. Glossop Corp., [1921] 3 K. B. 132. *Refd.* Duncan v. Findlater (1839), 6 Cl. & Fin. 894; Scott v. Manchester Corp., (1857), 29 L. T. O. S. 233; Gibbs v. Liverpool Docks Trustees (1858), 3 H. & N. 164; Holliday v. St. Leonard, Shoreditch, Vestry (1861), 11 C. B. N. S. 192; Tobin v. R. (1864), 10 C. B. N. S. 310.

**1188. —**—*—*—**MELLOR v. HEYWOOD CORPN.** (1884), 48 J. P. Jo. 148.

**Annotation.**—*Expld.* Sheppard v. Glossop Corp., [1921] 3 K. B. 132.

**1189. —**—*—*—**SHEPPARD v. GLOSSOP CORPN.**, No. 1197, *post*.

**1190. — Statutory duty to light.**—*Defts.* a metropolitan borough council, constructed a street refuge under powers conferred Metropolis Management Act, 1855 (c. 120), s. 108, & erected on it an electric lamp standard under s. 130 of the same Act. Owing to the war the lighting was diminished by the authorities, & *defts.* were aware that the lights had become irregular. On a dark night the lamp went out & *pltf.*'s taxicab was driven into the posts of the refuge & he was injured. In an action for negligence the jury found that *defts.* were negligent in omitting to maintain a danger lamp on the refuge but that there was no conclusive evidence as to what caused the lamp to go out:—*Held*: although the Act, while imposing on *defts.* the duty of lighting the streets, did not impose on them any duty to light the refuge, yet the fact that in spite of the directions of the authorities for the diminution of lighting *defts.* continued to light their refuges imposed on them the duty of watching the lamps so that a warning could be given, & there was evidence to support the finding of negligence, & *pltf.* was entitled to recover.—**BALDOCK v. WESTMINSTER CITY COUNCIL** (1918), 88 L. J. K. B. 502; 120 L. T. 470; 83 J. P. 98; 35 T. L. R. 188; 17 L. G. R. 190, C. A.

**Annotations.**—*Consd.* Carpenter v. Finsbury B. C., [1920] 2 K. B. 195. *Refd.* Sheppard v. Glossop Corp., [1921] 3 K. B. 132.

**1191. — Obstruction during repairs.**—**THURROLD v. ST. GEORGE'S, HANOVER SQUARE** (1898), *Times*, Dec. 7.

## PART VIII. SECT. 1, SUB SECT. 11.—A.

**1191 i. Liability for failure to light—Obstruction during repairs.**—*Defts.*, a township corp., asked the Department of Public Works of the Province of Ontario to construct concrete bridges in the township, at the expense of the Department. A superintendent em-

ployed by the department commenced the construction of a culvert in a certain road in the township, though that was not one of the works included in the application; after work upon the culvert had been going on for two weeks, *pltf.*, travelling over the road in a motor-car, on a dark night, was injured & his car was damaged by reason of the dangerous condition of

the road at the place where the work was being done, which was left unlighted & unguarded. In an action for damages for the injury & loss thus sustained:—*Held*: the accident happened by reason of the gross negligence of the superintendent, in failing to protect effectively what was in essence a trap for the public using the road, & it seemed unreasonable

1192. — **Post set up in centre of footway.]—**LAMLEY v. EAST RETFORD CORPN., No. 1171, *ante*.

1193. **Discretion to extinguish lights before daylight—Whether misfeasance.]—**A vestry, having the charge of the lighting of a parish, turned out some of the lights before daylight. A jury found that an accident occurred owing to the lights being out:—*Held*: the vestry had lawfully exercised their discretion to turn out the lights under Metropolis Management Act, 1855 (c. 120), s. 130, & were not liable for non-feasance.—YOUNG v. ST. MARY'S, ISLINGTON, VESTRY (1896), 60 J. P. 821, D. C.

*Annotations*:—**Expld. & Distd.** McClelland v. Manchester Corp., [1912] 1 K. B. 118. **Consd.** Sheppard v. Glossop Corp., [1921] 3 K. B. 132.

1194. **Obstruction improperly lit—Liability for misfeasance.]—**DONALDSON v. WOOLWICH CORPN. (1911), 75 J. P. Jo. 27, N. P.

1195. **Exercise of power to light—Gas-lamp affixed to private house—Whether authorised.]—**MEEK v. LANGDON (1862), 37 L. T. Jo. 181.

#### B. In Urban Districts.

See Public Health Act, 1875 (c. 55), ss. 149, 161.

1196. **Powers of authority—As to means of lighting provided.]—**The right of a local board under Public Health Act, 1875 (c. 55), s. 161, to provide light by "other means" than gas, viz. as in this case by electricity, is not affected by the subsequent paragraphs (CHITTY, J.).—FAREHAM LOCAL BOARD & FAREHAM ELECTRIC LIGHT CO. v. SMITH (1891), 7 T. L. R. 443; 35 Sol. Jo. 431.

*Annotations*:—**Mentd.** Baird v. Tambridge Wells Corp., [1894] 2 Q. B. 867; Escott v. Newport Corp., [1901] 2 K. B. 369.

1197. — **Discretionary.]—**A certain street was vested in an urban authority under Public Health Act, 1875 (c. 55). It declined sharply & was bounded on one side by a retaining wall about 5 feet high separating it from land at a higher level. The land & the retaining wall were the property of a private owner. In pursuance of sect. 161 of the Act the authority placed a lamp on the retaining wall, but extinguished it every night soon after 9 o'clock in accordance with a resolution passed on Dec. 12, 1918. On Dec. 25, 1918, at 11.30 p.m., pltf., intending to go home by the street, missed his way without negligence, strayed on to the private land, & fell over the retaining wall into the street & was injured. In an action against the urban authority for negligence in the performance of an alleged duty to light the street sufficiently:—*Held*: the Act confers upon urban authorities a discretion, but imposes on them no obligation to light the streets in their districts; consequently defts. who had begun were not bound to continue to light the street; & having done nothing to make the street dangerous they were under no obligation, whether by lighting or otherwise, to give warning of danger.—SIMPARD v. GLOSSOP CORPN., [1921] 3 K. B. 132; 90 L. J. K. B. 994; 125 L. T. 520; 85 J. P. 205; 37 T. L. R. 604; 65 Sol. Jo. 472; 19 L. G. R. 357, C. A.

that defts. should be reimbursed in respect of the damages & costs assessed against them.—KANKKUNEN v. KORHÄ TOWNSHIP (1920), 46 O. L. R. 412; 17 O. W. N. 273.—CAN.

1191 II. — **Defts. made a hole in the highway in order to ascertain whether repairs were required there but they did not replace the materials or fill up the hole, nor place a light there; & pltf., crossing the road, fell against the materials so left, & into the hole:]—***Held*: a cause of action within Municipal Act, 1873,

s. 409.—PEARSON v. YORK COUNTY CORPN. (1877), 41 U. C. R. 378.—CAN.

q. — **No legal right of plaintiff—To cross over unlighted land.]—**Defts. having authority by law to lay out & open streets laid out a street through an unenclosed & hilly piece of ground, & people were accustomed to pass over it as they pleased, in various directions, though there was no right of way, except by the street. Defts. made cuttings through the hill to level & improve street. Pltf. had been in the

#### C. In Rural Districts.

1198. **Under Lighting & Watching Act, 1833 (c. 90)—Adoption of Act by meeting of ratepayers—Calculation of statutory majority.]—**Under above Act, a majority of two-thirds of the ratepayers of a parish is required only at the original meeting to be held under sect. 9, for determining as to the adoption of the Act, & as to the amount which the inspectors shall have power to call for in any year: but where the parish has adopted the provisions of the Act, a majority of two-thirds is not necessary, in order to determine the amount to be raised for the purpose of the act in a subsequent year, under sect. 18, but the resolution of a simple majority of the ratepayers voting at the meeting called for that purpose, or, in case of a poll being demanded, of the ratepayers voting upon it, is sufficient.—BEECHY v. QUENTERY (1842), 10 M. & W. 65; 11 L. J. Ex. 420; 6 J. P. 364; 152 E. R. 383.

1199. — **Above Act being an Act for lighting & watching parishes in England & Wales, by sect. 8, provides that the adoption of the Act shall be determined by a majority consisting of two-thirds of the votes of the ratepayers present at such meeting:]—***Held*: the provisions of the Act had not been adopted when at a meeting, thirty-seven ratepayers being present, only twenty voted, the remainder not taking any part in the transaction.—LYNSHAM CASE (1819), 12 Q. B. 398, n.; 116 E. R. 917; *sub nom.* R. v. LYNSHAM PARISH RATEPAYERS, 3 New Sess. Cas. 507; 3 New Mag. Cas. 154; 13 L. T. O. S. 91; *sub nom.* Re LYNSHAM PARISH RATEPAYERS, 18 L. J. Q. B. 210; 13 Jur. 345.

*Annotations*:—**Apprvd.** Gosling v. Voley (1853), 4 H. L. Cas. 679. **Apld.** R. v. Christchurch Overseers (1857), 7 E. & B. 409.

1200. — **Within a year of rejection—Adoption by part of parish.]—**It is competent to a part of a parish to meet & adopt the provisions of above Act, as far as that part is concerned, though a general meeting of the whole parish held within a year before rejected it, if the second meeting be not substantially the same as the first, & not a colourable evasion of the clause which prohibits the discussion of the question within a year after its rejection. Where justices sign a warrant to enforce a rate made at such second meeting, they act without jurisdiction if that meeting be an illegal one, & trespass lies against them at the suit of any one distrained on under their warrant, for they are not protected by a rate apparently good, but by one actually good only.—WILKINSON v. GRAY (1844), 2 L. T. O. S. 348; 9 J. P. 71.

1201. — **Whether meetings substantially the same Question of fact.]—**Under above Act a meeting of the rated inhabitants of the parish of H. was held to determine whether the provisions of the Act should be applied to the parish. The assent of as much as two-thirds of the voters was not given. Within a year, a meeting was held of the rated inhabitants of a district of the parish, to determine whether the Act should be applied to that district; when two-thirds of

habit of crossing the open space; & after the street was levelled, was crossing the open space in the night, & not being aware of the cutting, fell into the street & was injured:—*Held*: pltf. had no legal right, as against defts., to cross over the land; & there was therefore no legal obligation on defts. to light the street.—HENDERSON v. ST. JOHN CORPN. (1872), 1 Pug. 72.—CAN.

r. — **Rice v. Whitby Town Corp.** (1897), 23 O. R. 598; *affd.* (1898), 25 A. R. 191.—CAN.

*Sect. 1.—Powers and duties: Sub-sect. 11, C. & D.; sub-sect. 12. Sect. 2: Sub-sect. 1.]*

the voters assented. A rate was laid upon the district, in conformity with this. S., one of the parties so rated, having refused to pay the rate, was summoned before the justices, when he objected that, the latter meeting having been held within a year of the former, the proceedings were void by sect. 16 of the Act & the rate invalid. The parties agreed that the question was whether the two meetings were substantially the same. The justices decided in the affirmative, & refused a warrant for levying:—*Held*: the question was properly put before the magistrates, & they having determined it, the ct. could not, on a rule to order the justices to issue a distress warrant, review their decision.—*R. v. DUNN* (1857), 7 E. & B. 220; 26 L. J. M. C. 74; 21 J. P. 565; 3 Jur. N. S. 341; 110 E. R. 1220; *sub nom.* *R. v. SUSSEX JJ.*, 28 L. T. O. S. 252.

*Annotation:—Mentd.* *R. v. DICKENSON* (1857), 22 J. P. 243.

**1202.** ——— *Validity of proceedings—Chairman not a ratepayer.]—Ex p. SOUTH MIMS (PARISH OFFICERS)* (1852), 19 L. T. O. S. 190.

**1203.** ——— *By whom meeting summoned.]—Ratepayers in an ecclesiastical district within parish K. being desirous of having above Act adopted in the district, sent in a written requisition to the chapelwardens of the district, who thereupon called the meeting, Aug. 1851, & gave the requisite notices under the Act. In May, 1852, the inspectors made an order on the overseers to raise & levy £150 under the Act. Part of the amount only was collected: & in June, 1853, a second order of the inspectors was made on the overseers to levy the arrears, & also a fresh sum ordered for the expenses of the current year:—*Held*: the meeting ought to have been called by the churchwardens of the parish K. under above Act & not by the chapelwardens of the district; & therefore the provisions of the Act had not been properly adopted; & all that had been done under the Act was void.—*R. v. STAFFORDSHIRE JJ. & KINGSWINFORF OVERSEERS* (1854), 23 L. T. O. S. 91; 2 W. R. 453.*

**1204.** ——— *Rates under—How questioned—Jurisdiction of magistrates.]—“Overseers,” in above Act includes churchwardens, although the parish is divided, & each part has separate elected overseers. Order for a rate under the Act can only be questioned by appeal under sect. 66. When a rate is made by the proper authority, the magistrates have no jurisdiction to inquire into the validity; they have no judicial function to perform; they have only to see that there is a rate, not to inquire into its merits.—*R. v. RYE JJ.* (1864), 5 New Rep. 169; 13 W. R. 142.*

**1205.** ——— *Recovery—Whether validity of adoption must be shown.]—On a summons for non-payment of rates under above Act, the overseers are not obliged to prove that the formalities prescribed by the Act for its due adoption by the parish have been complied with.—*R. v. REYNOLDS*, [1893] 2 Q. B. 75; 69 L. T. 321; 42 W. R. 32; 57 J. P. Jo. 356; 5 R. 423; *sub nom.* *R. v. FRODSHAM JJ. & EDWARDS*, 62 L. J. M. C. 120; 0 T. L. R. 456, D. C.*

*Annotation.—Consd.* *Roberts v. Clowne Overseers* (1896), 13 T. L. R. 18.

**1206.** ——— *“Overseers” — Include churchwardens.]—*R. v. RYE JJ.*, No. 1204, *ante*.*

**1207.** *Where Public Health Act, 1875 (c. 55), applies—Powers of authority—Whether powers of rating included.]—The first paragraph of sect. 161 of above Act empowers an urban sanitary authority*

*to contract with any person for the supply of gas, or other means of lighting the streets, markets, & public buildings in their district, & to provide the necessary materials. The Local Govt. Board declared by an order under sect. 276 of that Act that the provisions of the first paragraph of sect. 161 should be in force within certain portions of a rural sanitary district, & invested the rural sanitary authority with all the powers, rights, capacities, etc., of an urban sanitary authority “under those provisions” within such portions of the district. The rural authority incurred lighting expenses under this order, & treated them as general expenses under sect. 229 of the Act. A poor rate having been made to defray the expenses a railway co. was assessed in respect of the full ratable value of its property, which consisted of land occupied & used as a railway:—*Held*: upon the true construction of the order the rural authority was invested only with the power of an urban authority to incur lighting expenses under the provisions of the first paragraph of sect. 161 & not with the rating powers applicable to an urban authority under the Act; the expenses were rightly treated as general & not as special expenses under sect. 229; & the co. was not entitled to be rated under sect. 211 of the Act & in the proportion of one-fourth part only of the ratable value.—*LANCASHIRE & YORKSHIRE RY. CO. v. BOLTON UNION ASSESSMENT COMMITTEE & GREAT LEVER OVERSEERS* (1890), 15 App. Cas. 323; 60 L. J. Q. B. 118; 63 L. T. 358; 51 J. P. 532, H. L.*

**1208.** ——— *Recovery of expenses.]—LANCASHIRE & YORKSHIRE RY. CO. v. BOLTON UNION ASSESSMENT COMMITTEE & GREAT LEVER OVERSEERS*, No. 1207, *ante*.

#### *D. Injury to Street Lamps.*

**1209.** *Liability of master of carter—Whether accident or negligence—Metropolis Management Act, 1855 (c. 120), s. 207.]—A driver accidentally injured a metropolitan street lamp while driving a van laden with baskets. H., the master, was summoned, under above Act & the justices holding it to be an accident & not a negligent act, dismissed the charge:—*Held*: the justices were right.—*HARDING v. BARKER* (1888), 53 J. P. 308; 37 W. R. 78; 5 T. L. R. 42, D. C.*

**1210.** *Liability of driver—Lamp-post projecting over roadway.]—While an omnibus was being driven along a road in the metropolis the rail of the omnibus accidentally, & without negligence on the part of the driver, broke a street lamp. The lamp-post was placed on the footway so near to the kerb & at such an angle from the perpendicular that it projected to some extent over the roadway, & thereby contributed to the accident:—*Held*: notwithstanding the projection of the lamp-post over the roadway, the driver was liable for the damage to the lamp, under Metropolis Management Act, 1855 (c. 120), s. 207.—*BURGESS v. MORRIS* (1897), 77 L. T. 97; 61 J. P. 553; 41 Sol. Jo. 642, D. C.*

*Annotation:—Refd.* *Ashton v. Eccles Corp.* (1906), 71 J. P. 55.

**1211.** ——— *Driver negligent—Gas Works Clauses Act, 1847 (c. 15), s. 20.]—By above Act “Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers or under their control shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding £5, as any two justices or the sheriff shall think reasonable”:—*Held*: where a lamp-post had been knocked down by the negligent*

driving of debts.' servant, plffs. could maintain an action for negligence in the county ct. against the masters, as the sect. was not exclusive.—*CRYSTAL PALACE GAS CO. v. IDRIS & CO.* (1900), 82 L. T. 200; 64 J. P. 452; 16 T. L. R. 180; 44 Sol. Jo. 229, D. C.

*Annotations:—**Reid. Ashton v. Eccles Corpn.* (1906), 71 J. P. 55; *Birmingham Corpn. v. Allsopp* (1918), 88 L. J. K. B. 549.

**1212.** ————.]—On a summons against applt. for "unlawfully & carelessly" damaging a lamp-post under above Act, the magistrates found that there was evidence of "carelessness," & made an order against applt.:—*Held*: on the facts, that although the word "accidentally" was not in the summons there was sufficient evidence of carelessness to justify the order, as the kind of carelessness referred to in the sect. is something short of what may be called negligence, & is almost equivalent to pure accident.—*ASHTON v. ECCLES CORPN.* (1906), 71 J. P. 55, D. C.  
*Annotation:—**Reid. Birmingham Corpn. v. Allsopp* (1918), 88 L. J. K. B. 549.

See, further, GAS.

#### SUB-SECT. 12.—AS TO BUILDING LINES.

**Power to prescribe.]—**See Roads Improvement Act, 1925 (c. 68), s. 5.

— **In metropolitan streets.]—**See Part XIII., Sect. 1, sub-sect. 7.

— **In extra-metropolitan streets.]—**See Part XIII., Sect. 2, sub-sect. 6.

### SECT. 2.—EXPENSES.

#### SUB-SECT. 1.—OF COUNTY COUNCILS.

See Highways & Locomotives (Amendment) Act, 1878 (c. 77), ss. 13, 20; Local Government Act, 1888 (c. 41), s. 11 (1), (13).

**1213. Maintenance & repair of main roads.—**What is "maintenance"—Removal of snow.—The main roads within the district of a highway authority became impassable from snow, which the highway authority removed, & they claimed one-half the expense of doing so from the county authority under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13: *Held*: this was an "expense incurred in the maintenance" of such roads within that sect. & the county authority were liable.—*AMESBURY GUARDIANS v. WILTS JJ.* (1883), 10 Q. B. D. 480; 52 L. J. M. C. 64; 47 J. P. 184; 31 W. R. 521.

*Annotation:—**Distd. Acton District Council v. London United Tramways*, [1909] 1 K. B. 68.

**1214. ———— Scavenging—Necessary for keeping in repair.]—***R. v. ESSEX JJ.* (1888), 4 T. L. R. 676, D. C.

**1215. ———— Watering, removing refuse & scraping.]—**By Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13, disturnpiked roads are to become main roads, & half of the expense of maintenance is to be contributed out of the county rate. Certain main roads, formerly turnpike, passed through the borough of B.:—*Held*: with regard to scavenging, i.e. watering, removing refuse & scraping, the expense of so much of the scavenging as was necessary for the maintenance of the roads came within the sect., & £40 per mile *per annum* was a fair estimate for the roads in the borough of B. of the proportion that should come out of the county rate.—*BURNLEY CORPN. v. LANCASTER COUNTY COUNCIL* (1889), 54 J. P. 279.

*Annotation:—**Reid. Re Warminster L. B. & Wilts County Council* (1890), 59 L. J. Q. B. 434.

**1216. ———— Whether alteration in character of road—Macadamised road paved.]—**Converting a macadamised road into a paved road does not come within the term "maintenance" of the road as used in Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13, & therefore a highway authority cannot recover half the expenses thereby incurred from the county authority under that sect.—*LEEK IMPROVEMENT COMRS. v. STAFFORD JJ.* (1888), 20 Q. B. D. 794; 57 L. J. M. C. 102; 52 J. P. 403; 38 W. R. 654; 4 T. L. R. 520, C. A.

*Annotations:—**Reid. Cumberland County Council v. L. R. Comrs.* (1898), 78 L. T. 679; *Southampton County Council v. L. R. Comrs.* (1905), 92 L. T. 364.

**1217. ———— What "main roads" includes — Footpaths beside road.]—**The council of a county is liable to pay to an urban authority retaining its own main roads the costs of the repair, maintenance & reasonable improvement connected with the maintenance & repair of footpaths by the sides, & forming part of, main roads whether in town or country, & whether gravelled or paved, & for any reasonable alteration in construction thereof, & also for the paved & pitched crossings over the main roads. *Re WARMINSTER LOCAL BOARD & WILTS COUNTY COUNCIL* (1890), 25 Q. B. D. 450; 59 L. J. Q. B. 431; 62 L. T. 902; 54 J. P. 375; 38 W. R. 670, D. C.

*Annotations:—**Distd. Curtis v. Kesteven County Council* (1890), 45 Ch. D. 501. *Follid. Re Burslem Corpn. & Staffordshire County Council*, [1890] 1 Q. B. 24. *Apprvd. Derby County Council v. Matlock Bath & Scarthin Nick Urban District*, [1896] A. C. 315. *Reid. Acton U. D. C. v. London United Tramways* (1901), Ltd. (1908), 100 L. T. 80.

**1218. ———— .]—**Where under Local Government Act, 1888 (c. 41), s. 11, an urban authority undertake the maintenance & repair of the main roads within their district, the liability of the county council of the county to contribute to the costs of such maintenance & repair includes the costs of the maintenance & repair of paved footways at the side of disturnpiked roads, which were constituted main roads by Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13.—*Re BURSLEM CORPN. & STAFFORDSHIRE COUNTY COUNCIL*, [1896] 1 Q. B. 24; 65 L. J. Q. B. 1; 73 L. T. 651; 59 J. P. 772; 41 W. R. 356; 12 T. L. R. 48, C. A.

**1219. ———— .]—**Local Government Act, 1888 (c. 41), s. 11, by which every road in a county which is constituted a "main road" under Highways Act, 1878 (c. 77), s. 13, is, if repairable by the highway authority, to be wholly maintained & repaired by the county council, imposes upon the county the duty of maintaining & repairing, in an urban sanitary district, the footways at the side of such main roads.—*DERBY COUNTY COUNCIL v. MATLOCK BATH & SCARTHIN NICK URBAN DISTRICT*, [1896] A. C. 315; 65 L. J. Q. B. 419; 74 L. T. 595; 60 J. P. 676; 12 T. L. R. 350, H. L.

**1220. ———— — Road crossings.]—***Re WARMINSTER LOCAL BOARD & WILTS COUNTY COUNCIL*, No. 1217, *ante*.

**1221. ———— Main road within borough.]—**By Highway Act, 1862 (c. 61), s. 2, defining the word "county" "for the purposes of this Act all liberties & franchises except boroughs . . . shall be considered as forming part of that county by which they are surrounded." By Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 38, "in this Act 'county' has the same meaning as it has in Highway Acts, 1862 & 1861," & by sect. 13 any road which has between Dec. 31, 1870, & the date of the Act ceased to be a turnpike road . . . shall be deemed to be a main road, &

Sect. 2.—Expenses: Sub-sects. 1 & 2. Sects. 3 & 4.]

one-half of the expenses incurred in the maintenance shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area "by the county authority of the county in which such road is situate" out of the county rate. A road in the borough & highway area of Over Darwen, in Lancashire, ceased to be a turnpike road in 1877:—*Held*: although for the purposes of Highway Act, 1862, boroughs are not to be considered as forming parts of counties, yet as the road was within the geographical limits of Lancashire, the county of Lancaster was the "county in which such road is situate" within sect. 13 of 1878 Act, & the county authority was liable to pay half the expenses incurred in the maintenance of such road.—*OVER DARWEN CORPN. v. LANCASHIRE JJ.* (1884), 15 Q. B. D. 20; 54 L. J. M. C. 51; 51 L. T. 730, C. A.

*Annotation*:—*Reid*. *Ex p. Kent County Council & Dover Council, Ex p. Kent County Council & Sandwich Council*, [1891] 1 Q. B. 725.

*See, now*, Local Government Act, 1888 (c. 41), s. 35 (3).

**1222. Degree of liability**—Whether whole cost of maintenance—Main road in quarter sessions borough.]—A quarter sessions borough of 10,000 or upwards, not a county borough which has claimed to retain the maintenance & repair of the main roads within it under Local Government Act, 1888 (c. 41), ss. 11, 35, is not entitled as of right to the payment by the county council of the whole of the costs of such maintenance & repair, & in default of agreement between the borough & the county council, the amount of the payment can only be settled by arbitration of the Local Government Board under sect. 11, sub-sect. 3 of the Act.—*Re BEDFORDSHIRE COUNTY COUNCIL & BEDFORD URBAN SANITARY AUTHORITY*, [1894] 2 Q. B. 786; 64 L. J. Q. B. 26; 71 L. T. 433; 58 J. P. 786; 10 R. 485, D. C.

**1223. What must be considered**—Existence of trust fund for repair.]—*MIDDLESEX COUNTY COUNCIL v. WILLESDEN & HENDON URBAN DISTRICT COUNCILS*, No. 170, *ante*.

**1224. Cost of lighting, watching & watering.**—*MIDDLESEX COUNTY COUNCIL v. WILLESDEN & HENDON URBAN DISTRICT COUNCILS*, No. 170, *ante*.

**1225. Effect of agreement between borough authority & tramway company.**—By Blackburn & Over Darwen Tramways Act, 1870, s. 47, it is enacted that, "the co. shall maintain & keep in good repair the entire width of any road, exclusive of the footpath or foot pavement, along or across which any of their tramways shall be laid . . . & if the co. at any time fail or neglect so to do, the road authority may cause the necessary repairs to be done, & may in such case recover the reasonable cost of such repairs from the co. Provided that the provisions of this sect. shall only apply when steam power is used on the tramways. Provided also, that notwithstanding anything in this sect. contained, the co. may, from time to time, enter into & make such contracts or agreements with the road authority of either borough for the repair & maintenance of such road as may be approved by the Board of Trade." The road in question was a main road, on which a steam-tramway had been constructed in 1880. By an agreement dated May 1, 1880, & duly approved by the Board of Trade, made between the highway authority of D. & the tramway co., it was agreed that the co. should only be liable in respect of the repair of so much of the said road as lay between

the rails & 3 feet 6 inches beyond, & that the corpn. should maintain & keep in repair the whole width of the said road, & that the co. should pay to the corpn. a proportionate part of the expenses so incurred by the corpn. The county authority having denied their liability, to pay half of the amount expended by the highway authority in the repair & maintenance of the said road:—*Held*: the county authority were liable to pay their contribution, & the agreement between the highway authority & the co. had been legally made under the powers given by the proviso in sect. 47 of the Act.—*OVER DARWEN CORPN. v. LANCASTER COUNTY JJ.* (1887), 58 L. T. 51; *sub nom. DARWEN CORPN. v. LANCASHIRE JJ.*, 36 W. R. 140, D. C.

**1226. Right to recoupment from Exchequer Contribution Account**—Main roads declared repairable by hundreds.]—The maintenance of main roads throughout a county remains a "general county purpose" within Local Government Act, 1888 (c. 41), ss. 11 (1), 68, & chargeable on the Exchequer Contribution Fund appropriated under that Act for "general county purposes," although the county council may by resolution adopt Highway Act, 1878 (c. 77), s. 20, & throw the expense of maintaining main roads on the hundreds.—*R. v. DOLBY*, [1892] 2 Q. B. 736; 61 L. J. Q. B. 826; *sub nom. R. v. DOLBY, Re EXCHEQUER CONTRIBUTION ACCOUNT OF LANCASHIRE*, 67 L. T. 619, D. C.

**1227. Reference to local government board**—Decision "otherwise than as arbitrators"—Jurisdiction of court to interfere.]—London Government Act, 1890 (c. 14), s. 7 (1), enacts that where any duty is transferred from the London County Council to a borough council by or under the Act the county council shall contribute to the borough council such amount, if any, as may be finally determined by the local govt. board. Sect. 28 (3) enacts that when the local govt. board are authorised by the Act to determine any matter, it shall be at their option to determine the matter as arbitrators or otherwise. An application was made by several metropolitan borough councils to the local govt. board to determine the amount to be contributed by the county council in respect of the maintenance of main roads which was transferred to the borough councils by sect. 6 (1) of the Act. The local govt. board decided "otherwise than as arbitrators" that no contribution should be made:—*Held*: the ct. ought not to interfere.—*R. v. LOCAL GOVERNMENT BOARD, Ex p. HACKNEY BOROUGH COUNCIL* (1908), 72 J. P. 211; 6 L. G. R. 665, D. C.

**1228. Mode of payment**—Payment by local authority spread over term of years.]—A county council is bound to repay the whole burden of the cost of maintaining main roads to the urban authority under Local Government Act (c. 41), s. 11, but the council have only to defray that burden in the same way as the urban authority did, & whether it be defrayed out of current rates, or by means of a loan. If the urban authority spread the cost over two or three years, the county council may do the same.—*MARLBOROUGH TOWN COUNCIL v. WILTS COUNTY COUNCIL* (1894), 58 J. P. 213, D. C.

#### SUB-SECT. 2.—OF BOROUGH, URBAN OR OTHER COUNCILS.

*See, now*, Public Health Act, 1875 (c. 55), s. 102 (3).

**1229. District comprising several parishes**—

**Whether parishes separately rated—Each parish maintaining own highways.]**—Where several parishes or places separately maintaining their own highways are comprised in the district assigned to a local board of health, the highways throughout the district are, under Public Health Act, 1848 (c. 63), s. 87, to be maintained by a general district rate, & not by separate highway rates on the ancient divisions.—*MOSELEY v. ELY LOCAL BOARD OF HEALTH* (1856), 6 E. & B. 518; 26 L. J. M. C. 23; 3 Jur. N. S. 42; 119 E. R. 958.

**Annotations:—***Folld. Taft Ry. v. Cardiff L. B. of Health* (1857), 8 E. & B. 535. *Refd. Barber v. Jessopp* (1857), 1 H. & N. 578.

**1230. District comprising several townships—Whether townships separately rated.]**—A local board of health for a district consisting of a parish comprising three townships came within the description set out in Local Government Act, 1858 (c. 98), “where no public works of paving, water supply & sewerage are established,” & the local board levied a district highway rate for one of the townships:—*Held*: they had no authority to do so, for the highway rate could alone be levied over the whole district.—*Re BROUGHTON LOCAL BOARD OF HEALTH* (1865), 12 L. T. 310; 29 J. P. Jo. 324.

**1231. District coterminous with ancient parish—Whether expenses raised by district or highway rate.]**—The maintenance of the highways within the district of a local board of health must be provided for by a district rate, & not by a highway rate, whether the district be or be not coterminous with an ancient parochial division.—*TAFF VALE RY. CO. v. CARDIFF LOCAL BOARD OF HEALTH* (1857), 8 E. & B. 535; 120 E. R. 200.

**Annotation:—***Refd. R. v. Dukinfield* (1863), 4 B. & S. 159.

**1232. District extended—Power to levy improvement rate over extension—Construction of local Act.]**—By a local Act, after defining the limits of the town of C. for the purposes of the Act, the comrs. appointed thereunder were authorised to levy an annual rate on the occupiers of dwelling-houses within the limits of the Act not exceeding 2s. 1d. in the pound, & all persons assessed under the Act were released from liability for the repairs of highways without the limits of the Act. By Public Health Act, 1872 (c. 79), the district within the local Act became an urban district, & the comrs. became the urban authority. The expenses incurred by them in the execution of the Sanitary Acts were, at the time of the passing of the Public Health Act, 1875 (c. 55), payable out of rates in the nature of general district rates leviable by them through the whole of their district. At the time of the passing of Local Government Act, 1891 (c. 73), the parish of C. was partly within & partly without the urban district of C., but by a Confirmation Order of the Local Government Board in 1894 the urban district was extended as so to include the part of the parish outside the former urban district, & it was provided that the district should be deemed to have been extended before the passing of the Act of 1891. Applt. was the occupier of a dwelling-house within the limits of the local Act. In 1896 the C. urban district council made a rate for the whole district, including the added area, headed the “C. Improvement Rate for the year ending Midsummer 1897.” The rate exceeded the amount in the pound limited by the local Act. It was made to defray expenses to be incurred by the council under Public Health Act, 1875 (c. 55), including the purposes for which rates were leviable under the local Act; & was for the

repair of highways, both within the limits of the local Act & also in the added area:—*Held*: the rate was a good one, & was rightly headed.—*HILL v. CREDITON URBAN DISTRICT COUNCIL* (1899), 80 L. T. 861, C. A.

**1233. Public work of saving water supply & sewerage—Construction of stone kerbs—Half expense paid by local authority.]**—A local board under Public Health Act had been in the habit, by arrangement with the owners or occupiers adjoining, of constructing stone kerbs along the footpaths of certain roads & streets in their district, & of paying half the expense:—*Held*: this was not a “public work of paving” within Local Government Act, 1858 (c. 98), s. 37, clause 1, & therefore the local board were entitled to levy a highway rate for the repair of highways in their district.—*BIRMINGHAM CANAL CO. v. DOCKER* (1860), 21 J. P. 691.

**1234. — — —.]**—Applts., a local district board, made a general district rate, & a highway rate, & demanded the same from resps., who had constructed two compensation reservoirs in connection with the supply of water for the town of B. Resps. contended that the local board had no power to levy a highway rate because in 1880 they laid down in their district a curbstone, about 300 yards long, as a coping to a cinder pathway of a carriage road:—*Held*: putting down the curbstone did not constitute the establishment of public works of paving within Public Health Act, 1875 (c. 55), s. 216 (3), & therefore applts. were entitled to levy a highway rate.—*OXENHOPE DISTRICT LOCAL BOARD v. BRADFORD CORPN.* (1882), 47 L. T. 311; 47 J. P. 21; 31 W. R. 322.

**1235. — — — Repair of highways taken over—No addition to existing sewers.]**—In B. urban sanitary district when formed & when the local board began in 1877 to take charge of the repair of highways there were some old-fashioned stone drains or culverts into which some houses sent their sewage, & into which storm water entered through gratings, but the board had not added to these nor made any new works themselves. The board made a highway rate & assessed occupiers thereto:—*Held*: the existing drains sufficiently answered the description of public works within Public Health Act, 1875 (c. 55), s. 216 (3), & therefore, the expense of highway repairs should have been levied not by a highway rate but by a general district rate.—*R. v. BELPER LOCAL BOARD* (1881), 46 J. P. 166.

### SECT. 3.—ACCOUNTS.

*See LOCAL GOVERNMENT.*

### SECT. 4.—ILLEGAL EXPENDITURE.

**1236. Application of funds to expense of application to Parliament.]**—Comrs. under an Act for the better paving & lighting, etc., the borough of P. were empowered to levy rates, & to apply them to certain specified purposes, & “in & for carrying the intents & purposes of the Act into full & complete execution in other respects”:—*Held*: this did not authorise the comrs. in expending the rates in payment of the expenses of an application to Parliament for increased powers; the purposes of the Act were public, & the A.-G. might proceed to restrain an illegal application of the rates.—*A.-G. v. EASTLAKE* (1853), 11 Hare, 205; 2 Eq. Rep. 145; 22 L. T. O. S. 20; 18

**Sect. 4.—Illegal expenditure. Sect. 5: Sub-sect. 1, A.]**

J. P. 262; 17 Jur. 801; 1 W. R. 323; 68 E. R. 1240.

**Annotations.**—*Fold. A.-G. v. West Hartlepool Improvement Comrs.* (1870), L. R. 10 Eq. 152. *Mentid. Beaumont v. Oliveira* (1869), 4 Ch. App. 309; *Re St. Bride's Church, Fleet St.* (1877), 35 Ch. D. 147, n.; *Elias v. Griffith* (1878), 8 Ch. D. 521; *A.-G. v. Dartmouth Corp.* (1883), 48 L. T. 933; *Re St. Botolph without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142; *Smith v. Kerr* (1902), 71 L. J. Ch. 389.

**1237. — Extension of district.**—By a local improvement Act, passed in 1854, comrs. were incorporated, & a district was defined; & the comrs. were empowered to cause to be paved, drained, & otherwise improved, the town & township comprised in the district, & to be the surveyors of highways within the same, & keep the same in repair; to "do all acts, matters, & things for promoting the health, comfort, & convenience of the inhabitants" of the district, which they might deem or consider necessary, & "for that purpose" to "exercise all the powers vested in them" by the Act & the Acts incorporated therewith, amongst which were the Companies Clauses Act, 1845 (c. 16), & parts of the Towns Improvement (Clauses) Act, 1817 (c. 34).

The ct. granted an injunction to restrain the comrs. from applying any moneys produced by rates towards the promotion of a bill in Parliament the object of which was to obtain an extension of their district.—*A.-G. v. WEST HARTLEPOOL IMPROVEMENT COMRS.* (1870), L. R. 10 Eq. 152; 39 L. J. Ch. 624; 22 L. T. 510; 18 W. R. 685.

**Annotations.**—*Reid. A.-G. v. West Riding of Yorkshire Rivers Board* (1905), 69 J. P. 177. *Mentid. Hood v. N. E. Ry.* (1870), 19 W. R. 266; *A.-G. v. Merthyr Tydfil Grdn.*, [1900] 1 Ch. 516.

**1238. Bonâ fide exercise of statutory powers.—Incidentally benefiting particular class—Motor car trials.**—*R. v. BRIGHTON CORPN., Ex p. SHOOSMITH*, No. 1148, *ante*.

**SECT. 5.—LIABILITIES.****SUB-SECT. 1.—LIABILITY AS HIGHWAY AUTHORITY.****A. For Non-Feasance.**

**1239. Liability as highway authority & sanitary authority distinguished.**—This was an action

tried before a jury in which plff. sought to recover damages for personal injuries occasioned to her through having fallen off her bicycle owing to the defective condition of a gully in a road in defts.' district, defts. being both highway authority & sewer authority. The jury found negligence against defts. in both capacities, & judgment was entered for her. There was no evidence before the jury as to the capacity in which defts. controlled the gully, & no question was left to the jury as to whether defts. knew, or had the means of knowledge, or ought to have known, of the defect in the gully. No direction was given to the jury to address their minds to this question in answering the question of negligence. Defts. applied for judgment or a new trial:—*Held*: it ought to be determined whether the gully was a thing for which the road authority were responsible to the exclusion of the sewer authority, or for which the sewer authority were responsible to the exclusion of the road authority, or for which they were both responsible, for the reason that if the gully was vested in them as road authority defts. would not be liable for mere non-feasance; if it should be found that defts. were responsible for the gully as sewer authority, it ought to be determined, in order to ascertain whether there was actionable negligence, whether the defect was known, or with reasonable diligence would have been known to defts.; therefore there must be a new trial.—*PAPWORTH v. BATTERSEA CORPN.*, [1915] 1 K. B. 392; 84 L. J. K. B. 1320; 112 L. T. 681; 79 J. P. 105; 31 T. L. R. 52; 59 Sol. Jo. 74; 13 L. G. R. 197, C. A.; *subsequent proceedings*, [1916] 1 K. B. 583, C. A.

**Annotation.**—*Reid. Nash v. Rochford R. C.*, [1917] 1 K. B. 381.

**1240. Whether action lies—For mere non-feasance.**—*R. v. STATFORD (OR STRETFORD) (INHABITANTS)*, No. 1145, *ante*.

**1241. —**—*J.*—No action for damages lies against the surveyor of a highway appointed under Highway Act, 1835 (c. 50), for an accident caused by the non-repair of the highway.—*YOUNG v. DAVIS* (1863), 2 H. & C. 197; 2 New Rep. 205; 9 L. T. 145; 10 Jur. N. S. 79; 11 W. R. 735; 159 E. R. 82, Ex. Ch.

**Annotations.**—*Distd. Hartnall v. Ryde Comrs.* (1863), 4 B. & S. 361. *Consd. Parsons v. St. Mathew, Bethnal*

**PART VIII. SECT. 5, SUB-SECT. 1.—A.**

**1240 i. Whether action lies — For mere non-feasance.**—An action does not lie against a municipal corp. in respect of mere non-feasance.—*MONTREAL (CITY) v. MONTCLAIR* (1898), 28 S. C. R. 458.—*CAN.*

**1240 ii. —**—*J.*—*MINNS v. OME-NEW VILLAGE* (1901) 2 O. L. R. 579; 21 C. L. T. 561.—*CAN.*

**1240 iii. —**—*J.*—Although a duty to repair streets may be expressly imposed upon a municipality, no action lies against it for damages for injuries resulting from non-repair. *CLARK v. CALGARY* (1907), 5 W. L. R. 292; 6 W. L. R. 622; 6 Terr. L. R. 309.—*CAN.*

**1240 iv. —**—*J.*—Plff. collided with a telephone pole on the highway belonging to a co. which had no statutory or other right to erect it there:—*Held*: the omission of the municipality to remove an obstruction in the roadway placed there by a stranger was mere non-feasance, & plff. could not recover.—*HOWSE v. MOUTHWOLD TOWNSHIP* (1912), 22 O. W. R. 797; 3 O. W. N. 1592; 27 O. L. R. 29; 5 D. L. R. 708.—*CAN.*

**1240 v. —**—*J.*—*MOORE v. CORNWALL* (1912), 23 O. W. R. 113; 4

O. W. N. 145; 7 D. L. R. 413.—*CAN.*

**1240 vi. —**—*J.*—The immunity of municipalities at common law in cases of non-feasance & non-repair with regard to highways & bridges does not extend to such a case as where waters are deliberately diverted from their natural channel.—*STOTT v. NORTH NORFOLK MUNICIPALITY* (1914), 26 W. L. R. 774; 16 D. L. R. 48; 24 Man. L. R. 9.—*CAN.*

**1240 vii. —**—*J.*—*OGLOFF v. SLIDING HILLS RURAL MUNICIPALITY*, No. 273, [1916] 1 W. W. R. 126; 44 D. L. R. 108.—*CAN.*

**1240 viii. —**—*J.*—The Legislature of British Columbia has not imposed upon municipal corps. which are governed by Municipal Act, 1914 (c. 52), liability for injuries caused through mere non-repair, of their roads & sidewalks.—*CLARKE v. CHILLIWACK CORPN.*, [1923] 2 W. W. R. 726; 31 B. C. R. 316.—*CAN.*

**1240 ix. —**—*J.*—The exemption from liability of local bodies on the ground of non-feasance is confined to neglect of highways.—*DHOLKA TOWN MUNICIPALITY v. PATEL DESAIBHAI* (1913), 1 L. L. R. 38 Bom. 116.—*IND.*

**1240 x. —**—*J.*—A flood washed away a culvert which went across a

road under resps.' control, & left it in a dangerous condition. Resps. repaired the road by putting a pipe across it several feet below the surface to carry away the water; earth was then filled in, & metal was placed upon the top. There was a slight subsidence some three months afterwards, which was never filled up:—*Held*: the evidence did not show that the work was done improperly, but only that, having repaired the road in a way which was not shown to be improper, the road afterwards fell into disrepair & they omitted to repair it, & that this amounted to a non-feasance only, not a misfeasance.—*COLQUHOUN v. COUNTY OF BRUCE CHAIRMAN, COUNCILLORS & INHABITANTS* (1910), 29 N. Z. L. R. 442.—*N.Z.*

**1240 xi. —**—*J.*—*PASCOE v. PORT LEVY ROAD DISTRICT (INHABITANTS)* (1885), 4 N. Z. L. R. 150 (S. C.).—*N.Z.*

**1240 xii. —**—*J.*—*TARRY v. TAKANAKI COUNTY COUNCIL* (1894), 12 N. Z. L. R. 467.—*N.Z.*

**1240 xiii. —**—*J.*—A local authority having the control & care of roads is not responsible for damage caused by its mere non-feasance.—*TAMAKI WEST ROAD BOARD v. APPLETON*, [1916] N. Z. L. R. 183.—*N.Z.*



Green (1867), L. R. 3 C. P. 56. *Appld.* Gibson v. Preston Corp'n. (1870), L. R. 5 Q. B. 218. *Consd.* Cowley v. Newmarket L. B. (1892) A. C. 345. *Refd.* Wilson v. Halifax Corp'n. (1868), L. R. 3 Exch. 114; Taylor v. Greenhalgh (1874), L. R. 9 Q. B. 487; Pendlebury v. Greenhalgh (1875), 1 Q. B. D. 36; Holborn Grdns. v. St. Leonard's Vestry (1876), 41 J. P. 38; Loughborough Highway Board v. Curzon (1886), 16 Q. B. D. 565; R. v. Poole Corp'n. (1887), 19 Q. B. D. 602; Saunders v. Holborn District Board of Works (1894), 71 L. T. 519; Rundle v. Hearle, [1898] 2 Q. B. 83; Maguire v. Liverpool Corp'n., [1905] 1 K. B. 767. *Mentd.* Mill v. Hawker & Wickett (1874), 30 L. T. 894.

**1242.** ———.]—Under a private Act for the improvement of the town of R., incorporating the Towns Improvement Clauses Act, 1847 (c. 34), certain comrs. were appointed. By sect. 48 of the incorporated Act, these comrs. became on their appointment surveyors of the highways within the limits of the special Act, & sect. 49 of the incorporated Act rendered the comrs., in case they refused or neglected to repair such highways, liable in the same manner as the parish were liable before the passing of the special Act. The private Act enabled these comrs. to levy rates, but only to an amount fixed by the Act:—*Held*: the comrs. were liable for an injury caused to a private individual by the omission to repair one of the highways within the limits of their Act, & it was not necessary to aver in the declaration that there were funds applicable to that purpose. —HARTNALL v. RYDE COMRS. (1863), 4 B. & S. 361; 2 New Rep. 424; 33 L. J. Q. B. 39; 8 L. T. 574; 27 J. P. 599; 10 Jur. N. S. 257; 11 W. R. 963; 122 E. R. 491.

*Annotations*:—*Appld.* Ohrby v. Ryde Comrs. (1864), 5 B. & S. 743. *Distd.* Parsons v. St. Mathew, Bethnal Green (1867), L. R. 3 C. P. 56; Wilson v. Halifax Corp'n. (1868), L. R. 3 Exch. 114; Gibson v. Preston Corp'n. (1870), L. R. 5 Q. B. 218. *Consd.* A.-G. & Domes v. Basingsloke Corp'n. (1876), 45 L. J. Ch. 726; Glossop v. Heston & Isleworth L. B. (1879), 12 Ch. D. 102. *Appld.* Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256. *Distd.* Cowley v. Newmarket L. B. (1892) A. C. 345. *Consd.* Picot Municipality v. Geldart, [1893] A. C. 524; Thompson v. Brighton Corp'n., Oliver v. Horsham L. B. (1894) 1 Q. B. 332. *Distd.* Saunders v. Holborn District Board of Works, [1895] 1 Q. B. 64; Sydney Municipal Council v. Bourke, [1895] A. C. 433. *Consd.* & *Distd.* Maguire v. Liverpool Corp'n., [1905] 1 K. B. 767. That case, if it is to be supported at all at the present day, must be treated merely as a decision on the special wording of the Act there in question (ROMER, L.J.). *Refd.* Forbes v. Leo Conservancy Board (1879), 4 Ex. D. 116; Kent v. Worthing L. B. (1882), 10 Q. B. D. 118.

**1243.** ———.]—Towns Improvement Clauses Act, 1847 (c. 34), s. 52, imposes on the comrs. elected under the Act the duty of fencing footpaths, if needed for the protection of passengers, & leaves them no discretion:—*Held*: such comrs. are therefore liable, in their corporate capacity, to an action at the suit of a person injured by their negligent omission to fence a footpath.—OHRYBY v. RYDE COMRS. (1861), 5 B. & S. 743; 33 L. J. Q. B. 296; 28 J. P. 663; 10 Jur. N. S. 1048; 12 W. R. 1079; 122 E. R. 1007.

*Annotation*:—*Consd.* Forbes v. Leo Conservancy Board (1879), 4 Ex. D. 116.

**1244.** ———.]—An action for the non-repair of a highway will not lie against a vestry appointed under the Metropolis Management Act, 1855 (c. 120).—PARSONS v. ST. MATHEW BETHNAL GREEN (1867), L. R. 3 C. P. 56; 37 L. J. C. P. 62; 17 L. T. 211; 32 J. P. 55; 10 W. R. 85.

*Annotations*:—*Appld.* Gibson v. Preston Corp'n. (1870), L. R. 5 Q. B. 218. *Distd.* White v. Hindley L. B. (1875), L. R. 10 Q. B. 219; Holborn Grdns. v. St. Leonard, Shoreditch Vestry (1876), 2 Q. B. D. 145; Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256. *Refd.* Wilson v. Halifax Corp'n. (1868), L. R. 3 Exch. 114; Smith v. West Derby L. B. (1878), 3 C. P. D. 423; Forbes v. Leo Conservancy Board (1879), 4 Ex. D. 116; Maguire v. Liverpool Corp'n. (1905), 92 L. T. 375.

**1245.** ———.]—GIBSON v. PRESTON CORPN., No. 834, *ante*.

**1246.** ———.]—By Metropolis Management Act, 1855 (c. 120), s. 42, defts. were constituted a body corporate, with power to sue & liability to be sued. By sect. 125, vestries are required to employ a sufficient number of persons, or to contract with any co. or persons for removing all dirt, ashes, rubbish, & filth with their parishes. *Pltf.*, the guardians of a union, were possessed of a workhouse situate within defts.' parish. Defts. refused to remove from it the dirt, ashes, rubbish, & filth there collected; *pltf.*s. were in consequence obliged to remove same & thereby incurred expense:—*Held*: an action was maintainable by *pltf.*s. to enable them to recover from defts. the expense incurred by them in removing the dirt, ashes, rubbish, & filth from the workhouse.

By Metropolis Management Act, 1855 (c. 120), s. 96, the duties of surveyors of highways are imposed upon vestries; but this does not render them responsible to a person injured by the non-repair of a street (LUSH, J.). —HOLBORN GUARDIANS v. ST. LEONARD, SHOREDITCH, VESTRY (1870), 2 Q. B. D. 145; 46 L. J. Q. B. 30; 35 L. T. 400; 41 J. P. 38; 25 W. R. 40.

*Annotations*:—*Mentd.* Ellis v. Strand District Board of Works (1892), 67 L. T. 307; Klett v. Camberwell Vestry (1896), 60 J. P. 411.

**1247.** ———.]—*Pltf.*, while walking along a street which was vested in defts. as surveyors of highways under Metropolis Management Act, 1855 (c. 120), s. 96, fell over the iron flap cover to a water-meter box which was imbedded in the pavement, & broke his leg. The meter had been supplied by a water co. to defts. to enable them to water their streets under the powers given to them for that purpose by sect. 116, & the flap had been worn smooth by traffic. In an action to recover damages for the injuries sustained by *pltf.*: —*Held*: defts. were liable, not as surveyors of highways, but as owners of the meter, for their negligence in not keeping the iron flap in repair. —BLACKMORE v. MILE END OLD TOWN VESTRY (1882), 9 Q. B. D. 451; 51 L. J. Q. B. 196; 46 L. T. 860; 47 J. P. 52; 30 W. R. 740, C. A.

*Annotations*:—*Distd.* Moore v. Lambeth Waterworks Co. (1886), 17 Q. B. D. 462; Steel v. Dartford L. B. (1891), 60 L. J. Q. B. 256. *Consd.* Papworth v. Battersea B. C. (1914), 79 J. P. 105. *Refd.* Lambert v. Lowestoft Corp'n. (1901), 65 J. P. 326.

**1248.** ———.]—*Pltf.* brought an action against defts. for personal injuries sustained by him owing to the defective condition of the pavement, arising from the alleged negligence of defts. *Pltf.* at the trial was nonsuited, on the ground that no action lay against defts. for non-repair of the highway:—*Held*: the nonsuit was right, there being no evidence of negligence. *Qu.*: whether defts. in any case were liable to be sued for damages.—LAMPARD v. SEWERS COMRS. (1884), 1 T. L. R. 114, D. C.

*Annotation*:—*Distd.* Burrows v. London City Sewers Comrs. (1888), 4 T. L. R. 262.

**1249.** ———.]—C., who was the owner of certain cottages in a public highway, received a notice from defts. under the Public Health Act, 1875 (c. 55), requiring him to connect the drains of his cottages with the main sewer, & in compliance therewith he dug a trench in the road & made the connection to the satisfaction of defts.' surveyor, & he then filled up the trench. The soil afterwards subsided, & the subsidence was the cause of an accident to *pltf.* while driving in a pony cart. Defts. were the sewer authority & the highway authority of the district. In an action for damages for personal injuries:—*Held*: (1) defts.



**Sect. 5.—Liabilities: Sub-sect. 1. A.]**

were not liable as the sewer authority, on the ground that the notice did not constitute C. their agent; (2) nor as the highway authority, on the ground that no action would lie against a local board for personal injuries arising from the non-repair of a highway.—**STEEL v. DARTFORD LOCAL BOARD** (1891), 60 L. J. Q. B. 256, C. A.

*Annotation:—As to (2) Distd. Thompson v. Bradford Corpn. & Tinsley, [1915] 3 K. B. 13.*

**1250. ———.]—TAYLOR v. ST. MARY ABBOTTS, KENSINGTON, VESTRY (1880), 2 T. L. R. 668.**

**1251. ———.]—A highway was by virtue of the Public Health Act, 1875 (c. 55), vested in & under the control of a local board as the urban authority for the district. Sects. 144 & 149 of that Act provide that the urban authority shall have & be subject to all the powers, duties & liabilities of surveyors of highways, & shall from time to time level, alter & repair the highways vested in them as occasion may require. An owner of land adjoining the highway in making an approach to his land without the sanction or authority of the local board made a drop in the level of the highway & left it in a dangerous condition. Applt. walking along the highway fell down the drop & was injured. In an action by him against the local board for suffering the highway to be out of repair & in a dangerous condition it appeared that the local board was chargeable only with nonfeasance & not with misfeasance:—**Held**: no action lay against the local board.—**COWLEY v. NEWMARKET LOCAL BOARD**, [1892] A. C. 345; 62 L. J. Q. B. 65; 67 L. T. 486; 56 J. P. 805; 8 T. L. R. 788; 1 R. 45, H. L.**

*Annotations:—Consd. Pietou Municipality v. Geldert, [1893] A. C. 524; Thompson v. Brighton Corpn., Oliver v. Horsham L. B., [1894] 1 Q. B. 332; Saunders v. Holborn District Board of Works, [1895] 1 Q. B. 64. **Folld.** Sydney Municipal Council v. Bourke, [1895] A. C. 433. **Consd.** Shoreditch Corpn. v. Bull (1901), 20 T. L. R. 254. **Appld.** Maguire v. Liverpool Corpn., [1905] 1 K. B. 767. **Consd.** Papworth v. Battersea B. C. (1914), 79 J. P. 105. **Appld.** Papworth v. Battersea B. C. (No. 2) (1915), 81 L. J. K. B. 1881. **Consd.** Nash v. Rochester R. C., [1917] 1 K. B. 381. **Refd.** Robinson v. Workington Corpn., [1897] 1 Q. B. 619; Whistler v. Bingham R. D. C. (1900), 83 L. T. 652; Campbell Davys v. Lloyd, [1901] 2 Ch. 518; Dawson v. Bingley U. C., [1911] 2 K. B. 149; McClelland v. Manchester Corpn. (1911), 76 J. P. 21. **Mentd.** R. v. St. Giles, Camberwell, Vestry (1897), 61 J. P. 217; Smith v. Chorley District Council, [1897] 1 Q. B. 532; Harrington v. Derby Corpn., [1905] 1 Ch. 205; Butler (or Black) v. Fife Coal Co., [1912] A. C. 119; Neville v. London Express Newspaper, [1919] A. C. 368.*

**1252. ———.]—Apart from statute.]—Public corpns. to which an obligation to keep public roads & bridges in repair has been transferred are not liable to an action in respect of mere nonfeasance, unless the legislature has shown an intention to impose such liability upon them. In an action for damages for injuries caused by the neglect of applt. municipality to repair a bridge:**

**1252 i. ———.]—A part from statute.]—A municipality is not, by the common law, answerable in damages occasioned by defective highways or bridges. **WALLIS v. AINSBOLLA MUNICIPALITY (1880), 4 Man. L. R. 80.—CAN.****

**1252 ii. ———.]—No action can be maintained at common law for an injury arising from the non-repair of a highway.—**LINDSELL v. VICTORIA (CITY) CORPN. (1894), 3 B. C. R. 400.—CAN.****

**1252 iii. ———.]—In the absence of a statute imposing liability for nonfeasance, a municipal corpn. is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having**

**—Held**: by the Act under which it was incorporated, there was no indication of an intention to impose the liability sought to be enforced.—**PICTOU MUNICIPALITY v. GELDELT, [1893] A. C. 524; 63 L. J. P. C. 37; 69 L. T. 510; 42 W. R. 114; 9 T. L. R. 638; 1 R. 447, P. C.**

*Annotations:—Consd. Saunders v. Holborn District Board of Works, [1895] 1 Q. B. 64; Sydney Municipal Council v. Bourke, [1895] A. C. 433; Maguire v. Liverpool Corpn., [1905] 1 K. B. 767. **Refd.** Thompson v. Brighton Corpn., Oliver v. Horsham L. B., [1894] 1 Q. B. 332; Brabant v. King, [1895] A. C. 632; Short v. Hammersmith Corpn. (1910), 104 L. T. 70; Dawson v. Bingley U. C., [1911] 2 K. B. 149; Papworth v. Battersea B. C. (1914), 79 J. P. 105.*

**1253. ———.]—In an action to recover damages for injury caused by negligence, it appeared that defts. were an urban authority under the Public Health Act, 1875 (c. 55), having as such the property in & the management of the sewers & the streets, & that they had inserted a man-hole in one of the sewers. The cover of this man-hole was in the highway, was properly made & in good repair, but the road had been allowed to wear away so that the cover projected above the surface of the road. Pltf.'s horse stumbled over this projection & was injured:—**Held**: the only breach of duty which could be imputed to defts. was their omission to repair the highway; for this no action would lie, & defts. were not liable.—**Kent v. Worthing Local Board, No. 1312, post, overd.**—**THOMPSON v. BRIGHTON CORPN., OLIVER v. HORSHAM LOCAL BOARD, [1894] 1 Q. B. 332; 63 L. J. Q. B. 181; 70 L. T. 206; 58 J. P. 297; 42 W. R. 161; 10 T. L. R. 98; 38 Sol. Jo. 97; 9 R. 111, C. A.****

*Annotations:—Refd. Robinson v. Workington Corpn. (1897), 66 L. J. Q. B. 338; Lambert v. Lowestoft Corpn., [1901] 1 K. B. 590.*

**1254. ———.]—Where a statute vested all public ways in a city in the corpn., & gave the corpn. "full power to alter, widen, level, divert, extend, construct, improve, maintain, repair & order such public ways":—**Held**: no action would lie against the corpn. for not repairing such ways.—**SYDNEY MUNICIPAL COUNCIL v. BOURKE, [1895] A. C. 433; 61 L. J. P. C. 140; 72 L. T. 605; 59 J. P. 650; 11 T. L. R. 403; 11 R. 482, P. C.****

*Annotations:—Consd. Lambert v. Lowestoft Corpn., [1901] 1 K. B. 590. **Refd.** Brabant v. King, [1895] A. C. 632; Maguire v. Liverpool Corpn. (1905), 92 L. T. 371.*

**1255. ———.]—By a local Act deft. corpn. were declared to be the surveyors of highways for the borough of L.; the control of the streets was vested in them; & they were empowered to form or pave streets with such materials as they should think fit. By s. 58 it was enacted that the corpn. should be liable to be indicted at common law for the want of sufficient repair of any highway in the borough in same manner as any person or persons liable to the repair of such highways was or were before the passing of the Act. An action**

been allowed to get out of repair.—**ST. JOHN (CITY) v. CAMPBELL (1896), 26 S. C. R. 1.—CAN.**

**1252 iv. ———.]—The Municipal Act casts no duty on municipalities controlled by it to repair the roads, the possession of which is vested in them by Municipal Act, s. 370, & therefore, is not liable to pay damages for injuries sustained owing to mere non-repair.—**VON MACKENSEN v. SURREY (1915), 8 W. W. R. 541; 21 B. C. R. 198.—CAN.****

**1252 v. ———.]—Pltf., while walking along a street of H., was thrown down in consequence of a rut or hollow in an earth sidewalk:—**Held**: the case not being one of faulty**

construction, but purely a question of non-repair, the city was not liable in the absence of an absolute statutory obligation to keep the streets in good repair.—**COLEMAN v. HALIFAX (1915), 48 N. S. R. 442.—CAN.**

**1252 vi. ———.]—A county council, as the local road authority, is not liable at common law in an action for damages for injury caused by negligent omission on their part to repair a highway under their control.—**HARRISON v. ARMAGH COUNTY COUNCIL, [1902] 2 I. R. 538.—IR.****

**s. ———.]—Whether corporation insurer.—Against accidents on its streets.]—The fact that the duty of keeping its streets in repair is imposed upon a**

was brought against the corpn. for injuries caused to pltf.'s horse by the negligence of defts., in that they had not properly repaired a road. The want of repair was admitted, but there was no evidence of misfeasance on the part of defts.:—*Held*: the mere fact that a new body was created with the duty to repair roads did not of itself impose on the new body a liability to actions for damages caused by non-repair of roads; & if & so far as *Hartnell v. Ryde Comrs.*, No. 1242, *ante*, laid down a rule to the contrary, it must be taken to have been overruled. No fresh liability was created when the duty to repair was transferred by the local Act; & the action could not be maintained. Under the modern authorities a transfer to a public corpn. of the obligation to repair roads does not of itself render the corporation liable to an action for damages for non-feasance as distinguished from misfeasance; & the question whether such a liability is imposed upon them must be determined by the language of the particular Act of Parliament.—*MACUIRE v. LIVERPOOL CORPN.*, [1905] 1 K. B. 707; 74 L. J. K. B. 369; 92 L. T. 374; 69 J. P. 153; 53 W. R. 449; 21 T. L. R. 278; 49 Sol. Jo. 290; 3 L. G. R. 485, C. A.

*Annotation*.—*Mentd.* *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

1256. — — —.]—An action was brought against defts., a highway authority, to recover damages for injury sustained by pltf. in consequence of defts. negligently placing certain pitch or tar on a road, & negligently allowing same to remain for an unreasonable time, whereby the road became uneven & dangerous; alternatively for damages for a nuisance. The evidence showed that the injuries were caused by pltf.'s mare slipping on a pool of pitch or tar, which had, in consequence of the hot weather, oozed up between the setts of wood or stone from the asphalt beneath. The road had been constructed a long time before the accident. A county ct. judge held that there was no evidence to go to the jury of misfeasance on the part of defts., & as they were not liable in damages for mere omission to repair, he non-suited pltf.:—*Held*: as no evidence was given before the county ct. judge that the road had been improperly constructed, he was right in concluding that the accident did not arise from the misfeasance of defts.—*HOLLOWAY v. BIRMINGHAM CORPN.* (1905), 69 J. P. 358; 3 L. G. R. 878, D. C.

1257. — — —.]—A footpath which was a highway adjoined the entrance to a ballast yard. In 1910 the footpath was composed of hoggins, & where it adjoined the entrance to the yard it sloped for a distance of two feet outwards, to a depth of nine inches, where it met the entrance, & then inside the entrance the ground fell a further three inches to the level of the ground in the yard. The female pltf. slipped in this hole in the footpath & injured herself. In 1900 defts. had taken over the footpath as highway authority in succession to the vestry. In 1900 the footpath was in same position & constructed in same way & of same material as in 1910. In or about the year 1904 defts. repaired this footpath, the surface being slightly coated with hoggins. It appeared that on that occasion any hole or depres-

sion must have been filled up. Defts. purchased the ballast yard in 1907, at which time the hole existed. It appeared that the hoggins used to slip down the slope into the yard, & that this process was aided by the traffic of persons into defts.' yard. Immediately after the accident defts. placed a stone step at the entrance to the yard, thus keeping in position the footway. Pltfs. brought an action against defts. for damages for her injuries:—*Held*: there was no evidence on these facts that defts. were liable to pltfs. either as highway authority or as owners of the ballast yard. They were not liable as highway authority as they had not been guilty of any misfeasance; they were not liable as owners of the ballast yard, as they were under no liability to provide an artificial support to the highway to prevent it slipping down on to the lower level, at all events in the absence of evidence that they had dug a hole in their land so causing the highway to slide.

A highway authority is not liable in an action by a passer-by for non-feasance. Long established rules of prudence have prevented a highway authority from being exposed, as they would be, to the complaint of every tramp. They are not liable for non-feasance; they are liable for misfeasance—something they positively do to injure the road: either by raising the ground suddenly higher, so as to create an elevated obstruction or by digging the ground suddenly lower, so as to create an obstruction by depression & possibly in other ways for misfeasance, they are liable, & there are cases in which you have to look very carefully with the facts to see whether they establish non-feasance or misfeasance. When you are once certain they establish only non-feasance the highway authority is not liable in an action (*PHILLIMORE, J.*).—*SHORT v. HAMMERSMITH CORPN.* (1910), 101 L. T. 70; 75 J. P. 82; 9 L. G. R. 204, D. C.

*Compare Nos.* 2780, 2782, *post*.

1258. — — —.]—*For non-feasance amounting to negligence*—*Onus of proof.*—Defts. were bound by statute, when, after due notice, streets in their district were opened by a gas co., to inspect the works as they went on, & to see that the road was left by the co. in a proper & safe state. Pltf. was injured by a defect in the pavement at a spot where a trench had been opened by the gas co. There was evidence that the pavement was defective before the accident:—*Held*: (1) the onus of proving that the gas co. had not given due notice of their intention to do the work was upon defts.: (2) there was evidence of negligence for the jury & defts. were liable.—*BURROWS v. LONDON (CITY) SEWERS COMRS.* (1888), 4 T. L. R. 202, D. C.

1259. — — —.]—*OHRBY v. RYDE COMRS.*, No. 1213, *ante*.

1260. *What amounts to non-feasance*—*Non-repair of highway.*—Pltf. was a passenger in a motor omnibus passing along a road in a district of which defts. were the highway authority. The road had been paved seventeen years ago with wood blocks. Owing to a heavy rainfall these wood blocks at a particular part of the road had swollen & bulged upwards so as to cause a dangerous obstruction in the road. On arriving

municipal corpn. by statute does not make the corpn. an insurer against accidents on its streets & therefore, an action does not necessarily lie for every defect in the streets which occasion injury.—*CLARK v. WINNIPEG (CITY) & WINNIPEG ELECTRIC RY. CO.*,

[1918] 2 W. W. R. 457; 28 Man. L. R. 609; 40 D. L. R. 533.—*CAN.*

1260 i. *What amounts to non-feasance*—*Non-repair of highways.*—Municipal corpns. are liable, under C. S. U. C. c. 34, s. 337, for neglect to repair roads within their jurisdiction.—

*COLBECK v. BRANTFORD TOWNSHIP CORPN.* (1861), 21 U. C. R. 276.—*CAN.*

1260 ii. — — —.]—*O'CONNOR v. OTONABKE CORPN. & DOWN TOWNSHIP CORPN.* (1874), 35 U. C. R. 73.—*CAN.*

1260 iii. — — —.]—*LUCAS v.*

*Sect. 5.—Liabilities: Sub-sect. 1, A.]*

at this point of the road the omnibus came into contact with the obstruction caused by the bulging of the blocks, & was thus driven into collision with an electric-light standard. Pltf. suffered injuries & brought an action in the county ct. The evidence showed that the road had been properly constructed when the wood paving was originally laid down; but it was admitted by defts. that wood paving has always a tendency to rise after heavy rain from the swelling or bulging of the blocks. Defts. were also shown to have been aware of the actual bulging of the blocks in the road in question some time before the happening of the accident to pltf. & that they neither repaired the road nor fenced off the parts that had bulged. The county ct. judge gave judgment for pltf. on the ground that the construction of the road by defts. with a material which they knew was likely to become dangerous after rain, together with the further fact that they had not repaired the road, or fenced off such portions of it as had swollen & bulged after they had knowledge of this having occurred, amounted to misfeasance, & was not merely non-feasance:—*Held*: the facts did not show a case of misfeasance on the part of the highway authority, & there was nothing more than neglect to repair the road, & no distinction can be drawn between neglect to repair a road out of repair through ordinary wear & tear, & neglect to repair a road in disrepair caused by the surface rising above its ordinary level.

MOORE CORPN. (1879), 3 A. R. 602.—CAN.

1260 iv. ———.—]—No action will lie against a town for injuries resulting from the non-repair of a street if there are no acts of misfeasance on the part of the town.—*Dwyer v. Town of Portland* (1880), 20 N. B. R. 423.—CAN.

1260 v. ———.—]—*Carty v. London (City)* (1889), 18 O. R. 122.—CAN.

1260 vi. ———.—]—*Cameron v. Town of Moncton* (1889), 20 N. B. R. 373.—CAN.

1260 vii. ———.—]—*Lindell v. Victoria (City) Corp.* (1894), 3 B. C. R. 400.—CAN.

1260 viii. ———.—]—*St. John (City) v. Campbell* (1896), 26 S. C. R. 1.—CAN.

1260 ix. ———.—]—A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription & statute labour, & although the municipality never assumed any control over it, nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the sidewalk & there had been opportunity & time to repair it.—*Madill v. Caledon Township* (1902), 22 C. L. T. 175; 3 O. L. R. 60, 555; 1 O. W. R. 269.—CAN.

1260 x. ———.—]—A municipal corp., having placed a barrier round a portion of a sidewalk in course of repair, pltf., at night, passing around the barrier, fell into a trench dug by a gas co., with consent of the corp., under an agreement for indemnity & to properly warn & protect the public. No light was put up by the corp. or co.:—*Held*: both were liable to pltf., the corp. for non-repair & not warning the public, & the co. under their special contract with the corp.—*Molintyre v. Lindsay Town* (1902), 22 C. L. T.

292; 4 O. L. R. 448; 1 O. W. R. 492.—CAN.

1260 xi. ———.—]—*Holden v. Yarmouth Township* (1903), 23 C. L. T. 181; 5 O. L. R. 579; 2 O. W. R. 130.—CAN.

1260 xii. ———.—]—*Plant v. Normanby & Minto* (1905), 25 C. L. T. 398; 6 O. W. R. 31; 10 O. L. R. 16.—CAN.

1260 xiii. ———.—]—If work is performed on a public road by a municipality to facilitate travel between points on both sides of the place where the work is done, so as to provide a completed road between such points for the use of the public, the municipality is liable in case an accident happens by reason of non-repair of the road at any place between these points, although no work has been done at or near that particular place.—*Couch v. Louise Municipality* (1907), 16 Man. L. R. 636.—CAN.

1260 xiv. ———.—]—Where a municipal corp. is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, & adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, persons suffering injuries in consequence of such omission may maintain civil actions against the corp. to recover compensation in damages.—*Van-Couver (City) v. McPhelan* (1911), 20 W. L. R. 263; 1 W. W. R. 375; 45 S. C. R. 194.—CAN.

1260 xv. ———.—]—*Rickey v. Toronto Corp.*, *Schofield-Holden Machine Co. v. Toronto Corp.* (1914), 30 O. L. R. 523; 19 D. L. R. 146; 5 O. W. N. 892.—CAN.

1260 xvi. ———.—]—*Stott v. North Norfolk Municipality* (1914), 26 W. L. R. 774; 16 D. L. R. 48; 24 Man. L. R. 9.—CAN.

1260 xvii. ———.—]—*Oakville Town v. Cranston* (1917), 55 S. C. R. 630; 39 D. L. R. 76.—CAN.

1260 xviii. ———.—]—*Clinton v.*

If one thing is clear in these cases it is this: that a highway authority can only be successfully sued for damages, through the highway under their control being dangerous, when it can be shown that the danger was caused by their doing work on the highway badly or improperly. If the damage were caused because they chose to do nothing at all to the road they were not liable (*Lush, J.*).—*Moul v. Tilling (Thomas), Ltd.* (1918), 88 L. J. K. B. 505; 34 T. L. R. 473; *sub nom.* *Moul v. Croydon Corp.*, 119 L. T. 318; 82 J. P. 283; 16 L. G. R. 595, D. C.

1261. ———.—]—I understand the authorities to lay down on the one side that if there is a highway the highway authority are not responsible for doing nothing to the highway, letting it take its own course, but that if they do interfere then they must interfere with care. If they interfere, whether as highway authority or as sewer authority or as owners of the property, they must still do it with care; if they do not do it with care they are guilty of negligence for which an action for negligence will lie (*HorrIDGE, J.*).—*Andrews v. Merton & Morden Urban District Council* (1921), 56 L. Jo. 466, D. C.

1262. ———.—]—Road allowed to wear away round manhole cover—Authority both sanitary & highway authority.—*Thompson v. Brighton Corp.*, *Oliver v. Horsham Local Board*, No. 1253, *ante*.

1263. ———.—]—*v. Dover Corp.* (1908), 72 J. P. Jo. 341.

Liability of highway authority as sanitary authority, *see* Sub-sect. 2, *post*.

COUNTY OF HASTINGS (1923), 53 O. L. R. 266.—CAN.

1260 xix. ———.—]—*Oakville Town v. Cranston* (1917), 55 S. C. R. 630; 39 D. L. R. 762.—CAN.

1260 xx. ———.—]—*Bell v. Winnipeg (City)*, (1919) 2 W. W. R. 535.—CAN.

1260 xxi. ———.—]—*Harrison v. Armagh County Council*, [1902] 2 I. R. 538.—IR.

1. ———.—]—*What amounts to non-repair*.—*Armour v. Peterborough Town* (1905), 25 C. L. T. 283; 5 O. W. R. 630; 10 O. L. R. 306.—CAN.

a. ———.—]—*Holes in highway*.—*Boyle v. Dundas Town* (1876), 27 C. P. 129.—CAN.

b. ———.—]—After a block pavement had been laid down on Q. street, a drain was opened out across the street to the street railway track, & then tunnelled under the track. It was filled in with loose earth not rammed down, which was washed down, leaving a very dangerous hole. Residents in the neighbourhood, seeing its dangerous condition, took some posts & placed them in the hole. Pltfs. were driving along the road, & on reaching the drain the horse stumbled & fell, whereby pltfs. were injured:—*Held*: defts. must be deemed to have had notice of the condition in which the drain was at the time of the accident, & were liable for any injury resulting.—*Duck v. City of Toronto* (1884), 5 O. R. 295.—CAN.

c. ———.—]—*Sombra Township v. Moore Township* (1892), 19 A. R. 144.—CAN.

d. ———.—]—*Pltf.'s claim was for damages for injury to a horse caused by non-repair of a highway by reason of the continued existence of a series of deep pitch-holes produced by traffic in the snow-covered surface of a travelled road in deft. municipality. There were 10 or 12 of these pitch-holes in almost uninterrupted succession at intervals of only a few feet, varying in depth from*

**1264. — Failure to cut overhanging branches.]**—Pltf. suffered personal injuries through defts.' neglect of their duty to lop the branches of the trees in Victoria Park:—*Held*: this being mere non-feeance defts. were not liable.

If the servants of the London County Council had in pursuance of their duty lopped the trees so as to prevent them from being a nuisance & in the course of doing so had negligently let a branch fall on a passer-by & so caused an injury, then that would have been a misfeasance & the London County Council would have been liable (LORD RUSSELL OF KILLOWEN, C.J.).—*TREGELLAS v. LONDON COUNTY COUNCIL* (1897), 14 T. L. R. 55.

**1265. — Non-repair of ditch in highway.]**—By an award the comrs. set out certain public

carriage roads or highways & also certain allotments. There was a provision in the award that each allotment holder should discharge the water from his allotment on to the adjoining allotment. Pltf. brought an action against defts., the rural district council, for failure to cleanse & keep in repair a ditch on one of the roads set out under the award, whereby his fields were damaged. It appeared that defts. had not cleaned out the ditch, & that they had cut grips from the road into the ditch & cleaned out the grips from time to time. The drainage from two cottages on the other side of the road passed under the road through a culvert into the ditch:—*Held*: (1) the road was not an allotment under the award, & therefore, defts. were not bound to carry off the water from the ditch under the provisions of the

1 to 3½ or 4 feet below the level of the travelled snow-road, & the descent into them was very steep. The depth of the snow outside the one beaten trail was so great that it was impossible for a loaded sleigh such as pltf. was driving to turn out so as to avoid the pitch-holes, & that the defects in the road had existed for a considerable time & could have been remedied by a small expenditure of money:—*Held*: defts. were liable for the damages sustained by pltf.—*KENNEDY v. PORT-AGE LA PLAIRIE* (1899), 12 Man. L. R. 634.—CAN.

**e. —**—*MORRISON v. TORONTO (CITY)* (1906), 12 O. L. R. 333; 7 O. W. R. 607.—CAN.

**f. —**—*Pitfs.* sought to recover damages from deft. corpn. for injuries sustained in falling into a ditch or trench which had been dug across one of the streets of the town by a contractor under the town authorities in connection with the construction of a system of drainage. Pitfs. drove out of town in the morning before the trench was dug, & were returning after dark, when they were thrown into the trench, which, in the meantime, had been dug across the greater part of the street, & had been left unguarded & insufficiently lighted:—*Held*: the corpn. were guilty of negligence in not properly guarding the excavation, & the driver of the carriage could have avoided the accident by the exercise of reasonable care.—*WEIR v. AMHERST* (1906), 35 N. S. R. 477.—CAN.

**g. —**—*Pitf.* was injured by being thrown out of a buggy from a jolt caused by a hole in the highway about 20 inches to 2 feet deep, worn down by water passing over the grade of the road, which hole had been known for ten days or two weeks to the councillor of that division of the municipality. Dft. rural municipality was held liable in damages under Rural Municipalities Act, s. 196.

—*HUTTON v. STONKENGHE RURAL MUNICIPALITY* (1922), 70 D. L. R. 569; [1922] 3 W. W. R. 838.—CAN.

**h. Obstruction in highway.—Lumber.**—A corpn. through their neglect in permitting a pile of lumber placed upon the highway by deft. to remain there, became subjected to an action by a man whose horse had sustained injury by coming in contact with the lumber, & had damages & costs recovered against them:—*Held*: deft. having so placed the obstruction did not enable the corpn. to recover from him such damages & costs.—*VEPRA TOWNSHIP v. COOK* (1876), 26 C. P. 182.—CAN.

**k. —**—*On one side of a travelled road which defts. were bound to keep in repair, was a declivity down which a pile of wood, composed of blocks cut in two feet lengths, had been thrown by a person living near the highway. Some of the wood*

was upon the bed of the road, but a portion, estimated at from twenty-one to twenty-six feet, was free from obstruction, & the road itself was not defective. Pltf.'s horse, in passing, shied at the wood, threw him off, & injured him:—*Held*: defts. were not guilty of a breach of the statutory duty imposed upon them by R. S. O. 1877, c. 174, s. 491, to "keep in repair," & they were therefore not liable.—*MAXWELL v. TOWNSHIP OF CLARKE* (1879), 4 A. R. 460.—CAN.

**l. —**—*Where a contractor for taking down a building had laid planks on a sidewalk, which were fastened at both ends with iron straps to keep them together, which straps were raised from time to time by teams & waggons passing over the planks, leaving a space between the straps & the planks, into which a passer-by put her foot, & was thrown to the ground & injured:—Held*: the corpn. was liable notwithstanding there was evidence of repair by nailing down the straps when discovered to be loose.—*GRONAC v. TORONTO (CITY)* (1906), 11 O. L. R. 611; 7 O. W. R. 696.—CAN.

**m. —**—*On the side of a road allowance in front of a saw mill large quantities of logs were allowed to be piled & to be left there. Pitfs. were driving with their horse & buggy along the allowance, while passing the place in question, the horse became frightened & swerved from the beaten track in the direction of the pile, & in attempting to turn back again to the road, the front wheel of the buggy came in contact with a log lying about two or three feet from the travelled way, whereby the buggy was overturned, & pitfs. thrown out & injured:—Held*: defts. were liable therefor.—*KELLY v. WHITCHURCH TOWNSHIP, BAKER v. WHITCHURCH TOWNSHIP* (1906), 12 O. L. R. 83; 7 O. W. R. 279.—CAN.

**n. — Broken down waggon.]**—The existence of a broken down waggon with a bright red board sticking up in it, on the side of a highway & partly in the ditch, where it had been hauled by the owner, some eight or ten feet from the travelled part, leaving plenty of room to pass, & remaining there for ten days, does not constitute evidence of actionable negligence on the part of the corpn. Were, therefore, after the lapse of such ten days, pltf. in passing by with a horse & waggon was thrown out & injured, in consequence of the horse taking fright at the waggon & board, & shying:—*Held*: that the corpn. were not liable.—*HOUNDS v. TOWN OF STRATFORD* (1876), 26 C. P. 11.—CAN.

**o. — Dirt & rubbish.]**—*AYRE v. CITY OF TORONTO* (1879), 30 C. P. 225.—CAN.

**p. — Made by grade into cellar.]**—*COPELAND v. VILLAGE OF BLENHEIM*

(1885), 9 O. R. 19.—CAN.

**q. — Defective grating.]**—*THOMAS v. ANNAPOLIS TOWN* (1896), 28 N. S. R. 551.—CAN.

**r. —**—*In 1906, deft. city corpn., by the agency of a contractor, constructed a sidewalk upon a certain street in the city. Several property-owners arranged in some way to have gratings or light areas inserted in the sidewalk opposite their respective properties. These gratings were put in & paid for by the owners themselves. There was no evidence that the city, by resolution or by-law, ever consented to these gratings being placed in the sidewalk. Two gratings, inserted in that portion of the sidewalk fronting the property owned by the third party, contained a large number of light prisms, & some of these prisms were broken in such a way as to make holes in the sidewalk, upon & long before Nov. 15, 1912, when pltf., passing along the sidewalk, had the heel of his boot caught in one of the holes, by reason of which he was thrown to the ground & severely injured:—Held*: the city corpn. against which he brought this action to recover damages for his injuries, was liable to him.—*HUTCHINSON v. KESWICK (CITY)* (1913), 25 W. L. R. 668; 6 W. W. R. 395; 14 D. L. R. 372; 6 Sask. L. R. 126.—CAN.

**s. —**—*PIDGINS v. GLASGOW CORPN.* (1901), 4 F. (Ct. of Sess.) 94; 39 Sc. L. R. 81; 9 S. L. T. 236.—SCOT.

**t. — Milk stand.]**—A milk-stand built on a highway by an adjoining proprietor & projecting slightly over the travelled way, in such an obstruction as to constitute want of repair within Municipal Act, & when such an obstruction existed for three years, & the municipal corpn. having jurisdiction over the road in question take no steps to have it removed, they are liable in damages for an accident caused by it.—*HUFFMAN v. BAYHAM TOWNSHIP, TANNER v. BAYHAM TOWNSHIP* (1899), 26 A. L. 514; 19 C. L. T. 383.—CAN.

**u. —**—*Pitf.'s horse shied at a milk-stand standing upon a highway, at the side, not upon the via tria, & was so injured that it had to be destroyed:—Held*: defts., the township corpn., were not liable for the loss. The existence of the stand, where it was, did not, in itself, constitute a breach of the municipality's statutory duty to keep the road in repair.—*COLQUHOUN v. FULLERTON CORPN.* (1913), 28 O. L. R. 102; 4 O. W. N. 737; 11 D. L. R. 469.—CAN.

**v. — Large stump.]**—A highway, in an old & thickly settled district, over which there is much traffic, is out of repair within the meaning of the statute when a large stump is allowed to stand in the highway just at the edge of the travelled way.—

**Sect. 5.—Liabilities: Sub-sect. 1, A. & B. (a).]**

award; (2) defts. were not guilty of misfeasance but only of non-feasance.—*IRVING v. CARLISLE RURAL DISTRICT COUNCIL* (1907), 71 J. P. 212; 5 L. G. R. 776, D. C.

**1266. — Gullies allowed to be overgrown.]—**On the grass waste adjoining a highway, over which ran a light railway, a platform had been constructed for the use of passengers. Prior to 1888 gullies or "grips" were made in the waste for the surface drainage of the road by the highway authority, a county council. These grips became overgrown with grass, & pltf., in passing to the platform, not seeing one of the grips fell, & was injured:—*Held*: allowing the grips to be overgrown with grass being a non-feasance & not a misfeasance, an action would not lie against the county council.—*MASTERS v. HAMPSHIRE COUNTY COUNCIL* (1915), 81 L. J. K. B. 2194; 79 J. P. 493; 13 L. G. R. 870, D. C.

— **Failure to light highways.]—See Sect. 1, sub-sect 11, ante.**

— **Failure to fence.]—See BOUNDARIES, Vol. VII., p. 293, No. 200.**

*FOLEY v. EAST FLAMBOURGH TOWNSHIP* (1899), 26 A. R. 43.—**CAN.**

c. — **Heap of sand.]—McGREGOR v. HARWICH TOWNSHIP MUNICIPALITY** (1899), 29 S. C. R. 443.—**CAN.**

d. — **Building materials.]—MITCHELL v. WINNIPEG (CITY)** (1907), 6 W. L. R. 31; 7 W. L. R. 120; 17 Man. L. R. 166.—**CAN.**

e. — **Neglect to corrugate surface.]—HUTH v. WINDSOR (CITY)** (1913), 8 O. W. N. 574; 9 O. W. N. 114; 21 D. L. R. 875; 34 O. L. R. 512.—**CAN.**

f. — **Rotten plank in sidewalk.]—**Pltf. was injured by the breaking of a rotten plank in a sidewalk which by statute deft. municipality was bound to keep in repair. The rottenness of the plank was not apparent on the surface, but three days before the accident the city inspector had marked & reported the plank for replacement because of a hole in one corner of it that he feared the heel of a lady's boot might catch in. The jury found the deft. was negligent in not replacing the plank more promptly & gave pltf. damages:—*Held*: their verdict should not be disturbed.—*ELNARSON v. CITY OF WINNIPEG* (1920) 1 W. W. R. 130; 60 D. L. R. 440; 30 Man. L. R. 98.—**CAN.**

g. — **Loose soil on embankment.]—WALKER v. SOUTHWOLD TOWNSHIP, GOSNELL v. SOUTHWOLD TOWNSHIP** (1920), 46 O. L. R. 265; 50 D. L. R. 176.—**CAN.**

h. — **Large stone.]—DARGIE v. FORBES MAGISTRATES** (1855), 17 Duml. (Cl. of Sess.) 730; 27 Sc. Jur. 311; (1856), 18 Duml. (Cl. of Sess.) 343; 25 Sc. Jur. 178.—**SCOT.**

k. — **Door opening outwards on street.]—Held**: a door opening outwards upon a street was not an obstruction to the highway within Edinburgh Municipal & Police Act, 1879, s. 151, which the corpn. had power to remove.—*EVANS v. EDINBURGH CORPN.*, [1916] 2 A. C. 45.—**SCOT.**

l. **Whether notice of non-repair necessary.]—**The town of Moncton is liable for injury caused by non-repair of a sidewalk constructed by the town; provided it has either actual or constructive notice of the defect.—*CAMERON v. TOWN OF MONCTON* (1889), 29 N. B. R. 372.—**CAN.**

m. — **—**A city corpn. are liable for injuries happening to a person while walking, resulting from the

defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, & having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe.—*BADAMS v. TORONTO (CITY)* (1896), 21 A. R. 8.—**CAN.**

n. — **—**—*ROLSTEN v. ST. JOHN* (1904), 36 N. B. R. 574.—**CAN.**

o. — **—**—*MCMINROY v. BRACKBRIDGE TOWN* (1905), 25 C. L. T. 398; 6 O. W. R. 75; 10 O. L. R. 360.—**CAN.**

p. — **—**—*TAYLOR v. PORTAGE LA PRAIRIE* (1906), 4 W. L. R. 404.—**CAN.**

q. — **—**—Pltf. was injured in consequence of stepping on the end of a loose plank in a comparatively new sidewalk in a city, & so being thrown down. There was evidence that the plank had been loose for two or three weeks before the accident, but none to show that any of the city's servants or officials had knowledge of it, & many persons, including an inspector of sidewalks in the employ of the city, had walked over it without noticing that there was any defect there:—*Held*: defts. were not liable, as negligence on their part was not proved.—*FORRESTER v. WINNIPEG (CITY)* (1909), 18 Man. L. R. 440; 10 W. L. R. 307.—**CAN.**

r. — **—**—Upon the evidence, defts., a city corpn., were held liable to pltf. in damages for injuries sustained by pltf. by falling through a flimsy wooden grating placed in the corner sidewalk opposite a shop owned by the third party, & the third party was held not liable over to defts.: the fault being that of defts., & they having had notice of the condition of the sidewalk.—*MCMINERSON v. VANCOUVER (CITY)* (1912), 20 W. L. R. 926; 1 W. W. R. 1114; 2 D. L. R. 912.—**CAN.**

s. — **—**—Where a municipal corpn. is liable for damages sustained by reason of negligent non-feasance of the statutory duty imposed upon it to maintain its highways in good repair the question of notice or knowledge of the defects does not arise.—*VANCOUVER (CITY) v. CUMMINGS* (1912), 22 W. L. R. 164; 46 S. C. R. 457; 2 W. W. R. 66.—**CAN.**

**Non-repair by tramway company.]—See TRAMWAYS & LIGHT RAILWAYS.****B. For Misfeasance.****(a) In General.**

**1267. Whether action lies—General rule.]—***MEELING v. ST. MARY NEWINGTON VESTRY* (1893), 10 T. L. R. 54, D. C.

**1268. —**—(1) Where a public body takes upon itself the making up of a road, such work being of itself, unless carefully done, likely to be dangerous to the public, a duty is cast upon such public body to see that no dangerous obstructions are allowed to exist to passengers passing along the road. (2) That duty cannot be evaded by employing a contractor to carry out the work.—*HILL v. TOTTENHAM URBAN DISTRICT COUNCIL* (1898), 79 L. T. 495; 15 T. L. R. 53. *Annotation*:—As to (1) *Reid*. *Thompson v. Bradford Corpn. & Tinsley*, [1915] 3 K. B. 13.

**1269. —**—*SHORT v. HAMMERSMITH CORPN.*, No. 1257, *ante*.

**1270. —**—A street within the district of defts., a municipal corpn., was dedicated to

t. — **—**—*HUTSON v. REGINA (CITY)* (1913), 25 W. L. R. 668; 5 W. W. R. 395; 14 D. L. R. 372.—**CAN.**

u. — **—**—*STOTT v. NORTH NORFOLK MUNICIPALITY* (1914), 26 W. L. R. 771; 16 D. L. R. 48; 24 Man. L. R. 9.—**CAN.**

v. — **—**—*HUTH v. WINDSOR (CITY)* (1915), 8 O. W. N. 574; 9 O. W. N. 114; 24 D. L. R. 875; 34 O. L. R. 542.—**CAN.**

aa. — **—**—In order for a municipality to be liable for an accident by reason of non-repair it must be shown that it had notice of the existence of the defect or that the defect has existed for such a length of time as makes it probable that it knew of it or ought to have known of it.—*BELL v. WINNIPEG (CITY)*, [1919] 2 W. W. R. 535.—**CAN.**

bb. — **—**—Pltf. having proved damage by reason of a street not being kept in repair, the municipality is fixed with responsibility, unless it may be that pltf. has himself been the author of his own wrong. In the ordinary case of disrepair, notice or knowledge thereof on the part of the municipality is not material, to fix it with responsibility.—*NEWELL v. CITY OF MOOSE JAW*, [1923] 2 W. W. R. 790.—**CAN.**

cc. — **—**—*GREENAWAY v. CANADIAN PACIFIC RY. CO.*, [1924] 4 D. L. R. 977; 3 W. W. R. 498.—**CAN.**

**PART VIII. SECT. 5, SUB-SECT. 1.—B. (a).**

**1267 i. Whether action lies—General rule.]—**Actions against public authorities performing public works will not be encouraged unless the authority has conducted the matter without ordinary care & skill.—*BLAKE v. DOUGLAS* (1853), 3 Nfld. L. R. 390.—**NFLD.**

**1267 ii. —**—*HALLIWELL v. JOHANNESBURG MUNICIPAL COUNCIL* (1912), App. D. 659.—**S. AF.**

**1267 iii. —**—A road authority empowered, but not obliged, to repair a public thoroughfare, is not liable for mere failure to do so. But when such an authority, under permissive powers, either constructs or repairs a street in such a way as to introduce a new source of danger, then the duty is imposed upon it of taking steps to guard against the danger.—*BULAWAYO MUNICIPALITY v. STEWART* (1916), App. D. 357.—**S. AF.**

dd. **What amounts to misfeasance—Doing lawful act improperly.]—**The

the public by its owner. Across the end of the street was an unfenced natural ravine. In 1901 defts. took over the street under the provisions of a private Act of Parliament similar to those contained in the Public Health Act, 1875 (c. 55), & paved & made it up & subsequently maintained it. They also lighted it under their statutory powers, which authorised them to do such acts as they should think necessary for lighting their district. In 1910 a motor car containing the pltf. while being driven along the street at night fell over the ravine in consequence, it was alleged, of the ravine being unfenced & the street being insufficiently lighted. In an action by pltf. to recover damages for injuries sustained, the jury found that the street as made up & constructed was a danger to persons using it, that the unfenced ravine was a hidden trap, & that defts. had not taken proper care to warn the public of the danger : —*Held* : the effect of the findings of the jury was that defts. in taking over & making up the street & leaving it in a dangerous condition had been guilty of misfeasance, & also that they had acted negligently in the performance of their statutory duties with regard to maintaining & lighting the street, & pltf. was, therefore, entitled to judgment.

There are many public duties, no doubt, for the non-performance of which a plff. cannot sue because he loses the benefit of what would have been done if the duty had been performed, as, for instance, the obligation to provide a system of sewerage for the benefit of a district; but if a duty is undertaken & improperly performed, & actual damage is occasioned thereby, the person injured has, as I have already stated, a perfectly good cause of action (LUSH, J.).- *McCLELLAND v. MANCHESTER CORPN.*, [1912] 1 K. B. 118; 81 L. J. K. B. 98; 105 L. T. 707; 76 J. P. 21; 28 T. L. R. 21; 9 L. G. R. 1209.

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**Annotations.**—**Consd.** Baldwin's Ltd. v. Halifax Corpn. (1916), 85 L. J. K. B. 1769. **Apprvd.** Papworth v. Battersea Corpn. (No. 2), [1916] 1 K. B. 583. **Expld.** Moul v. Tilling (1918), 88 L. J. K. B. 505. **Distd.** Carpenter v. Finsbury B. C., [1920] 2 K. B. 195. **Consd.** Sheppard v. Glossop Borough Corpn., [1921] 3 K. B. 132. **Refd.** Thompson v. Bradford Corpn. & Tinsley, [1915] 3 K. B. 13.

**1271.** ———.]—**ANDREWS v. MERTON & MORDEN URBAN DISTRICT COUNCIL, No. 1261,**  
*ante.*

1272. — [Misfeasance of predecessors.]—Pltf. in this case was driving upon a highway within defts.' district of which they were the highway authority. His pony suddenly put his foot through the crust of the highway & fell; pltf.'s arm was broken & his pony injured. He brought

an action against defts. for £170 damages, alleging that the accident was caused by the improper construction by defts. of a drain under the highway. At the hearing he failed to prove that defts. had constructed the drain in question, but by arrangement he was allowed, without formal amendment of the pleadings, to contend that the drain was made by defts.' "predecessors in title," by which was intended their predecessors in the office of highway authority, & that defts. were liable for their predecessors' misfeasance. On this question the jury found that the accident was caused by the negligent construction of the drain & that the drain was constructed by some of defts.' predecessors in title, & they assessed the damages at £100. On those findings judgment was entered for plff. Defts. appealed:—*Held*: (1) as there was no right of action for damages against a highway authority until actual damage had accrued, the preceding highway authorities were not under any liability which could be passed on to their successors; & (2) on the true construction of the Acts of Parliament creating the successive highway authorities, there was nothing to make any such authority liable for acts of misfeasance committed by its predecessors. —*NASH v. ROCHEFORD RURAL COUNCIL*. [1917] 1 K. B. 381; 80 L. J. K. B. 370; 116 L. T. 120; 81 J. P. 57; 15 L. G. R. 103. C. A.

*Annotations:—As to (2) Rejd.* Maxwell Willshire v. Bromley R. C. (1917), 87 L. J. Ch. 241. *Generally, Mentd.* Ware & Do v. Freville r Motor Trade Assocn., (1921) 3 K. B. 40; Young v. Grieron Oldham (1924), 41 R. P. C. 548.

1273. Effect of contributory negligence.]— In an action to recover damages for the death of a horse which died after pulling a loaded waggon over a stretch of country road which was being laid with granite by defts., the particulars of negligence alleged were that the road was not closed; that no warning notice was erected; that the road had not been scarified; that the road was not laid in halves; that the road was laid with granite to so great a depth as five inches. There was evidence to support these allegations. It appeared also that the stretch of country road was about 130 feet in length, part of it rolled, part of it rolled but not rolled in, & the rest of it unrolled, or only rolled once. The waggoner put his horse to the task without asking for help from the men with the steam-roller that was there or otherwise. The waggon could not turn round in the lane. The jury found that there was negligence on the part of defts servants; that pltf. & his driver could not, by the exercise of reasonable care, have avoided the consequences of defts negligence; & that the death of pltf.'s horse was the natural & necessary consequence of defts negligence: *Held*: there was evidence of negligence to be left to the jury, but as the waggoner saw the condition of the road & elected to take the risk of drawing the waggon over it, the death of the horse was not the natural & necessary consequence of defts negligence, & therefore pltf. was not entitled to recover damages.—*TORRANCE v. ILFORD URBAN DISTRICT COUNCIL*. (1909), 73 J. P. 225; 25 T. L. R. 355; 53 Sol. Jo. 301; 7 L. G. R. 554, C. A.

1274. What amounts to misfeasance—Non-repair of drain constructed by authority.]—The municipality of B., having the care, construction & management of the roads & streets within their municipality, constructed therein a barrel drain

doing of a lawful act in such way as to endanger the safety of the public is misfeasance.—KEECH v. SMITH'S FALLS TOWN (1907), 11 O. W. R. 309; 15 O. L. R. 300.—CAN.

1274 i. — *Non-repair of drain constructed by authority.*—Pltf.'s horse stumbled through a rotten culvert on a public road within the municipal limits, & pltf. & his wife were thrown

from the vehicle & injured. The culvert had been placed there some 18 years previously, & had never been inspected, repaired or renewed during that time: Held: the municipality



Secl. 5.—Liabilities: Sub-secl. 1, B. (a).]

into which ran an open drain, the brickwork of which having been broken away, & not having been repaired, a hole was caused, into which pltf.'s horse fell, carrying the pltf. with him, crushing pltf.'s leg against one side of the hole, & causing a compound fracture of the leg. In an action claiming damages against the municipality (a) for negligence in constructing the street, (b) for negligence in keeping & maintaining the street, & not repairing the drain, gutter, or sewer in the street (plea, the general issue) the judge directed the jury that defts. under their Act of incorporation were not liable for the result of any mere nonfeasance; that if they thought fit to construct a sewer, & did the work in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance & it became defective afterwards they were not bound to repair it; & further, that if the defective state in which the drain was arose from the operation of the weather or wear & tear, it having been properly constructed originally, they were not liable. Verdict for defts.:—*Held*: as regards (b) there was misdirection. The barrel drain was not only made by the defts., but the sole control & management of it were by the statute vested in them. By reason of their construction of that drain & their neglect to repair it, whereby, as an indirect but natural consequence the dangerous hole was formed, which was left open & unfenced, they caused a nuisance in the highway for which, whatever their statutory obligation to repair may have been, they were liable to an indictment, & also to an action by pltf. who had sustained direct & particular damage from their breach of duty.—*BATHURST BOROUGH v. MACPHERSON* (1879), 4 App. Cas. 256; 48 L. J. P. C. 61; 41 L. T. 778, 43 J. P. 827, P. C.

*Annotations*:—*Apld.* *Kent v. Worthing L. B.* (1882), 10 Q. B. D. 118. *Distd.* *Pictou Municipality v. Geldert*, [1893] A. C. 524. *Consd.* *Thompson v. Brighton Corpn.*, *Oliver v. Horsham L. B.*, [1894] 1 Q. B. 332; *Sydney Municipal Council v. Bourke*, [1895] A. C. 433. *Expld.* *Lambert v. Lowestoft Corpn.*, [1901] 1 K. B. 590. *Held.* *Moore v. Lambeth Waterworks Co.* (1886), 17 Q. B. D. 482; *Goodson v. Sunbury Gas Consumer's Co.* (1896), 75 L. T. 251; *Short v. Hammersmith Corpn.* (1910), 104 L. T. 70; *Papworth v. Battersea B. C.* (1914), 70 J. P. 105.

**1275. — Pavement improperly constructed.**—*TAYLOR v. ST. MARY ABBOTTS, KENSINGTON, VESTRY* (1886), 2 T. L. R. 608.

**1276. — Highway left unsafe—After repairs.**—*MEELING v. ST. MARY, NEWINGTON, VESTRY* (1893), 10 T. L. R. 54, D. C.

had been guilty of misfeasance in allowing the culvert to become a nuisance, & was therefore liable.—*COOKLEY v. NEW WESTMINSTER CORPN.* (1899), 14 B. C. R. 330.—*CAN.*

**1276 i. — Highway left unsafe—After repairs.**—*LONDON (CITY) CORPN. v. GOLDSMITH* (1889), 16 S. C. R. 231.—*CAN.*

**1276 ii. — — — — —.**—*Deft.* corp'n. constructed a sidewalk & street crossing in such manner that deft., walking upon the sidewalk at night with reasonable care, failed to step on to the crossing, which was of less width than the sidewalk, but stepped over its outer edge on to the ground, which at that point was at a considerably lower level, thereby sustaining injury:—*Held*: the method of construction constituted a misfeasance by the corp'n., & it was liable in an action for damages.—*SMITH v. VANCOURT (CITY)* (1897), 3 B. C. R. 491.—*CAN.*

**1276 iii. — — — — —.**—*Defts.*, a town corp'n., pursuant to the powers vested in them to instal & maintain a waterworks system, placed a man-hole in a highway. Pltf. fell into it, & was injured. Defts. had knowledge of its existence & condition:—*Held*: they exercised their power negligently in such way as to leave a trap for persons using the highway, & were liable for the injuries sustained by the pltf.—*SKIEWS v. KAMLOOPS TOWN* (1911), 19 W. L. R. 612; 1 W. W. R. 241.—*CAN.*

**1276 iv. — — — — —.**—*If* a municipality fails to properly fill in an excavation made in a street for the purpose of water & sewer connections, & injury results the municipality is liable in damages, notwithstanding that on inspection of the street there was nothing to indicate a need of repair. Such is a case of misfeasance.—*MOORE JAW BREAD CO., LTD. v. CITY OF MOORE JAW*, [1920] 2 W. W. R.

**1277. — — — — —.**—*McCLELLAND v. MANCHESTER CORPN.*, No. 1270, *ante*.

**1278. — — — — —.**—*A* highway which was vested in the Bradford Corp'n. & over which very heavy traffic passed was at a certain point very narrow. The Corp'n. under powers conferred upon them by a local Act, determined to widen the highway by setting back the kerbstone & throwing the causeway into the road. On the edge of the causeway nearest the road there was a telegraph pole, which it was necessary to remove, & the Corp'n. wrote to the post office authorities asking them to set back the pole to the improved street line. The post office accordingly had the pole removed & the hole filled in. Shortly afterwards the Corp'n. threw the road open for traffic. A few days later a steam wagon belonging to pltf. was passing along the highway when one of its wheels sank into the hole & the wagon was considerably damaged. In an action brought by pltf. against the Corp'n. & the post office authorities to recover damages for injury to his wagon caused by the negligence of defts.:—*Held*: defts. were liable, the Corp'n. upon the ground that they were altering the character of the part of an old road, i.e. in effect making a new road, & their duty was to so make it that when they threw it open for public use it should be reasonably safe for the purposes for which it was intended to be used; the post office authorities upon the ground that having done, perhaps voluntarily, a piece of work they did it negligently.—*THOMPSON v. BRADFORD CORPN. & TINSLEY*, [1915] 3 K. B. 13; 84 L. J. K. B. 1440; 113 L. T. 506; 79 J. P. 304; 59 Sol. Jo. 495; 13 L. G. R. 884, D. C.

**1279. — — — — —.**—*After removal of fence.*—*WHYLER v. BINGHAM RURAL COUNCIL*, No. 1168, *ante*.

**1280. — — — — —.**—*New road carried over embankment—Unlit & unfenced.*—*A* local authority in exercise of their powers under Public Health Act, 1875 (c. 55), & Public Health (Interments) Act, 1879 (c. 31), altered a road to form a shorter & more convenient access to their cemetery. The road was carried over a steep embankment, but there was no light or protection on either side of the road. There was ample evidence that this was a public way & that people so used it, & defts. were aware that a great many people used it at night:—*Held*: defts. were in duty bound to keep the road safely & not have it in a dangerous & insecure state, & were consequently liable for injuries arising from a foot-passenger straying off the road at night.—*EVANS v. RHYMNEY LOCAL BOARD* (1887), 4 T. L. R. 72.

917; 53 D. L. R. 293.—*CAN.*

**1276 v. — — — — —.**—*RYAN v. TIPPERARY NORTH RIDING COUNTY COUNCIL* (1912), 46 I. L. T. 302.—*IR.*

**1276 vi. — — — — —.**—*A* road authority in charge of a suburban road had in winter collected road scrapings 2 feet long 18 inches wide & 8 inches high at the side of a footway where it ran in front of cottages. On the opposite side there was a footway but no houses. The heaps were allowed to remain several days before they were removed. A woman coming out of one of the cottages on a dark night & proceeding to cross the road tripped upon one of these heaps as she stepped from the footway on to the road, fell & broke her arm:—*Held*: in the circumstances the road authorities were at fault & therefore liable in damages.—*NELSON v. LANARKSHIRE LOWER WARD COUNTY COUNCIL*, 19 R. (Cl. of Sess.) 311.—*SCOT.*

1281. — Tree loppings allowed to injure passengers.]—TREGEILLAS v. LONDON COUNTY COUNCIL, No. 1264, *ante*.

1282. — Deposit of obstruction in highway—Failure to light obstruction.]—THURROLD v. ST. GEORGE'S HANOVER SQUARE (1898), *Times*, Dec. 7.

1283. — ———.]—DONALDSON v. WOOLWICH CORPN. (1911), 75 J. P. Jo. 27, N. P.

1284. — Highways improperly repaired—Subsequent subsidence.]—SMITH (JAMES) & Co. v. WEST DERBY LOCAL BOARD, No. 1317, *post*.

1285. — Road laid with wooden blocks—Blocks swelling after heavy rain.]—MOUL v. TILLING (THOMAS) LTD., No. 1280, *ante*.

1286. — Fire plug covered up—Work of fire brigade delayed.]—Pltfs. sought from defts. damages alleged to have been occasioned by their negligence in covering up a fire plug with a layer of earth & in not properly indicating the position of the fire plug, whereby the efforts of a fire brigade to extinguish a fire on their premises were retarded. A plate with the letters & figures "F. P. 22 ft. 3 in." had been put in the road by defts., but the plug was some feet out of position in relation to the plate, although the plug could have been seen if it had not been covered up. The road had not been taken over by the local authority. A jury found that the authority were negligent in not keeping the plug level with the surface of the road & in not indicating its situation, but that there was no evidence that they had covered up the fire plug. They also found that this negligence caused delay in extinguishing the fire, & awarded damages:—*Held*: the finding of the jury that there was negligence in not indicating on the plug plate the position of the fire plug was a finding of misfeasance against defts., & defts. were liable for the damage caused to pltfs., by such misfeasance. DAWSON & Co. v. BINGLEY URBAN COUNCIL, [1911] 2 K. B. 149; 80 L. J. K. B. 842; 104 L. T. 659; 75 J. P. 289; 27 T. L. R. 308; 55 Sol. Jo. 340; 9 L. G. R. 502, C. A.

*Annotations*:—*Reid*, McClelland v. Manchester Corp'n [1912] 1 K. B. 118; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832. *Mentl*, Fraser v. Fen (1912), 107 L. T. 423; Ryall v. Kidwell, [1913] 3 K. B. 123.

1287. — Damage to adjoining owners—Retaining wall causing flood—Unusual flow of water.]—Defts., the highway board & local authority for the district, built a retaining wall across a street for the purpose of altering the level of a roadway. This wall did not interfere with the ordinary flow of surface water across the street & alongside pltf.'s premises, but owing to the wrongful act of third parties on land over which defts. had no control, an unusual flow of water ran down this street & did damage to pltf.'s pre-

misses:—*Held*: defts. were not liable, as the damage was occasioned by the unexpected flow of water for which they were not responsible, & they were not negligent in not building this retaining wall so as to have prevented the unusual flow of water across the street & alongside pltf.'s premises.—ELY BREWERY Co. v. PONTYPRIDD URBAN DISTRICT COUNCIL (1903), 68 J. P. 3; 2 L. G. R. 40, C. A.

1288. — Footpath raised—Fence damaged by damp & pressure.]—In 1913 a county council repaired a main road & in the course of doing so raised the level of the footpath, some inches. In consequence the soil of the path covered the gravel boards of the fence between the path & the property of pltf. The result was that the pressure of the traffic & the dampness of the soil damaged these boards & caused the fence to bulge towards pltf.'s property. Pltf. claimed damages for trespass & other relief. Defts. disputed the title of pltf. to the fence, alleging that it was an unlawful encroachment upon the highway, & denied that they had raised the level of the path or caused the injury to the fence, or been guilty of misfeasance. The road was constructed on an embankment through Epping Forest by turnpike trustees in 1834, & in 1865 the then owner of pltf.'s property erected a fence at the top of the embankment. This fence was taken down in 1899 & the fence in question, a close-boarded oak fence about one thousand feet in length, was erected on its site. The gravel boards of this fence at that time were visible from the road throughout the length of the fence. There was no suggestion by defts., until the defence in the action, that the fence was an encroachment or that it was not the property of pltf.:—*Held*: on the evidence, the fence was lawfully there & was the property of pltf., the path had been raised as alleged, this was the direct cause of the injury to the fence, & defts. were liable in damages for the trespass. ROCHFORD v. ESSEX COUNTY COUNCIL (1915), 85 L. J. Ch. 281; 14 L. G. R. 33.

1289. — — — Construction of new road acting as catchwater—Insufficient drainage—Drainage inadequately maintained.]—The Halifax Corp'n. obtained statutory powers, in or about 1867, for constructing a road across a hill which sloped down towards the bottom of a narrow valley traversed by a stream, on the banks of which were the mills of pltfs. The greater part of the hill was covered with loose shale from the weathering of the shale which was the foundation of the hill. No precise way was laid down in the statute for constructing the road, nor were the exact provisions prescribed which should be made or maintained for dealing with water & shale. The road had to be cut deep into the side of the hill, & the natural &

12821. — Deposit of obstruction on highway—Failure to light obstruction.]—TAIT v. NEW WESTMINSTER (CITY) (1911), 18 W. L. R. 470.—CAN.

g. ———.]—EVENS v. HALIFAX (CITY) (1861), 1 Old. 111.—CAN.

h. ———.]—Pltf. sued defts. for allowing dirt & rubbish to be thrown or put upon a lane upon which his premises abutted. It appeared that the damage was occasioned by the filling in & levelling a hollow in the lane by private individuals, by which pltf.'s fence was pressed inwards:—*Held*: for the mere act of a wrongdoer in throwing rubbish upon a highway, & thereby injuring a private individual, defts. would not be liable.—BUCHANAN v. GALT TOWN (1862), 12 C. P. 73.—CAN.

k. ———.]—Pltf., who was driving his motor-car at night along

a highway which was in a city, but in the outskirts, & not much travelled, ran against a water-pipe which had been left at the side of the road, & sued the city corp'n. for damages for the injury done to his car:—*Held*: if defts. were liable at all, it was not for nonfeasance, but for misfeasance in placing the water-pipe in the position it was in at the time of the accident.—GREIG v. MERRITT (1913), 24 W. L. R. 328; 11 D. L. R. 852.—CAN.

l. ———.]—WESTON v. MID-DLESEX COUNTY (1913), 5 O. W. N. 616; 16 D. L. R. 325; 30 O. L. R. 21.—CAN.

m. ———.]—It is a misfeasance on the part of a municipality repairing a hole in the road to place manure therein stamping it down & filling it up to a height a foot or so above the

hole if such repair fail to sustain the vehicles passing over it by reason of which an accident happens.—CARLTON v. SHERWOOD MUNICIPALITY (1915), 32 W. L. R. 177, 936; 8 W. W. R. 562; 9 W. W. R. 611; 25 D. L. R. 66; 8 Sask. L. R. 431.—CAN.

n. ———.]—BUTTERLY v. DROUKEDA CORPN., [1907] 2 I. R. 134.—IR.

o. ———.]—*Errecting dam*.—NELLIE v. WILKES (1843), 1 U. C. R. 46.—CAN.

p. ———.]—*Negligent construction of sidewalk*.—A sidewalk was constructed on a street in St. John, running from east to west, a distance of 480 feet on a grade of about 8 feet in 100 feet. From the south line of the street the sidewalk also sloped northward to the gutter in various grades, at one point the slope being about one foot in eight.



**Sect. 5.—Liabilities: Sub-sect. 1, B. (a), (b) & (c). ]**

obvious effect of making such a road was that it acted as a catch-water for the rain water from the upper slopes, which would otherwise have flowed on to the parts of the hill below the site of the road. It also caught the loose shale carried down by the water flowing over the slopes of the hill, & it was necessary to provide for the water & shale coming from above, which would thus be intercepted by the road. For this purpose the contract & plans originally made certain provisions, which, with modifications from time to time, were carried out. On July 1, 1914, heavy rains fell, & water & vast quantities of shale flowed over the road to the valley beneath, & into pltf.'s mills & upon their land. At the trial of the action for damages the judge found on the evidence that insufficient provision was made for carrying off the water & shale, & that defts. had not exercised reasonable care in maintaining the works intended for dealing with the water & the shale:—**Held:** on the findings of fact the corpn. were liable on the ground of misfeasance, & the damage was not caused by the act of God, but could have been provided against by reasonable care & skill. — **BALDWIN'S, LTD. v. HALIFAX CORPN.** (1916), 85 L. J. K. B. 1769; 80 J. P. 357; 11 L. G. R. 787.

**1290. — Watercress beds injured by road water—Road water containing tar acid.**—In Public Health Act, 1875 (c. 55), s. 17, "filthy water" is distinguishable from "sewage" & includes any matter, whether "foul" or "noxious," which would "affect or deteriorate the purity & quality of the water." "Surface water from a road retained by a local authority under Local Government Act, 1888 (c. 41), s. 11 (2), had long drained into watercress beds occupied by pltf., & through them into the river beyond. In May, 1919, the local authority, in order to allay dust nuisance, sprayed the road with tar. This was the only method then open to them, & the work was done in the public interest & with due care. Six months afterwards frost broke up the tar, & the road water, containing tar acid, destroyed pltf.'s beds:—**Held:** the road water was "noxious matter" within the above sect.; defts. had power to tar-spray the road, but they could not justify the damage to pltf. without showing that it was a necessary consequence of the exercise of the power.—**DELL v. CHESHAM URBAN COUNCIL**, [1921] 3 K. B. 427; 90 L. J. K. B. 1322; 125 L. T. 633; 85 J. P. 186; 37 T. L. R. 731; 19 L. G. R. 480.

**1291. Pleading—Sufficiency of notice.**—**SMITH (JAMES) & Co. v. WEST DERRY LOCAL BOARD**, No. 1317, *post*.

At this point, water from the land south of the street, which was higher than the sidewalk, was accustomed to run across the sidewalk to the gutter, & to freeze in winter & form ice on the sidewalk. Pltf., in walking upon the sidewalk, at this point in the evening, slipped upon the ice & was injured. In an action against the city for damages:—**Held:** there was evidence which should have been left to the jury to find whether defts. had been guilty of negligence in the construction of the sidewalk.—**DRISCOLL v. CITY OF ST. JOHN CORPN.** (1890), 29 N. B. R. 150.—**CAN.**

**g. — Sidewalk left unsafe.**—**CHRISTIE v. ST. JOHN (CITY)** (1891), 30 N. B. R. 492.—**CAN.**

**r. — Ditch at side of road—Left unprotected.**—The digging by a municipality of a ditch dangerous to animals,

alongside the travelled portion of a highway, & the leaving of it unprotected.—**Held:** to be misfeasance.—**HOWELL v. WILTON RURAL MUNICIPALITY**, No. 472 (1922), 66 D. L. R. 321; 15 Sask. L. R. 427; [1922] 2 W. W. R. 568.—**CAN.**

 **PART VIII. SECT. 5, SUB-SECT. 1.— B. (b). ]**

**1293 i. Dangerous obstruction placed in highway — By road repairers.**—**MCDONALD v. DICKINSON** (1893), 25 O. R. 45; *affd.* (1894), 21 A. R. 485.—**CAN.**

**1293 ii. —**—Pltf., a physician, was answering a hurry call before dawn when his buggy crashed into an obstruction which had been left on the highway by those engaged in repairing the same. Pltf. was hurled out & was internally injured. He

 **(b) For Acts of Employees. ]**

**Sec. generally,** CORPORATIONS, Vol. XIII., pp. 403 *et seq.*

**1292. General rule.**—(1) The trustees appointed under a public Road Act are not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road.

(2) The funds raised by such Act cannot be charged with compensation for such an injury; the persons employed on the road not being in the situation of servants to the trustees.—**DUNCAN v. FINDLATER** (1839), 6 Cl. & Fin. 894; Macl. & Rob. 911; 7 E. R. 934, H. L.

**Annotations:**—As to (1) **FOLLIS, Holliday v. St. Leonard, Shoreditch, Vestry** (1861), 11 C. B. N. S. 192. **Apld.** **Coe v. Wise** (1861), 5 B. & S. 440. **Refd.** **Brownlow v. Metropolitan Board of Works & Aird** (1864), 16 C. B. N. S. 546; **Mersey Dock Trustees v. Gibbs** (1866), L. R. 1 H. L. 93. As to (2) **Consd.** **Coe v. Wise** (1861), 5 B. & S. 440; **Ohryby v. Hyde Comrs.** (1861), 5 B. & S. 743; **Mersey Dock Trustees v. Gibbs** (1866), L. R. 1 H. L. 93. **Refd.** **Thomson v. Mitchell** (1840), 7 Cl. & Fin. 564; **Heriot's Hospital (Feoffees) v. Ross** (1816), 12 Cl. & Fin. 507; **Edwards v. Lowndes** (1852), 1 E. & B. 81; **Scott v. Manchester Corpn.** (1857), 29 L. T. O. S. 233; **Ruck v. Williams** (1858), 3 H. & N. 308; **Southampton & Itchen Bridge Co. v. Southampton L. B.** (1858), 8 E. & B. 801. **Generally,** **Mentall, Ferguson v. Kinnoull** (1842), 9 Cl. & Fin. 251; **Brunton v. Forrest, Edinburgh City (Ministers) v. Edinburgh City (Lord Provost, etc.)** (1849), 14 L. T. O. S. 121; **Tobin v. R.** (1861), 16 C. B. N. S. 310; **Harris v. G. W. Ry.** (1876), 1 Q. B. D. 515; **Jackson v. Watson**, [1909] 2 K. B. 193.

**1293. Dangerous obstruction placed in highway —By road repairers.**—The surveyor appointed by the vestry to look after the highways in the parish employed men to do some work in one of the streets, who left some stones in such a position as to cause the cart in which the pltf. was driving to be upset, whereby he sustained serious damage. In an action against the vestrymen:—**Held:** as they were acting gratuitously as a public body, & did not participate in the wrong done, they were not liable.—**HOLLIDAY v. ST. LEONARD, SHOREDITCH, VESTRY** (1861), 11 C. B. N. S. 192; 30 L. J. C. P. 361; 4 L. T. 406; 26 J. P. 135; 8 Jur. N. S. 79; 9 W. R. 694; 112 E. R. 769.

**Annotations**—**Apld.** **Coe v. Wise** (1861), 5 B. & S. 440. **Consd.** **Mersey Dock Trustees v. Gibbs** (1866), L. R. 1 H. L. 93. **Dtd.** **Foreman v. Canterbury Corpn.** (1871), L. R. 6 Q. B. 214. **Refd.** **Brownlow v. Metropolitan Board of Works & Aird** (1864), 16 C. B. N. S. 546; **Ohryby v. Hyde Comrs.** (1861), 5 B. & S. 743; **Hillyer v. St. Bartholomew's Hospital**, [1909] 2 K. B. 820.

**1294. —**—A heap of stones was left by the side of a road without light, & pltf. on a dark night drove his cart against it, & was upset & injured. The road was in the district of which defts. were the local board of health, & the heap was left there by the negligence of persons employed by them to repair the roads:—**Held:** defts. were liable, as the local board, to an action

brought an action to recover damages, alleging negligence on the part of deft. municipality. No light was placed upon the obstruction as a warning:—**Held:** defts., the county corpn., were liable in damages for pltf.'s injuries.—**BATEMAN v. MIDDLESEX COUNTY** (1911), 20 O. W. R. 567; 3 O. W. N. 307; 25 O. L. R. 137.—**CAN.**

**1293 iii. —**—**RAY v. BURCHELL** (1900), 8 Nfld. L. R. 364.—**NFLD.**

**s. Ditch constructed —Without authorisation of council.**—**ATCHESON v. PORTAGE LA PRAIRIE RURAL MUNICIPALITY** (1894), 10 Man. L. R. 39.—**CAN.**

**t. Tree left in dangerous position.**—Where defts. servants, in getting materials on land adjoining the road for its repair, felled a tree, which in falling lodged against another tree

for the negligence of their servants; & were not exempt from liability by Public Health Act, 1848 (c. 63), s. 117, which imposes on them same duties & liabilities as a surveyor of highways. *Qu.*: whether, if the negligence had been the negligence of the surveyor appointed under sect. 37, the local board would have been liable for his negligence, inasmuch as the surveyor cannot be removed by them at pleasure, but only on approval by the General Board of Health.—**FOREMAN v. CANTERBURY CORPN.** (1871), L. R. 6 Q. B. 214; 40 L. J. Q. B. 138; 24 L. T. 385; 35 J. P. 629; 19 W. R. 719.

**Annotations.**—**Reid.** Taylor v. Greenhalgh (1874), L. R. 9 Q. B. 487; Pendlebury v. Greenhalgh (1875), 1 Q. B. D. 36; White v. Wigan L. B. (1875), 39 J. P. 633; Glossop v. Heston & Isleworth L. B. (1879), 12 Ch. D. 102; Tucker v. Axbridge Highway Board (1888), 53 J. P. 87; Cowley v. Newmarket L. B. (1890), 55 J. P. 54; Crisp v. Thomas (1890), 62 L. T. 810; Hillyer v. St. Bartholomew's Hospitals, [1909] 2 K. B. 820; Dawson v. Bingley U. C. (1911), 80 L. J. K. B. 842.

**1295.** ———. *Pltf.* coming out from his house on to the pavement in front of his house put his foot on a piece of sandstone lying on the pavement & fell, spraining his ankle. Evidence was given that a heap of sandstone had been tipped by defts.' servants in the roadway close to the kerb in front of *pltf.*'s house, & subsequently several stones were seen on the pavement. There was no barrier between the kerb & the stones. *Pltf.* brought an action against defts. alleging that his injuries were caused by the malfeasance of defts.; but he was nonsuited: *Held*: the nonsuit was wrong & there was some evidence that the piece of sandstone was on the pavement by the action of defts.' servants.—**GOULD v. BIRKENHEAD CORPN.** (1909), 71 J. P. 105; *sub nom.* GOULDSON v. BIRKENHEAD CORPN., 8 L. G. R. 395, D. C.

**1296.** ———. **Employee nominally a contractor.**—Defts., a highway board, had left a heap of stones on the side of a road within their jurisdiction, at a place which was used as a depot for stones used in repairing the road. The contractor, a servant of defts., in placing stones there, had allowed them to project a few inches on to the road. A person, when driving along the road one dark night, drove against the heap, & thereby met with his death. His widow & child thereupon brought an action under Fatal Accidents Act, 1846 (c. 93), against defts.: *Held*: (1) the action was maintainable; (2) inasmuch as the so-called contractor was really a servant of defts. they were liable.—**TUCKER v. AXBRIDGE HIGHWAY BOARD** (1888), 53 J. P. 87; 5 T. L. R. 26, D. C.

**1297. Roadway dangerous to traffic—During repairs—Failure of workmen to instal warning.**—**TORRANCE v. ILFORD URBAN DISTRICT COUNCIL**, No. 1273, *ante*.

near the road, & being left there afterwards fell, & killed *pltf.*'s wife while she was passing along the road: *Held*: defts. were liable.—**GILCHRIST v. CARDEN TOWNSHIP** (1852), 2 C. P. 1.—**CAN.**

**a. Opening of bridge span.**—**EVANS v. TOWNSHIP OF RICHMOND**, [1919], 3 W. W. R. 339; 48 D. L. R. 209.—**CAN.**

**PART VIII. SECT. 5, SUB-SECT. 1.—B. (c).**

**13001. General rule.**—Where a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to

be done so that the necessary precautions are taken, & that if the precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.—**MCGILLIVRAY v. CITY OF MOORE JAW** (1907), 6 W. L. R. 108; 7 T. L. R. 465.—**CAN.**

**1300 II.** ———. **WALLER v. SARNIA** (1913), 24 O. W. R. 204; 4 O. W. N. 890; 9 D. L. R. 834.—**CAN.**

**1300 III.** ———. *A municipal corpn. must so perform the statutory duty of repairing a highway as not to endanger the safety of the travelling public, & its obligation in this respect is none the less where it employs an independent contractor to do the work, unless the work was not from its nature likely to cause danger to*

**1298.** ———. *A motor-cab was overturned late at night, owing to the disturbed condition of a highway, at a point which was being repaired by the local authority. At 4.30 p.m. on the previous afternoon the workmen had left the road in the following condition: one half consisting of loose stones which had been rolled in by a steam-roller, & the other half undisturbed for the passage of traffic. The latter half was at a lower level than the former. The road was left unguarded & without lights, & during the evening, the loose stones were disturbed, owing to the passage of a number of char-a-bancs & the accident occurred while the road was in this condition: Held: a case of misfeasance had been proved against the local authority.*—**PARKINSON v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL**, (1922), 66 Sol. Jo. 488; 20 L. G. R. 308, D. C.

**1299. Pit in highway—Cover removed by workman.**—**JONES v. WESTMINSTER CITY COUNCIL** (1915), 79 J. P. Jo. 112.

*See, generally, MASTER & SERVANT; NEGLIGENCE.*

*(c) For Acts of Contractors and Agents.*

*See, generally, CORPORATIONS, Vol. XIII., pp. 403 et seq.; MASTER & SERVANT; NEGLIGENCE.*

**1300. General rule.**—**HILL v. TOTTENHAM URBAN DISTRICT COUNCIL**, No. 1268, *ante*.

**1301. Negligence of contractor—Effect of interference by highway authority.**—Trustees of a turnpike road are not liable in damages for an injury occasioned by the negligence of contractors, or others, employed under them, in the performance of public works on the road; unless they personally interfere in the management of the works. *Qu.*: what degree of personal interference would suffice to render them so liable.

Assuming that *deft.* did not personally interfere in the management of the work the case of *Hall v. Smith* (1824), 2 Bing. 156, is decisive to show that he is not liable in the presentation, & I think the evidence of his interference is far too slight to take this case out of the general rule laid down in that & other cases on this subject (**LORD TENTERDEN, C.J.**).—**HUMPHREYS v. MEARS** (1827), 1 Man. & Ry. K. B. 187; 1 Man. & Ry. M. C. 30; 6 L. J. O. S. K. B. 89.

**Annotations.**—**Reid.** Duncan v. Findlater (1839), 6 Cl. & Fin. 894; Holliday v. St. Leonard's, Shoreditch, Vestry (1861), 11 C. B. N. S. 192.

**1302.** ———. *Where a surveyor of highways has been ordered by a vestry to do certain works on a highway, & during the performance of these works an accident occurs in consequence of the road being left in a dangerous condition, the surveyor is guilty of neglect of a statutory duty under Highway Acts, 1835 (c. 50), s. 56, & will be*

persons using the road. **LORTINE v. LANGSFORD RURAL MUNICIPALITY**, [1917] 3 W. W. R. 778; 37 D. L. R. 566.—**CAN.**

**1300 IV.** ———. **CALCUTTA TOWN CORPN.** v. **ANDERSON** (1884), L. L. R. 10 Cal. 445.—**IND.**

**1300 V.** ———. **VIZAGAPATAM MUNICIPAL COUNCIL v. FORTER** (1918), L. L. R. 41 Mad. 538.—**IND.**

**1300 VI.** ———. **CLEMENTS v. TYRONE COUNTY COUNCIL**, [1905] 2 L. R. 542.—**IR.**

**1300 VII.** ———. **CARNAHAN v. NORTH INVERCARGILL BOROUGH** (1902), 21 N. Z. L. R. 175.—**N.Z.**

**1300 VIII.** ———. **STEPHEN v. THURSO POLICE COMRS.** (1876), 3 L. (Cl. of Sess.) 535; 13 Sc. L. R. 339.—**SCOT.**

**Sect. 5.—Liabilities: Sub-sect. 1, B. (c); sub-sect. 2.]**

liable in an action for damage notwithstanding that he has contracted with a third party for supplying the necessary labour & has not personally interfered with the work—*TAYLOR v. GREENHALGH* (1876), 24 W. R. 311, C. A.; *revisg.* (1874), L. R. 9 Q. B. 487; 23 L. J. Q. B. 168; 31 L. T. 184; 38 J. P. 599; 43 W. R. 4. *Annotation: Distd. Pendlebury v. Greenhalgh* (1875), 24 W. R. 98.

**1303. — Work supervised by surveyor.]**—Deft. was surveyor of highways, appointed by the vestry of a parish, at a salary. By a resolution of the committee of management for the highways, appointed by the vestry, it was ordered that about 150 yards of a road should be raised, & deft. as surveyor was directed to carry out the resolution. Deft. contracted with G. to do the labour at 34d. per yard, the vestry finding stones & materials. G. worked himself, & employed & paid his own men, & deft., as surveyor, employed men to cart materials to the ground. Deft. set the work out, & determined the levels, but had nothing to do with the paving himself, except superintending on behalf of the committee. The work was carried out by raising one half of the width of the road about a foot, leaving the other half at its old level; & a considerable length of road was so left without light or fencing at night; & in consequence of this, the dog-cart of pltf. which he was driving along the road, was upset & he was injured. Deft. had been previously warned of the dangerous condition of the road. The jury found that leaving the road in its then state, without light or warning was negligence; but that deft. did not personally interfere in doing the work, or directing the road to be left as it was: *Held*: the ct. having power to draw inferences of fact, deft. was liable. *Semble*: Highway Act, 1835 (c. 50), s. 56, which imposes a penalty on a surveyor who causes any heap of stones or other matter to be laid on the highway, & allows it to remain there at night without proper precautions, does not apply to such a case. — *PENDLEBURY v. GREENHALGH* (1875), 1 Q. B. D. 36; 45 L. J. Q. B. 3; 33 L. T. 372; 40 J. P. 30; 24 W. R. 98, C. A.

*Annotations: Follid. Tucker v. Axbridge Highway Board* (1888), 53 J. P. 87. *Reid. Holborn (Grdn.) v. St. Leonard's, Shoreditch, Vestry* (1876), 41 J. P. 38; *Taylor v. Greenhalgh* (1876), 24 W. R. 311; *Robinson v. Beaconsfield R. Co.* [1911] 2 Ch. 188.

**1304. — ] SMITH (JAMES) & Co. v. WEST DERRY LOCAL BOARD, No. 1317, post.**

**1305. — ]** A highway board, finding part of a wall of a bridge needed repair, instructed their surveyor to employ S., a contractor, to do the work. S. thereupon by his servants, did the work, & the board's surveyor did not interfere. In course of the work S.'s servants left stones on the highway, which were not lighted at night, & R., travelling in a gig, ran against them & was injured: *Held*: there was no evidence upon which the board or its surveyor could be held liable for the injury to R. — *REID v. DARLINGTON HIGHWAY BOARD* (1877), 41 J. P. 581, D. C.

**1306. — ]** — *LANCASTER v. WEST HAM LOCAL BOARD* (1880), 2 T. L. R. 820.

**1307. — Contractor actually a servant.]** — *TUCKER v. AXBRIDGE HIGHWAY BOARD, No. 1206, ante.*

**1308. — ]** — A district council, acting under Public Health Act, 1875 (c. 55), s. 150, employed

a contractor to make up a highway, which was used by the public, but had not become repairable by the inhabitants at large. In carrying out the work the contractor negligently left on the road a heap of soil, unlighted & unprotected. A person walking along the road after dark fell over the heap & was injured. In an action against the district council & the contractor to recover damages for the injuries sustained:—*Held*: as, from the nature of the work, danger was likely to arise to the public using the road, unless precautions were taken, the negligence of the contractor was not casual, or collateral to his employment, & the district council were liable. — *PENNY v. WIMBLEDON URBAN COUNCIL*, [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 80 L. T. 615; 63 J. P. 406; 47 W. R. 565; 15 T. L. R. 348; 43 Sol. Jo. 476, C. A.; *affg.*, [1898] 2 Q. B. 212.

*Annotations:—Apld. Hill v. Tottenham U. D. C.* (1898), 79 L. T. 495; *The Shark*, [1900] P. 105; *Robinson v. Beaconsfield R. Co.* [1911] 2 Ch. 188. *Reid. Holliday v. National Telephone Co.*, [1899] 1 Q. B. 231; *Mileham v. Marylebone Corp.* & *Latter* (1903), 67 J. P. 110; *Hurlstone v. L. Elcot, Ry.* (1918), 29 T. L. R. 514; *Wilson v. Hodgson's Kingston Brewery Co.* (1915), 85 L. J. K. B. 270; *Kimber v. Gas Light & Coke Co.*, [1918] 1 K. B. 439; *Rainham Chemical Works v. Belvedere Fish Guano Co.*, [1921] 2 A. C. 465; *British Thomson-Houston Co. v. Sterling Accessories, Same v. Crowther & Osborn*, [1924] 2 Ch. 33. *Mentid. Padbury v. Holliday & Greenwood* (1912), 28 T. L. R. 494.

**1309. Negligence of sub-contractor.]**—A. contracted with parish officers to pave a certain district, & entered into a sub-contract with B., under which the latter was to lay down the paving of a street, the materials being supplied by A., & brought to the spot in his carts. Preparatory to the paving, the stones were laid, by labourers employed by B. on the pathway, & there left unguarded at night, in such a manner as to obstruct same, & C. fell over them, & broke his leg: *Held*: B. was responsible for this negligence, & not A. — *OVERTON v. FREEMAN* (1852), 11 C. B. 867; 21 L. J. C. P. 52; 18 L. T. O. S. 224; 16 Jur. 65; 138 E. R. 717.

*Annotations:—Consd. Peachey v. Howland* (1853), 13 C. B. 182. *Reid. Ellis v. Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767; *Sadler v. Henlock* (1855), 3 C. L. R. 760; *Blake v. Thirst* (1863), 2 H. & C. 20.

**1310. Work done by householder—Undue notice from authority—Whether householder constituted agent of authority.]** — *STEEL v. DARTFORD LOCAL BOARD, No. 1219, ante.*

## SUB-SECT. 2.—LIABILITY AS SANITARY AUTHORITY.

**1311. Liability as sanitary authority & highway authority distinguished.]** — *PAPWORTH v. BATTERSEA CORPN.*, No. 1239, *ante.*

**1312. Dangerous projection in highway—Road surface worn down.]** — The iron cover of a valve connected with a water main was properly fixed in a highway by defts., but in consequence of the ordinary wearing away of the highway the valve cover projected an inch above it. Pltf.'s horse using the highway stumbled over the valve cover & was hurt. In an action against defts., who were both the water authority & the highway authority, for the injury to the horse:—*Held*: it was the duty of defts. to make such arrangements that works under their care should not become a nuisance to the highway, & pltf. was entitled to recover. — *KENT v. WORTHING LOCAL BOARD*

## PART VIII. SECT. 5, SUB-SECT. 2.

b. *Dangerous projection in highway—Stakes.]* — *BIGGAR v. CROWLAND TOWNSHIP* (1906), 13 O. L. R. 164; 8 O. W. R. 819.—*CAN.*

(1882), 10 Q. B. D. 118; 52 L. J. Q. B. 77; 48 L. T. 362; 47 J. P. 23; 31 W. R. 583, D. C.

*Annotations*.—*Consd.* Moore v. Lambeth Waterworks Co. (1886), 17 Q. B. D. 462. *Distd.* R v. Poole Corp'n. (1887), 19 Q. B. D. 602. *Overd.* Thompson v. Brighton Corp'n., Oliver v. Horsham L. B., [1894] 1 Q. B. 332.

**1313.** ———. *J.*—*THOMPSON v. BRIGHTON CORPN., OLIVER v. HORSHAM LOCAL BOARD*, No. 1253, *ante*.

*Liability as road authority.*—*See* Nos. 1253, 1263, *ante*.

**1314.** ———. *Negligent maintenance of manhole.*

—The predecessors of an urban district council in 1893 constructed a sewer with manholes under a main road repairable by the county. In 1906 the cover of one of the manholes projected above the granite setts surrounding it, & the setts projected above the surrounding surface of the roadway. *Pltf.* when riding a motor cycle was upset by the manhole & injured, & brought an action against the urban district council for damages. The jury found that the manhole was defective & was the cause of the accident to *pltf.* & that the defects in the manhole were owing to improper construction. On appeal:—*Held*: there was no evidence to support the finding of the jury that the manhole or the setts projected above the roadway owing to the original improper construction of the manhole. The *ct.*, however, were of opinion that there should be a new trial upon the question as to whether *defts.* had been guilty of negligence in the maintenance of the manhole, & they gave *pltf.* leave to amend his pleadings so as to raise that question.—*WINSLOWE v. BUSILEY URBAN DISTRICT COUNCIL* (1908), 72 J. P. 259, C. A.

*Liability of gas or water undertakers, see GAS, Vol. XXV., pp. 471 et seq., 482 et seq.; WATER SUPPLY.*

**1315.** *Subsidence of highway—Defective sewer—Misfeasance.*—A vestry, acting as a sewer authority, laid down a new sewer, & in so doing, a contractor employed by them laid bare a wrought iron service water-pipe, which was about two & a half feet below the surface. The surveyor of the vestry knew that the pipe was old & rusty, & likely, therefore, to become leaky. In filling in the trench some clay was put round the pipe, but not in such a quantity or in such a manner as to prevent it from leaking. A few months afterwards the pipe leaked, & the surrounding clay & earth, being thereby moistened, gave way under a heavily laden van, which *pltf.* was driving, & the van being overturned, *pltf.* was thrown from it to the ground, & seriously injured. Upon an action brought to recover damages from *defts.*:—*Held*: the vestry knew, or ought to have known, the character & condition of the pipe at the time it was laid bare in constructing the new sewer, & consequently were liable for negligence in not having taken special precautions against its leaking thereafter.—*COX v. PADDINGTON VESTRY* (1891), 64 L. T. 566, N. P.

**1316.** ———. *Nonfeasance.*—A local sanitary authority, in whom a sewer under a high-

way is vested by Public Health Act, 1875 (c. 55), is not in the absence of negligence liable for an accident caused to a person passing along the highway, by reason of the sewer having got out of repair.

A sewer was constructed with due care & of proper materials by private persons under a high road. Subsequently the sewer became vested in *defts.* as the local sanitary authority by Public Health Act, 1875 (c. 55), s. 13; & by sects. 15 & 19 the duty of repairing it & keeping it so as not to be a nuisance was imposed upon them. Owing to the mortar in one of the joints of the sewer having been worked away by rats a cavity was formed below the surface of the road; but the existence of that cavity was not known to & could not by the exercise of reasonable care have been discovered by the *defts.* *Pltf.*'s horse, whilst passing along the road, broke through the crust of the road into the cavity, & was injured:—*Held*: *defts.* were not liable.—*LAMBERT v. LOWESTOFT CORPN.*, [1901] 1 K. B. 590; 70 L. J. K. B. 333; 84 L. T. 237; 65 J. P. 326; 49 W. R. 316; 17 T. L. R. 273; 45 Sol. Jo. 295.

*Annotation*.—*Reid.* Short v. Hammersmith Corp'n. (1910), 104 L. T. 70.

**1317.** ———. *Highway badly reconstructed—After pipe-laying operations.*

—(1) *Defts.* who were both the highway & the sewer authorities of West Derby, employed a contractor to construct a pipe-sewer under a highway within their district. The contractor in laying the pipes dug a trench, which he afterwards filled in with earth, & the roadway was apparently made good. The work was done under the directions & to the satisfaction of *defts.*' surveyor. Some months after it was finished, a subsidence of the soil in the trench took place without any assignable cause, leaving the road apparently sound. *Pltf.*'s horse, in consequence of the surface giving way, fell into the trench, & was injured:—*Held*: there was evidence that the work of filling in the trench had been negligently & improperly done, & *defts.*, either as the sewer or the highway authority, or as both, were responsible.

(2) A notice of action under Public Health Act, 1815 (c. 63), s. 139, stated that *pliffs.* intended to enter a claim against *defts.* for the injury & damage caused to them through *defts.* by matters or things done or omitted by them & their labourers & servants, etc., to wit, that they did, by themselves, their labourers & servants, "negligently, carelessly, & improperly leave a certain portion of the highway in an insufficient & improper state of repair, whereby," etc.:—*Held*: this was a sufficient intimation to defendants that they were to be charged with an act of misfeasance, & not merely with a neglect of duty to repair the road.—*SMITH (JAMES) & Co. v. WEST DERBY LOCAL BOARD* (1878), 3 C. P. D. 423; 47 L. J. Q. B. 607; 38 L. T. 716; 42 J. P. 615; 27 W. R. 137, D. C.

*Annotation*.—*As to* (2) *Reid.* Green v. Broad & Hunt (1882), 46 L. T. 882.

**1315 I.** *Subsidence of highway—Defective sewer—Misfeasance.*—*O'CONNOR v. HAMILTON CITY* (1905), 25 C. L. T. 458; 60 W. R. 227; 10 O. L. R. 529.—*CAN.*

**1315 II.** ———. *J.*—The fact that a subsidence has occurred several times in the roadway above a sewer is not a ground for requiring the city to anticipate subsidence in other portions of the street where there is nothing to indicate the existence of a cavity, & the subsidence have not been so frequent & numerous that the street could

properly be held to be a trap for traffic. *DOUGLAS v. IROQUA CITY*, [1918] 2 W. W. R. 1000; 11 Sask. L. R. 255; 42 D. L. R. 464.—*CAN.*

**1315 III.** ———. *J.*—A drain was constructed in a proper manner by *deflt. corp'n.* under a road. The control & management of the road & the drain were vested in the *corp'n.* The drain got out of repair, causing subsidence in the road, as a result of which accidents happened. The *corp'n.* knew that the drain was out of repair, that accidents had happened, & that the

road was dangerous, but took no steps to remedy the matter:—*Held*: the *corp'n.* was liable for an accident to a horse belonging to *pltf.*, caused by the dangerous state of the road owing to the defective condition of the drain.—*GILCHRIST v. OAMARU (MAYOR, ETC.)* (1913), 32 N. Z. L. R. 902.—*N.Z.*

**1315 IV.** ———. *J.*—*Uncovered drain or ditch in highway.*—Where *pltf.*'s horse was injured by falling into a deep uncovered drain by the side of a road in the suburbs of the city:—*Held*: the drain being proved to be well constructed,

**Sect. 5. - Liabilities: Sub-sects. 2, 3 & 4. Part IX.****Sect. 1: Sub-sect. 1, A.]**

**1318.** ----- **Work done by householder under notice from authority.]** - *STEELE v. DARTFORD LOCAL BOARD*, No. 1249, *ante*.

**1319. Sewer grating inserted below level of road - Absence of negligence.]** - A local authority in 1883, acting under Metropolis Management Act, 1855 (c. 120), s. 105, paved & made up a road, for the purpose of carrying away the surface water they constructed a gully near the side of the road leading into a subjacent sewer, & covered the hole with a grating. The grating & framework were so laid as to cause a considerable depression in the road, but the work was done with due care & skill in accordance with the usual method at the time. In 1912 pltf. was riding a bicycle along the road, when in passing over the grating she was, in consequence of the depression in the road, thrown from her bicycle & injured. In an action against the local authority to recover damages for the injuries so sustained, the jury found that the grating, by reason of the excessive depression in the original construction, was dangerous to a careful cyclist, but that the local authority were not negligent in not having discovered the defect:

*Held*: as the local authority, in the execution of their statutory powers, had exercised due care & skill in the original construction of the grating, & as they were not negligent in not having discovered the danger, they were not liable though the work turned out subsequently to be dangerous. *PATWORTH v. BATTERSEA CORPN.* (No. 2), [1916] 1 K. B. 583; 85 L. J. K. B. 746; 114 L. T. 340; 80 J. P. 177; 60 Sol. Jo. 120; 11 L. G. R. 230, C. A.

*Annotation*: *Refd.* *Nash v. Rochford R. D. C.*, [1917] 1 K. B. 381.

**1320. Sewer trench inadequately filled. Diver-sion causing collision with obstacle.]** - *Applts.*, who were both the sanitary & the highway authority, dug a trench along a road under their control for the purpose of laying a sewer. When the work was completed they filled in the trench & opened the road for traffic. About a week afterwards resp. was driving along the road in a cab at night. The driver found that the part of the road where the trench had been opened was soft, & crossed on to the other side, & ran into a heap of rubbish, with the result that the cab was overturned & resp. was injured. The rubbish had been wrongfully deposited in the road without the permission of *applts.*, but they knew that it was there, & had not lighted or fenced it. The jury found that the part of the road where the trench had been opened had been properly filled in, but had been rendered soft by subsequent rain, & was dangerous to traffic at the time of the accident: - *Held*: *applts.* were liable for the injury. *SHOREDITCH CORPN. v. BULL* (1904), 90 L. T. 210; 68 J. P. 415; 20 T. L. R. 254; 2 L. G. R. 750, H. L.; *affg.* *S. C. sub nom. BULL v. SHOREDITCH CORPN.* (1902), 67 J. P. 37, C. A.

*Annotations*: *Distd. Holloway v. Birmingham Corp.* (1905), 69 J. P. 358. *Consd. Maguire v. Liverpool Corp.*, [1905] 1 K. B. 767; *Gould v. Birkenhead Corp.* (1909), 74 J. P. 105. *Apld. Dawson v. Bingley U. D. C.*, [1911] 3 K. B. 149. *Consd. McClelland v. Manchester Corp.*, [1912] 1 K. B. 118. *Apld. Baldwin v. Halifax Corp.* (1916), 85 L. J. K. B. 1769. *Refd. Short v. Hammersmith*

& of a kind, uncovered, usual in the suburbs, the city was not liable. *MACKINLAY v. HALIFAX (CITY)* (1877), 11 N. S. R. (2 R. & G.) 305. - *CAN.*

D. — (.) - Action by pltf. for damages for the loss of his horse which

was killed by falling into a ditch dug by the township, on a road therein, under a drainage bye-law. The township council had passed a bye-law for opening & establishing this road, & shortly afterwards the county council had

*Corp.* (1910), 104 L. T. 70; *Barker v. Herbert* (1911), 75 J. P. 355; *Thompson v. Bradford Corp.* & *Tinsley* (1915), 79 J. P. 364.

**1321. Dangerous fixture in highway - Damaged water-meter flap.]** - *BLACKMORE v. MILE END OLD TOWN, VESTRY*, No. 1247, *ante*.

**1322. Defective sewer grating.]** - As pltf. was riding along a highway, under which was a sewer, his horse trod on a grid, or grating, put there to drain the surface-water off the road into the sewer. The grid being in a defective state gave way, & the horse's leg was injured. Pltf. brought an action against the local board of health of the district, who are the surveyors of the highway by Public Health Act, 1848 (c. 63), sects. 68, 117, & in whom also the sewers are vested under sects. 43, 45: - *Held*: though *defts.* might not be liable as surveyors of the highway, they were liable as owners of the sewer of which the grid formed part, for negligence in not keeping the grid in a proper state. - *WHITE v. HINDLEY LOCAL BOARD* (1875), 1 L. R. 10 Q. B. 219; 44 L. J. Q. B. 114; 32 L. T. 400; 23 W. R. 651; *sub nom. WHITE v. WIGAN LOCAL BOARD*, 39 J. P. 533, D. C.

*Annotations*: - *Consd. Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256. *Apprvd. & Fold.* *Blackmore v. Mile End Old Town, Vestry* (1882), 9 Q. B. D. 451. *Consd. Moore v. Lambeth Waterworks Co.* (1886), 17 Q. B. D. 462. *Expid. Thompson v. Brighton Corp.*, *Oliver v. Hesham L. B.*, [1894] 1 Q. B. 332. *Refd. Kent v. Worthing L. B.* (1882), 10 Q. B. D. 118; *Papworth v. Battersea Corp.*, [1914] 2 K. B. 89.

**1323. Removable carriage plates - Improperly replaced by householder.]** - In 1873 the local authority, purporting to act under the powers conferred by the Public Health Act, 1848 (c. 63), did certain private improvement works, including the making of a gutter or channel over which they placed iron carriage plates, & recovered a proportion of the expenses, including 18s. for one carriage plate from *deft.*'s predecessor in title as one of the frontagers. Pltf., in crossing the street by night, put her foot in a hole immediately opposite *deft.*'s house left between two carriage plates, one being that for which *deft.*'s predecessor in title had been charged as aforesaid. She suffered severe injuries, & sued *deft.* for damages. *Deft.* had from time to time lifted the carriage plate to clean the gutter or channel, & put it back as it was before: - *Held*: the carriage plate was not the property of *deft.*, & *deft.* was not responsible to pltf. for the nuisance on the highway. - *JONES v. REW* (1910), 79 L. J. K. B. 1030; 103 L. T. 165; 71 J. P. 321; 8 L. G. R. 881, C. A.

**1324. Damaged fireplugs Repairable by undertakers - At expense of authority.]** - By a local Act the Wolverhampton Waterworks Co., at the request of the comrs. under an Act for improving the town, were required to fix proper fire plugs in the main & other pipes belonging to the co. By sect. 54 "the co. shall, at the cost & charges of the comrs., from time to time, repair, renew & keep in proper order every such fire plug." By sect. 55, "the costs of such fire plugs & the expense of fixing, placing & maintaining same in repair shall be defrayed by the comrs." The co. having put down plugs in the streets the comrs. paid for them; & by a further local Act, & subsequent Acts the plugs became the property of the local Board of Health. A horse was injured by getting its foot into one of the plugs, the cap of

passed a bye-law "assuming the road as a road of the said county for the purpose of expending thereon the county appropriation, & for such purpose only." - *Held*: the county were bound to keep the road in repair,

which was broken :—*Held* : the co. & not the local Board was liable to an action for the neglect to repair.—*BAYLEY v. WOLVERHAMPTON WATERWORKS CO.* (1860), 6 H. & N. 241; 30 L. J. Ex. 57; 25 J. P. 199; 158 E. R. 99.

*Annotations* :—*Distd.* *Moore v. Lambeth Waterworks Co.* (1886), 50 J. P. 756. *Refd.* *Dawson v. Bingley U. D. C.* (1910), 27 T. L. R. 46.

**1325. Refuse in highway—Liability for non-removal.**—Public Health (London) Act, 1891 (c. 76), s. 29, which imposes on the sanitary authorities of London the duty of removing street refuse from the streets within their respective districts, does not give any right of action to a person suffering special damage from a breach of such duty.—*SAUNDERS v. HOLBORN DISTRICT BOARD OF WORKS*, [1895] 1 Q. B. 64; 64 L. J. Q. B. 101; 71 L. T. 519; 59 J. P. 453; 43 W. R. 26; 11 T. L. R. 5; 39 Sol. Jo. 11; 15 R. 25, D. C.

*Annotations* :—*Apld.* *Maguire v. Liverpool Corpn.*, [1905] 1 K. B. 767. *Consd.* *R. v. Marshland Smeth & Fen District Comrs.*, [1920] 1 K. B. 155. *Apld.* *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

**Exercise of statutory powers as a defence.**—*See* Part IX., Sect. 2, sub-sect. 7, *post*.

#### SUB-SECT. 3.—LIABILITY IN RESPECT OF STATUTORY UNDERTAKINGS.

*See* ELECTRIC LIGHTING, Vol. XX., pp. 200-212, Nos. 64, 66, 68, 70, 75, 76, 81; GAS, Vol. XXV., pp. 471 *et seq.*, 482 *et seq.*; TRAMWAYS & LIGHT RAILWAYS; WATER SUPPLY.

#### SUB-SECT. 4.—SUMMARY PROCEEDINGS.

*See* Highway Act, 1835 (c. 50), ss. 20, 25, 46, 56, 73, 94, 96.

**1326. Liability of surveyor—Failure to fence highway.**—*MORGAN v. LEACH*, No. 1749, *post*.

**1327. —Obstruction in highway—Obstruction placed by employee—Knowledge of surveyor.**—A cart was injured through contact with a heap of stone which had been allowed to remain after nightfall upon a highway. The stone had been laid there by a carter who acted under the orders of a person to whom the surveyor had given general directions as to repairing the road; but the surveyor did not himself know that the stone had been laid on the road :—*Held* : the facts did not show any evidence of an offence by the surveyor within the meaning of Highway Act, 1835 (c. 50), s. 56.—*HARDCASTLE v. BIELBY*, [1892] 1 Q. B. 709; 61 L. J. M. C. 101; 66 L. T. 343; 56 J. P. 549, D. C.

**1328. Liability of individual members of highway authority—Contracting with authority.**—*BUCKLEY v. HANSON*, No. 830, *ante*.

**1329. Procedure—Must follow statutory provisions—Necessity for view.**—Justices convicted applt., a surveyor, under Highway Act, 1835 (c. 50), s. 20, upon evidence in the ordinary way, of neglecting his duty by neglecting to repair a foot-path for which he was liable :—*Held* : the justices could convict for non-repair only upon adopting the course provided by Highway Act, 1835 (c. 50), s. 94; & this conviction was therefore bad.—*ROBINSON v. STEVENITT* (1878), 38 L. T. 611; 42 J. P. 614, D. C.

## Part IX.—Nuisances and Remedies.

### SECT. 1.—NUISANCES.

#### SUB-SECT. 1.—OBSTRUCTIONS.

##### A. In General.

**1330. When obstruction a nuisance—Right of passage incommoded—Statue erected in new street.**—An Act of Parliament empowered the Comrs. of Woods & Forests to make certain new streets according to a particular plan therein referred to, & to lease, & to enter into agreements for leasing, the ground in the lines of the new streets. Under this power leases were granted of two plots of ground, upon which the lessees erected two particular houses in the line of one of the new streets. Each of the leases described the plot of ground which it demised as being "on the north side of a new street then forming there, called," etc., & as "fronting towards the south on the said new street." The plan referred to in the Act of Parliament exhibited an open space in front of the sites of these houses; but that plan was not mentioned in either of the leases. The intended streets were completed, & the space in front of the houses was left open. The Comrs. of Woods & Forests, & the paving committee of the parish, afterwards gave permission to certain persons to erect an equestrian statue in the open space, & those persons proceeded to place it upon

a part of that open space, but without interfering with the line of the carriage way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging that, upon the treaty for the leases, the lessees were shown the plan of the intended new street & parts adjacent, by which it appeared that the space in question was to be quite open & free from all obstructions, & that it was upon the treaty represented & stated that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue; they also alleged that the proposed erection would diminish the value of their property, & be a public & a private nuisance :—*Held* : these circumstances did not entitle the lessees to an injunction to restrain the erection of the statue.—*SQUIRE v. CAMPBELL* (1836), 1 My. & Cr. 459; 6 L. J. Ch. 41; 40 E. R. 451, L. C.

*Annotations* :—*Refd.* *Dietrichsen v. Cabburn* (1846), 1 Coop. temp. Cott. 72. *Mond.* *Williams v. Jersey* (1841), Cr. & Ph. 91; *Fewster v. Turner* (1842), 11 L. J. Ch. 161; *N. B. Ry. v. Tod* (1846), 12 Cl. & Fin. 722; *Soltan v. De Held* (1851), 2 Sim. N. S. 133; *Allen v. Maddock* (1858), 11 Moo. P. C. C. 427; *Eastwood v. Lever* (1863), 4 De G. J. & Sm. 114; *Lett v. Randall* (1883), 49 L. T. 71.

**1331. —Question for jury.**—*It. v. MATHIAS*, No. 1641, *post*.

& were liable to pltf.—*BALZER v. GOMFIELD SOUTH CORPN.* (1889), 17 O. L. 700.—*CAN.*

#### PART IX. SECT. 1, SUB-SECT. 1.—A.

e. *When obstruction a nuisance—Right of passage incommoded.*—The

lessee of the ordnance department had obstructed the road leading to Niagara Falls ferry, which had been dedicated by the Crown for a highway.—*Held* : guilty of a nuisance.—*It. v. DAVIS & C. FRALICK* (1853), 11 U. C. R. 340.—*CAN.*

f. ——— *Partial obstruction.*—*It. BETTSWORTH* (1909), 11 W. L. R. 649.—*CAN.*

g. ——— *Enclosing & fencing.*—*It. v. NIMMONS* (1892), 1 Terr. L. R. 415.—*CAN.*

h. ——— *How evidenced.*—

Sect. 1.—Nuisances: Sub-sect. 1, A. & B.]

**1332.** — — — — —.]—(1) The laying down on a highway of iron flanges, as a tramway, may be a nuisance, if it obstructs to a substantial degree the ordinary use of the highway, in any part of it, by horses & carriages. Whether it does so, is a question for the jury. That it causes accidents, & by fear of such accidents deters persons from using the highway, is evidence that it is a nuisance, however rarely the accidents may occur.

(2) Every obstruction which to a substantial degree, renders unsafe or inconvenient the exercise of the right to pass & repass, on foot & with horses & carriages, at their free will & pleasure, over a highway, i.e. over every part of it, is a violation of that right (ERLE, C.J.).—*R. v. TRAIN* (1862), 3 F. & F. 22; *subsequent proceedings*, 2 B. & S. 640.

**1333.** — — — — —.]—*R. v. UNITED KINGDOM ELECTRIC TELEGRAPH CO., LTD.*, No. 452, *ante*.

**1334.** — — — — —.]—The soil of roads is vested in a highway authority simply to the extent necessary for the purpose of preserving & maintaining & using them as roads. A highway authority has no general power to break up a road; so that permission given by a highway authority for a tramway to cross a highway is of no effect when in the opinion of the ct. the crossing is a nuisance.

*Scmble*: otherwise, if no nuisance is proved.

Is this, or is it not, a nuisance of which the A.-G. on behalf of the public, is entitled to complain? That is a question of fact. Now, I propose to give myself the same direction which MARTIN, B., gave to the jury in *R. v. United Kingdom Electric Telegraph Co., Ltd.*, No. 452, *ante* (FARWELL, J.).

Assume, for the sake of argument that they [defts.] have got it [the sanction of the county council to commit the acts complained of]. It is said that the county council have power to authorise this, although in fact, it is found by the ct. to be nuisance. They have no such power. They are given the management of the roads in the same way that the highway authorities used to have it, & under Local Govt. Act, 1888 (c. 41), s. 11, to some extent the soil is vested in them. In my opinion Parliament has vested the soil of the roads in them *quod* roads & simply to the extent necessary for the purpose of preserving & maintaining & using them as roads. There is nothing that would justify the county council in allowing the destruction of the road *in toto*. If they cannot allow it *in toto*, then they cannot allow it to some less degree which the ct. finds in fact to be nuisance (FARWELL, J.).

Then it is said that the advantage to be derived from the relief to the highway compensates for any inconvenience or makes the tramway more beneficial to the public by relieving the highway from any ruts that used to be made. That is disposed of by *R. v. Train*, No. 1387, *post* (FARWELL, J.). *A.-G. v. BARKER* (1900), 83 L. T. 245; 16 T. L. R. 502.

**1335.** — — — — —.]—*How evidenced—Causation of accidents.*—*R. v. TRAIN*, No. 1387, *post*.

**1336.** — — — — —.]—*Passage rendered unsafe.*—A public turnpike road, which had been a public

highway, ran through the property of A., who was the owner of several coal-pits on the west side of the road, & also of the land on both sides of it. On the east side of the road was a navigable river, & from time to time for upwards of sixty years tramroads had been made by the lessees of the pits, leading from the pits to the river, & crossing the road in question, the tramroads being made of iron sunk into the road, grooved for the wheels of coal waggons, the highest part being on a level with the road. By the turnpike Act the trustees of the road had power to grant licences for the formation of tramroads across the turnpike road. A new tramroad was made in 1848 by defts., who were lessees of the pits, but no licence had been obtained from the trustees of the road. Upon an indictment preferred by the trustees for a nuisance in obstructing the road:—*Held*: (1) the tramroad in question was such an obstruction to the road as to be an indictable nuisance; (2) the dedication of the highway by the owner of the soil to the use of the public could not be limited by so extensive a reservation as that of a power to make tramroads across it at any time he should think right for the convenient use of his property, & the ct. would not presume such a reservation from the user.

Such a dealing with the highway as by placing a tramroad across it, must render it less safe for passengers, & it is therefore a nuisance. The fact that the road, if made without the consent of the trustees, subjects the party to a penalty under the local Act, does not take away the common law right to indict for the nuisance (PATTESON, J.).—*R. v. CHARLESWORTH* (1851), 16 Q. B. 1012; 4 New Sess. Cas. 703; 17 L. T. O. S. 91; 15 J. P. 707; 5 Cox, C. C. 174; 117 E. R. 1169.

*Annotations*.—As to (1) *Reid. R. v. Betts* (1850), 16 Q. B. 1022. As to (2) *Reid. Mervin v. Woodgate* (1869), L. R. 5 Q. B. 26; *Re Bidder & North Staffordshire Ry.* (1878), 4 Q. B. D. 412; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**1337.** — — — — —.]—*Under exercise of statutory powers—Unreasonable exercise—Question for jury.*—On an indictment for a nuisance in a highway, by putting & keeping steps on the footpath on account of a difference of level, the defence set up being an authority given by a local Act to make certain alterations:—*Held*: (1) it was, nevertheless, a question for the jury whether, under all the circumstances, the alterations had been carried out with reasonable care & if what might have been excused as temporary had been kept up an unreasonable time the defence ceased; (2) the lapse of time, the nature of the obstruction, & the other circumstances attending it, were sufficient evidence as to the unreasonableness of the time.—*R. v. BURT* (1870), 11 Cox, C. C. 309.

**1338.** “Injury, interruption or personal danger” —*Resulting from obstruction—Highway Act, 1835* (c. 50), s. 72—*Multiplicity of offences.*—*Highway Act, 1825* (c. 50), s. 72, makes it an offence to lay any substance upon the highway “to the injury, interruption, or personal danger of any person travelling thereon”:—*Held*: a conviction for having laid matter on the highway “to the interruption & personal danger of any person travelling thereon” was not bad for duplicity under Summary Jurisdiction Act, 1848 (c. 43), for the act of laying the matter on the

The evidence showed that an obstruction placed on a road must necessarily prevent vehicles from passing at all & foot-passengers from passing without inconvenience:—*Held*: it is a necessary inference that persons were obstructed & that it is not necessary to prove that

any specific individual was actually obstructed.—*Re VENKATPA* (1913), 1 L. R. 38 Mad. 305.—IND.

*k.* — — — — —.]—*Liability of local authority.*—Where a local authority allows a culvert forming part of a road under its control & care to be choked &

with a definite knowledge of the fact neglects to remove the obstruction, thereby permitting a nuisance to arise causing damage to property, the local authority is responsible for the damage.—*TAMAKI WEST ROAD BOARD v. APPLETON*, [1916] N. Z. L. R. 183.—N.Z.



highway followed by any one or more of the consequences above-mentioned, constituted but one offence.—*SMITH v. PERRY*, [1906] 1 K. B. 262; 75 L. J. K. B. 124; 94 L. T. 140; 70 J. P. 93; 22 T. L. R. 158; 50 Sol. Jo. 171; 4 L. G. R. 224; 21 Cox, C. C. 98, D. C.

**Inappreciable obstruction—Whether a defence.]**—See Sect. 2, sub-sect. 8, *post*.

**Obstruction for public benefit—Or in exercise of statutory powers.]**—See Sect. 2, sub-sects. 2 & 7, *post*.

**Obstruction with consent of highway authorities.]**—See Sect. 2, sub-sect. 3, *post*.

*See, generally*, NUISANCE.

### B. "Wilful Obstruction."

*See Highway Act, 1835 (c. 50), s. 72.*

**1339. What amounts to wilful obstruction—General rule.]**—By Town Police Clauses Act, 1847 (c. 89), s. 28, "every person who . . . by means of any cart, carriage, sledge, truck, or barrow, or any animal, or other means . . . wilfully causes any obstruction in any . . . public thoroughfare," is made liable to a penalty:—*Held*: to constitute the offence of wilfully causing an obstruction within the sect. there must be an unreasonable use of the thoroughfare.

It is, however, not necessary that any person should be actually obstructed; it is sufficient if circumstances exist from which justices before whom a charge of wilfully causing an obstruction is brought can conclude that in the ordinary course persons may be obstructed, & that the actual use of the road was calculated to obstruct.

*Applts.* at 4 p.m. on an afternoon left two vehicles, four-wheeled, each with a horse between the shafts & a chain horse in front, standing unattended for five minutes in a main road twenty-five yards wide from the kerb to kerb with two sets of tram lines down the centre. Any vehicle proceeding in the same direction as that in which *applts.* were in the course of travelling would have to draw on the tram lines, & so would obstruct the tram until the vehicle had passed the stationary vehicles of *applts.* or had otherwise crossed over to the wrong side of the road. The horses had just been watered by the ostler of an inn used as a baiting-house, *applts.* being found in the inn, where they were having something to eat:—*Held*: there was no evidence of an unreasonable user of the highway, & *applts.* had not wilfully caused an obstruction in the highway within the sect.

An offence is committed under the [above] sect. if a person wilfully causes any obstruction. What do those words mean? For a person merely to stand still or to cause his horse & cart to stand still in the roadway, is not causing an obstruction. An obstruction will only be caused if there is an unreasonable use of the road by stopping. The language of *JES-EL, M.R.*, in *Original Hartlepool Collieries Co. v. Gibb*, No. 1447, *post*, is very much to the point. It is quite true he was dealing with another statute & with other words, but he explains what was the right of access a person has to the highway & pointed out that the real question is "Has there been anything unreasonable in the user of the highway?" (*LORD READING, C.J.*).—*GILL v. CARSON & NIELD*, [1917] 2 K. B. 674; 117 L. T. 285; 81 J. P. 250; 15 L. G. R. 567; 25 Cox, C. C. 774; *sub nom.* *GILL v. CARSON, NIELD v. CARSON*, 86 L. J. K. B. 1290, D. C.

**1340. — Obstruction in fact—Sufficiency—Irrelevant circumstances.]**—*Appl.* placed in a street opposite a house a motor, which, by creating

a vacuum, caused the dust & dirt to pass from the house through india-rubber tubes to a receptacle on the top of the motor. The tubes were passed over the pavement at such a height as not to interfere with persons using the footway. *Appl.* was summoned for obstruction of the highway under Metropolitan Police Act, 1839 (c. 47), s. 54 (6). The magistrate found that the business for which the motor was placed there was reasonable, that it did not remain there longer than was necessary to clean the house & that the space occupied was not excessive, but that the system of cleaning was not necessary to the ordinary comfort of life & was still in the experimental stage & could not be regarded as an incident of everyday life, & the noise & collection of sight-seers might be productive of discomfort to occupants of houses & people using the street & convicted *appl.*:—*Held*: as there was no evidence of wilful obstruction, or obstruction in fact, the conviction was wrong.

The magistrate has given us some reasons, which do not seem to be applicable. I do not think the noise of the machinery used so as possibly to cause discomfort & inconvenience to occupants of neighbouring houses is an obstruction of a highway, or an element of the obstruction of a highway. Of course, if it causes a crowd, it would be otherwise (*KENNEDY, J.*).

I do not think it relevant to consider that the system of carpet-cleaning involved is not necessary to the ordinary comfort or exigency of life. If that is to be considered it is prohibitive of every new invention of the same kind, if there could be any justification to bring machinery there to clean carpets (*KENNEDY, J.*).—*DUNN v. HOLT* (1904), 73 L. J. K. B. 341; 90 L. T. 577; 68 J. P. 271; 20 T. L. R. 207; 48 Sol. Jo. 200; 2 L. G. R. 502; 20 Cox, C. C. 625, D. C.

*Annotations.*—*Reid, Hinde v. Evans* (1906), 70 J. P. 548; *R. v. Bartholomew* (1908), 77 L. J. K. B. 275.

**1341. — — — — —.]** In determining whether an offence has been committed against Highway Act, 1835 (c. 50), s. 78, by leaving a horse & trap on the highway so as to obstruct the passage thereof, the fact that the horse & trap have been placed in charge of some one does not prevent there being an offence under the sect., if there was an obstruction in fact.

It ought substantially to be an obstruction. That is in accordance with the decision in *Stinson v. Browning*, No. 1537, *post*. One might say that every cart left at the edge of a highway is an obstruction in one sense, but in order to constitute an offence, it must be found to be really an obstruction (*RIDLEY, J.*).

As *RIDLEY, J.*, has referred to the case of *Stinson v. Browning* No. 1537, *post*, I ought to say that since that case there has been the decision in *Dunn v. Holt*, No. 1340, *ante*, which shows that where there is wilful obstruction of the road, there may be an offence, though nobody is obstructed (*LORD ALVERSTONE, C.J.*).—*HINDE v. EVANS* (1906), 96 L. T. 20; 70 J. P. 548; 4 L. G. R. 1152; 21 Cox, C. C. 331, D. C.

*Annotation.*—*Reid, Gill v. Carson & Nield*, [1917] 2 K. B. 674.

**1342. — — — — —.]**—*GILL v. CARSON & NIELD*, No. 1339, *ante*.

*Compare* No. 1338, *ante*; Nos. 1523, 1537, *post*.

**1343. — Highway Act, 1835 (c. 50), s. 72—Rain water from eaves flowing across footway.]**—C. was the owner of houses, some of which were let to tenants, & adjoining the houses was a public footpath on C.'s land on which the rain dripped from the eaves & interfered with the passage of

Sect. 1. — Nuisances: Sub-sect. 1, B., C. & D.]

the public. C. refused to do anything to prevent this rain drip:—*Held*: C. could not be convicted under above Act for wilfully obstructing or letting offensive things flow on the highway.—*CROASDILL v. RATCLIFFE* (1862), 5 L. T. 834; *sub nom. CROASDILL v. RATCLIFFE*, 26 J. P. 165.

*Annotation*: *Consd. Gully v. Smith* (1883), 12 Q. B. D. 121.

**1844.** — — — — **Suffering trees to grow across footway.**—By Highway Act, 1835 (c. 50), s. 72, if any person shall "wilfully obstruct the passage of any footway," he is made liable to a penalty of 40s. Resp. was summoned under above sect. for obstructing a way. Evidence was given that trees & underwood on his land had grown over & across the way, so as to be an obstruction to the free passage along it:—*Held*: in merely suffering the trees to grow so as to be an obstruction, did not "wilfully obstruct" the way within the sect.—*WALKER v. HORNER* (1875), 1 Q. B. D. 4; 45 L. J. M. C. 34; 33 L. T. 601; 24 W. R. 95; 30 J. P. Jo. 773.

*Annotations*: *Consd. Gully v. Smith* (1883), 12 Q. B. D. 121. *Refd. Horner v. Cadman* (1886), 55 L. J. M. C. 110.

**1845.** — — — — **Stones on repaired highway—Insufficient warning during night.**—A local surveyor of highways, in repairing a road, placed stones thereon, & allowed them to remain at night insufficiently fenced & without sufficient light to warn the public against the obstruction:—*Held*: he was properly convicted under Highway Act, 1835 (c. 50), s. 72, notwithstanding that he might also have been guilty of an offence under sect. 56.

The facts stated disclose a wilful obstruction of the highway within the Act. It was a wilful obstruction, in the sense of being purposely placed there (LORD COLERIDGE, C.J.).—*FEARNLEY v. ORMSBY* (1870), 4 C. P. D. 136; 43 J. P. 384; 27 W. R. 823.

*Annotation*: *Consd. Gully v. Smith* (1883), 12 Q. B. D. 121.

**1846.** — — — — **Omission to remove obstruction—After notice.**—In order to constitute wilful obstruction of a highway within Highway Act, 1835 (c. 50), s. 72, it is not necessary that there should be any act of commission, but the offence may be complete by an omission on the part of the person whose duty it is to remove an obstruction to do so after notice.

G. was occupier of lands through which a highway was made 20 feet deep, the soil being marly & the retaining wall perpendicular. Owing to rains ten loads of soil fell on the highway & notice was frequently given to G. to remove the same which he omitted to do. The wall had been occasionally repaired by G. G. being summoned under Highway Act, 1835 (c. 50), s. 72: *Held*: he was rightly convicted of wilfully obstructing the highway by allowing the soil to lie on the highway. *GULLY v. SMITH* (1883), 12 Q. B. D. 121; 53 L. J. M. C. 35; 48 J. P. 300.

*Annotation*: *Consd. Hudson v. Bray*, [1917] 1 K. B. 520.

**1847.** — — — — **Collection of crowd—Street orator.** Resp. was summoned under Highway Act, 1835 (c. 50), s. 72, for "wilfully obstructing the free passage" of a highway. It was proved that he stood on a chair in the highway & addressed a large crowd of persons who had collected round him. There was space for vehicles & foot-passengers to pass to & fro outside the crowd, but to have attempted to have walked or driven across that part where applt. & the crowd were stationed would have been attended with inconvenience & danger:—*Held*: applt. was guilty of wilful obstruction of the free passage of the highway within sect. 72.—*HORNER v. CADMAN* (1886),

55 L. J. M. C. 110; *sub nom. HOMER v. CADMAN*, 54 L. T. 421; 50 J. P. 454; 34 W. R. 413; 2 T. L. R. 407; 16 Cox, C. C. 51, D. C.

**1848.** — — — — **Street singer.**—A person, by singing hymns, occasioned a crowd to assemble, & thereby obstructed a certain highway within the metropolitan police district. An information was accordingly preferred against him by an inspector of police, under Highway Act, 1835 (c. 50), s. 72:—*Held*: (1) the provisions of that sect. were applicable to highways within the metropolitan area; (2) a prosecution under that sect. might be initiated by any one, & therefore the proceedings taken by the police were valid.—*BACK v. HOLMES* (1887), 57 L. J. M. C. 37; 56 L. T. 713; 51 J. P. 693; 16 Cox, C. C. 263; *sub nom. BACH v. HOLMES*, 3 T. L. R. 564, D. C.

*Annotations*:—As to (2) *Refd. R. v. Stewart* (1896), 65 L. J. M. C. 83; *Giebler v. Manning*, [1906] 1 K. B. 709. *Generally, Mentd. Keep v. St. Mary's, Newington, Vestry, Austin v. St. Mary's, Newington, Vestry*, [1894] 2 Q. B. 521.

Assembly of crowd generally, *see* Sub-sect. 1, P., *post*.

**1849.** — — — — **Tree blown across footway—Omission by owner to warn passengers.**—Where a tree, blown down in a violent gale, has fallen across a highway so as to cause an obstruction thereto, the occupier of the land upon which the tree was growing is under no obligation by Highway Act, 1835 (c. 50), s. 65 or s. 72, to light the tree or to warn persons passing along the highway of the existence of the obstruction.—*LUDSON v. BRAY*, [1917] 1 K. B. 520; 86 L. J. K. B. 576; 116 L. T. 122; 81 J. P. 105; 33 T. L. R. 118; 61 Sol. Jo. 231; 15 L. G. R. 156, D. C.

**1850.** — — — — **Highways Act, 1835 (c. 50), s. 78—Cart & horse on highway—In charge of attendant.**

*HINDE v. EVANS*, No. 1311, *ante*.

**1851.** — — — — **Towns Police Clauses Act, 1847 (c. 89), s. 28—Caravan near market place—Sale by auction to crowd.**—B. obtained for a small payment leave of the improvement comrs. of a town to put his caravan on a strip of land near the market place, & sold his goods there by auction. A crowd collected & stood in the market:—*Held*: B. was improperly convicted under above sect. for wilfully causing an obstruction in a public thoroughfare.—*BALL v. WARD* (1875), 33 L. T. 170; 40 J. P. 213.

*Annotation*: *Refd. Horner v. Cadman* (1886), 55 L. J. M. C. 110.

**1852.** — — — — **Walking abreast.** *R. v. LONG*, ETC. J.J., No. 1721, *post*.

**1853.** — — — — *—* *R. v. WILLIAMS*, No. 1725, *post*.

**1854.** — — — — **Cart & horse unattended.**—*GILL v. CARSON & NIELD*, No. 1339, *ante*.

**1855.** — — — — **Metropolitan Police Act, 1839 (c. 47), s. 54 (6)—Rubber tubes from vacuum cleaner—Elevated across pavement.**—*PUNN v. HOLT*, No. 1310, *ante*.

### C. Inappreciable Obstruction.

*See* Sect. 2, sub-sect. 8, *post*.

### D. Obstruction in Footway.

**1856. Ploughing up footpath—Through field—Claim of right.**—On an information against B., the occupier of a field through which a highway or public footway ran, for wilfully destroying the surface of such highway, it was proved that B. ploughed up part of the footway:—*Held*: the justices were warranted in convicting B., & it was immaterial that B. had often before done so,

& claimed a right to do so.—**BRACKENBOROUGH v. THORSBY** (1869), 19 L. T. 692; 33 J. P. 565.

*Annotation*.—**Consd. Dennis v. Good** (1918), 88 L. J. K. B. 388.

**1357.** — — — — —.]—There may, in law, be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, & destroy all trace of it for the time.

As far as living memory went, the occupier for the time being of a field over which a footpath crossed had been in the habit, in due course of farming, of ploughing up the whole field, & so destroying the footpath. There was no evidence of the existence of the footpath before living memory:—*Held*: the inference to be drawn was, that the owner had originally dedicated the right of way to the public, subject to this right of periodically ploughing it up.

Suppose a swing-bridge dedicated to the public, but to be opened at times when it is necessary to let in the ships of the person dedicating; surely, that can be done. What is that but the present case? (**COCKBURN, C.J.**).—**MERCER v. WOODGATE** (1869), L. R. 5 Q. B. 26; 10 B. & S. 833; 39 L. J. M. C. 21; 21 L. T. 458; 34 J. P. 261; 18 W. R. 116.

*Annotations*.—**Folld. Arnold v. Blaker** (1871), L. R. 6 Q. B. 433; **Dennis v. Good** (1918), 88 L. J. K. B. 388. *Refd.* Greenwich Board of Works v. Maudsley (1870), 39 L. J. Q. B. 205; **Arnold v. Holbrook** (1873), 42 L. J. Q. B. 80; **Spier v. Peacock** (1875), 39 J. P. 581; **Rundle v. Hearle**, [1895] 2 Q. B. 83; **A-G v. Horner** (No. 2), [1913] 2 Ch. 110.

**1358.** — — — — —.]—H., being the occupier of land over which a public footpath existed, ploughed it up. On information against him under Highway Act, 1835 (c. 50), s. 72, witnesses proved that the field had once been a grass common; that it had about thirty years ago been inclosed & cultivated as arable land, but no witness remembered whether it had been ploughed up until about thirteen years ago, since which time it had been sometimes ploughed up:—*Held*: the justices were right in presuming that the road had not been dedicated subject to the occupier ploughing it up, & they had rightly convicted H.—**HARRISON v. DANBY** (1870), 34 J. P. 759.

**1359.** — — — — —.]—Pltf. was the occupier of an arable field, across which a footway from time immemorial had been used by every person at his pleasure; but pltf. & his predecessors had also from time immemorial ploughed up the footway when & in such parts as they thought fit, & in other parts lifted the plough across it. Defts. were surveyors of highways, & in order to repair the footway placed materials on it, making it a hard causeway, so as to prevent pltf. from ploughing it up:—*Held*: the footway was a highway, which it must be assumed had been dedicated to the public subject to the condition that the owner of the soil might plough it up, & there could at law be such a limited dedication; & defts. were therefore liable for the trespass.—**ARNOLD v. BLAKER** (1871), L. R. 6 Q. B. 433; 40 L. J. Q. B. 185; 35 J. P. 775; 19 W. R. 1090, Ex. Ch.

*Annotations*.—**Folld. Arnold v. Holbrook** (1873), L. R. 8 Q. B. 96. *Refd. A-G v. Horner* (No. 2), [1913] 2 Ch. 110.

**1360.** — — — — —.]—**ARNOLD v. HOLBROOK**, No. 515, *ante*

**1361.** — — — — —.]—**Conversion of field into arable land—Under Defence of the Realm Regulations—Invalid authority.**—Applts. were the occupiers of two grass fields, across which there had from time immemorial been two public footways. Under regulation 2 M. of Defence of the Realm Regulations

the War Agricultural Executive Committee required applts. to plough up certain grass land, namely, the two fields in question. Applts. ploughed up the fields, footpaths & all, & were convicted under Highway Act, 1835 (c. 50), s. 72, of wilfully destroying the surface of the footpaths:—*Held*: the conviction was right, as "highway" in the above enactment included a public footway, & as the regulation under which applts. were required to do the ploughing did not authorise the committee to order the ploughing of public footpaths.—**DENNIS & SONS, LTD. v. GOOD** (1918), 88 L. J. K. B. 388; 120 L. T. 88; 83 J. P. 110; 35 T. L. R. 93; 17 L. G. R. 9, D. C.

**Claim of right—Dedication subject to right to plough.**—See Sect. 2, sub-sect. 6, *post*.

**Riding & driving on footpath.**—See Sub-sect. 15, *post*.

**1362. Cellar opening into pavement—Interference of third person—Liability.**—A tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed & secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed & secured it, & a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it.—**DANIELS v. POTTER** (1830), as reported in 4 C. & P. 262, N. P.

*Annotation*.—**Consd. Clark v. Chambers** (1878), 3 Q. B. D. 327.

**1363.** — — — — —.]—**Defective condition—Liability of landlord or tenant.**—Deflt. let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair & dangerous. A passer-by in consequence fell into the aperture & was injured:—*Held*: (1) the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident; (2) the provision in Metropolitan Management Act, 1855 (c. 120), s. 102, made no difference in this respect.—**PERRY v. BICKMORE** (1873), L. R. 8 C. P. 401; 28 L. T. 701; 37 J. P. 552; 21 W. R. 733.

*Annotations*.—As to (1) **Folld. Gwinnell v. Eamer** (1875), L. R. 10 C. P. 658. *Consd. Hall v. Norfolk*, [1900] 2 Ch. 493. *Refd. Nelson v. Liverpool Brewery Co* (1877), 2 C. P. D. 311; **Heaven v. Pender** (1882), 30 W. R. 749; **Barham v. Ipswich Dock Comrs.** (1885), 54 L. T. 23; **Jones v. Rew** (1910), 103 L. T. 165.

**1364.** — — — — —.]—**Improper user by injured person.**—(1) A. was injured by the giving way of a grating in a public footway, which was used for a coal-shoot & for letting light into the lower part of the premises adjoining. These premises were at the time of the accident under lease to B., who covenanted to repair & keep in repair all except the roofs, main walls, & main timbers. At the time of the demise the grating was unsafe; but there was no evidence that C., the landlady, had any knowledge of its unsafe state; & the jury found that no blame was attributable to her for not knowing it:—*Held*: upon the authority of **Perry v. Bickmore**, No. 1363, *ante*; no action was maintainable against C.

(2) At the time of the accident, A. was not passing along the way, but was standing on the grating to talk with a person at a window above it:—*Held*: A. was not making an improper use of the (1875), L. R. 10

C. P. 658; 32 L. T. 835. *Annotation*.—As to (1) *Refd. Jones v. Rew* (1910), 103 L. T. 165.

**1365.** — — — — —.]—**BRAITHWAITE v. WATSON** (1889), 5 T. L. R. 331.

*Sect. 1. Nuisances: Sub-sect. 1, D., E. & F.]*

**1366.** — [Pltf. was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by deft. on a weekly tenancy. The evidence showed that the defect had existed for some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to the defective state of the flagstone, or to the presence of clay, which prevented the plate from sitting. The county ct. judge directed a verdict for pltf., the amount of damages being agreed. On appeal:—*Held*: it was a question for the jury whether the injury was caused by the negligence of the tenant, or by a structural defect existing at the date of the original letting, for which deft. would be liable, & there must be a new trial.—*BOWEN v. ANDERSON*, [1894] 1 Q. B. 164; 58 J. P. 213; 42 W. R. 236; 38 Sol. Jo. 131; 10 R. 47, D. C.

*Annotations*: *Mentd. Simmons v. Crossley*, [1922] 2 K. B. 95; *Mellows v. Low*, [1923] 1 K. B. 522; *Queen's Club Gardens Estates v. Bignell*, [1924] 1 K. B. 117.

**1367.** — *Removal of cover—Liability of master for servant's act.*—The carman of deft., a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the footway which covered an opening communicating with the coal cellar. Pltf. was passing along the footway at the time. The carman gave her no warning that the plate was taken up, & in consequence of his negligence in not taking due precautions without any want of due care on her part, she fell into the opening & sustained injuries. In an action against deft. for negligence:—*Held*: he was responsible.—*WHITELEY v. PEPPER* (1877), 2 Q. B. D. 276; 46 L. J. Q. B. 436; 38 L. T. 588; 41 J. P. 424; 25 W. R. 607, D. C.

*Annotation*: *Refd. Duke v. Courage* (1882), 46 J. P. 453.

**1368.** — *Flaps projecting into street—Liability of contractor.*—A brewery co. employed an independent contractor to deliver some beer to a tied house which abutted on the highway & the cellar flaps of which occupied the greater part of the pavement. The beer, at the request of the occupier of the licensed premises, was delivered by the carman into the cellar, the flaps of which were turned back by the carman. Pltf., who was passing along the pavement, was tripped by the flaps & fell into the cellar, & was injured:—*Held*: the brewery co. were not liable to pltf., as they had not employed the contractor to do work on the highway which was dangerous to the public, nor to interfere with the surface of the highway, & therefore they were not liable for the negligent acts of the contractor. *WILSON v. HODGSON'S KINGSTON BREWERY CO.* (1915), 85 L. J. K. B. 270; 113 L. T. 1112; 80 J. P. 39; 32 T. L. R. 60; 60 Sol. Jo. 112, D. C.

**1369.** *Grating over area—Accident due to excessive crowd—Liability for repair.*—*ROBBINS v. JONES*, No. 1590, post.

**1370.** *Defective stop-cock box—Projection above pavement—Liability of Metropolitan Water Board.*—Pltf. was walking along the pavement when the toe of her boot went into the circular orifice of a stop-cock box which was part of defts.' water system, with the result that she sustained personal injuries. The stop-cock box had been constructed by the Lambeth Waterworks Co., who were defts.' predecessors, under statutory authority. It had an opening 2½ inches in diameter & 3½ inches deep to the point where the spindle was reached. It was the practice of defts. to fill up the space

between the spindle & the level of the pavement by means of a tight wisp of straw with mud or earth on top of it for the purpose of protecting the mechanism against frost & grit. Upon the occasion in question this wad reached within 1 inch of the top of the stop-cock box:—*Held*: the original construction of the stop-cock box was lawful; there was a duty to supplement the construction of the box by a wad, but there was no duty on the part of defts. to renew a wad which in course of time had become worn, & from the above facts the judge might infer that after the occasion of the last user of the stop-cock box in question either no wad was put in or an insufficient one, & accordingly he was justified in coming to the conclusion that defts. were liable.—*OSBORN v. METROPOLITAN WATER BOARD* (1910), 102 L. T. 217; 74 J. P. 190; 26 T. L. R. 283; 8 L. G. R. 170, D. C.

*Annotation*:—*Consd. Rosenbaum v. Metropolitan Water Board* (1910), 103 L. T. 739.

**1371.** — [Pltf. caught the heel of her shoe in a stop-cock box in the pavement of a highway, & falling to the ground, sustained personal injuries. The stop-cock box was placed in position by the predecessors of the Metropolitan Water Board under statutory authority. A large number of these boxes were in existence in London. For some time it had been the practice of the servants of the Board to stop up each hole with a plug or wad of straw with earth or mud above it. These plugs were renewed three times a year. On the occasion of the accident it was proved that the plug of straw had become so worn as to leave a hole some two inches deep. In an action for damages for negligence:—*Held*: there was a duty on the Water Board to the public to keep the holes properly plugged with straw, & having failed to discharge this duty, they were liable in damages.—*ROSENBAUM v. METROPOLITAN WATER BOARD* (1910), 103 L. T. 234; 74 J. P. 378; 26 T. L. R. 510; 8 L. G. R. 735; on appeal, 103 L. T. 739, C. A.

*Annotation*:—*Refd. Batt v. Metropolitan Water Board* (1911), 9 L. G. R. 307.

**1372.** — *Duty to maintain on occupiers supplied.*—Metropolitan Water Board (Charges Act, 1907 (c. clxxi), s. 8, applies to existing service pipes as well as to pipes & their fittings hereafter to come into existence on the request of owners or occupiers.

Pltf. caught her foot in a stop-cock box in a street outside a house, & fell & sustained injuries. The stop-cock box in question, which was out of repair, had been constructed in the time of defts.' predecessors, & was connected with the communication pipe which carried the supply of water from defts.' main to the house outside which the accident occurred:—*Held*: the obligation to maintain the stop-cock box was upon the owner or occupier of the house & not upon defts., & therefore pltf. was not entitled to recover against defts.—*BATT v. METROPOLITAN WATER BOARD*, [1911] 2 K. B. 905; 80 L. J. K. B. 1354; 105 L. T. 496; 75 J. P. 545; 27 T. L. R. 579; 55 Sol. Jo. 714; 9 L. G. R. 1123, C. A.

*Annotation*:—*Fold. Mist v. Metropolitan Water Board & Creamilk* (1915), 81 L. J. K. B. 2041.

**1373.** *Defective meter-pit—Water supply for purposes not domestic—Liability of persons supplied.*—Metropolitan Water Board Charges Act, 1907 (c. clxxi), s. 16.—Pltf. was injured owing to the dangerous condition of a water meter-pit cover in the highway within the district of the Metropolitan Water Board:—*Held*: the owners & occupiers of the premises, for the supply of water

to which this cover was part of the apparatus, were *prima facie* liable, & the Water Board was not liable, the former, under sect. 16 (1) having to maintain such apparatus.—*MIST v. METROPOLITAN WATER BOARD & CREAMILK, LTD.* (1915), 81 L. J. K. B. 2041; 113 L. T. 500; 79 J. P. 495; 13 L. G. R. 874, D. C.

**1374. Interference with stepping stones over stream—Highway Act, 1835 (c. 50), s. 72.]—SUTCLIFFE v. SOWERBY HIGHWAYS SURVEYORS, No. 612, ante.**

**1375. ———.]—Ex p. WHITTAKER (1859), 23 J. P. Jo. 84.**

**1376. Erection of steps on footpath—Claim of right.]—FISHER v. PROWSE, COOPER v. WALKER, No. 60, ante.**

*See, further, Sect. 2, sub-sect. 6, post.*

**1377. ———.]—R. v. BURT, No. 1337, ante.**

**1378. Machinery moved across pavement—By trolleys & wagons—Claim of right.]—ST. MARY, NEWINGTON, VESTRY v. JACOBS, No. 587, ante.**

*See, further, Sect. 2, sub-sect. 6, post.*

**1379. Carpet laid on pavement.]—No one has a right to place anything across a highway which might cause injury to passenger (SMITH, J.).—WATSON v. ELLIS (1885), 1 T. L. R. 317; 49 J. P. Jo. 148, D. C.**

**1380. Erection of posts in footpath—Right to obstruct—Liability for negligence.]—LAMLEY v. EAST RETFORD CORPN., No. 1171, ante.**

**Goods exposed for sale on pavement.]—See Sub-sect. 1, K. (a), post.**

#### *E. Gates and Posts.*

**1381. Erecting gate across highway.]—(1) If a new gate be erected across a public highway it is a common nuisance, although it be not fastened; & any of the King's subjects passing that way may cut it down & destroy it.**

**(2) A public nuisance may be abated by a private individual.—JAMES v. HAYWARD (1630), Cro. Car. 184; W. Jo. 221; 79 E. R. 761.**

*Annotations:—As to (1) Reidd, Lodie v. Arnold (1697), 2 Salk. 438; Perry v. Fitzhugh (1846), 8 Q. B. 757; Mercer v. Woodgate (1869), 34 J. P. 261; Campbell Davys v. Lloyd, [1901] 2 Ch. 518; Petter v. Parsons, [1914] 1 Ch. 704.*

**1382. ——— Notwithstanding provision of keys.]**

**It is an obstruction to a person's free right of way if another person locks gates across such way & it is no answer to the complaint as to the obstruction to say that keys for the gates will be supplied.—GUEST'S ESTATES, LTD. v. MILNER'S SAFES, LTD. (1911), 28 T. L. R. 59.**

**1383. ——— Nuisance subsequently legalised by special Act—Omission to light at night—"Reduction of Lighting" Regulations.]—A railway co., for the more convenient management of their station, erected in the public highway certain gate posts from which collapsible steel gates could be run across the road so as to close the entrance to the station yard. These posts were erected by the co. in contravention of their special Act, & in 1901 were judicially held to be an obstruction to the highway. In 1902 the co. obtained an Act which empowered them to "maintain" the posts & gates & to replace them, when necessary, on the same site. A licenced taxicab driver, while**

**lawfully driving his cab on a dark rainy night along the public highway into the station yard collided with one of these posts, which was practically invisible owing to the darkening of the street in compliance with the Reduction of Lighting Regulations, & thereby damaged his cab. The post was in the condition in which it was at the time of the passing of the Act of 1902. In an action by the cabdriver against the railway co. for damages for negligence:—Held: the accident arose, not from any overt act of the co., but from the existence of the gate post, which had been legalised by the Act of 1902, coupled with the diminution of light necessitated by the exigencies of the war; the mere power to maintain the post imposed no obligation on the co. to take reasonable precautions to warn the public of its existence; & the co. was not guilty of negligence.—GREAT CENTRAL RY. CO. v. HEWLETT, [1910] 2 A. C. 511; 85 L. J. K. B. 1705; 115 L. T. 349; 80 J. P. 365; 32 T. L. R. 707; 60 Sol. Jo. 678; 14 L. G. R. 1015, H. L.; *reversg.* S. C. *sub nom.* HEWLETT v. GREAT CENTRAL RY. CO., 114 L. T. 713, C. A.**

*Annotations:—Distd. Morrison v. Sheffield Corpn., [1917] 2 K. B. 866. Exptd. Sheppard v. Glossop Borough Corpn., [1921] 3 K. B. 132.*

**1384. Posts on footway.]—LAMLEY v. EAST RETFORD CORPN., No. 1171, ante.**

#### *F. Rail Tracks.*

**1385. Rails laid in highway—For colliery waggons.]—(1) Deft., being proprietor of a colliery made a rail-road from it to a sea-port town. The rail-road was 400 yards long, & was laid upon a turnpike road, which it narrowed so far, that in some places there was not a clear space for two carriages to pass. Deft. allowed the public to use his rail-road, paying a toll:—Held: the facility thereby given to the general traffic with the sea-port, & particularly to the conveyance of coals, etc., thither, was not such a convenience as justified the obstruction of the highway. *Qu.*: whether, upon an indictment for nuisance by obstructing a highway, it be a proper question for the jury, whether the general benefit to the public by the obstruction be equivalent or superior to the inconveniences which thereby result to some of the public.**

**(2) By a local Act, authority was given to all persons to lay waggon-ways along or across any of the roads mentioned in the Act, of which the turnpike road in question was one, but the parties so doing were to keep such roads in repair for twenty yards on each side of the waggon-way so laid down:—Held: the Act did not authorise the laying of such waggon-way where there were not twenty yards of road on each side.—R. v. MORRIS (1830), 1 B. & Ad. 441; 9 L. J. O. S. K. B. 55; 109 E. R. 851.**

*Annotation:—As to (2) Reidd, R. v. Bradford Navigation Co. (1865), 6 B. & S. 631.*

**1386. ———.]—R. v. CHARLESWORTH, No. 1336, ante.**

**1387. ——— Street tramways.]—A person, without the authority of Parliament, but with the concurrence of & by virtue of a contract with the vestry of the parish, laid down in one of the streets of the metropolis a double line of tramways on**

#### **PART IX. SECT. 1, SUB-SECT. 1.—E.**

**1. Posts supporting statutory "sign-board."—PIL's horse, which she was driving along the highway, became frightened, & the vehicle to which it was attached was brought into collision with one of the posts supporting the "sign-board" required by statute to be erected across the highway:—Held:**

**the posts would not necessarily be an indictable nuisance.—SOULS v. GRAND TRUNK RY. CO. (1871), 21 C. P. 308.—CAN.**

#### **PART IX. SECT. 1, SUB-SECT. 1.—F.**

**m. Rails laid in highway—Street tramways—Rail above level of highway.]—A rail was above the level of the**

**roadway, contrary to the requirements of a tramway co.'s charter, & being a street obstruction unauthorised, was a nuisance.—JOYCE v. HALIFAX STREET RY. CO. (1892), 24 N. S. R. 113.—CAN.**

**n. ——— Grooved rail.]—Deft. had statutory authority to construct & operate a street railway along the public streets of a city. The**

Sec. 1.—Nuisances: Sub-sect. 1, F., G. & H.]

which omnibuses of a peculiar construction plied for hire. These tramways were dangerous & inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramway, & horses which put their feet upon it were startled:—*Held*: (1) this was a public nuisance, even though those tramways might be for the convenience of the public generally; (2) what was here done could not be looked on as a mode of paving the street & consequently not within the powers conferred on vestries by Metropolis Management Act, 1855 (c. 120), s. 98.—*R. v. TRAIN* (1862), 2 B. & S. 640; 31 L. J. M. C. 109; 6 L. T. 380; 26 J. P. 469; 8 Jur. N. S. 1151; 10 W. R. 539; 9 Cox, C. C. 180; 121 E. R. 1209; *previous proceedings*, 3 P. & F. 22.

*Annotations*:—*As to* (1) *Consol.* Bradburn v. Morris, Morris v. Bradburn (1876), 3 Ch. D. 812. *Reid.* Pimlico Tram. Co. v. Greenwich Union (1873), L. R. 9 Q. B. 9; *Re Bidder & North Staffordshire Ry.* (1878), 4 Q. B. D. 412. *As to* (2) *Consol.* A.-G. v. Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282. *Appl.* A.-G. v. Barker (1900), 83 L. T. 245. *Reid.* R. v. United Kingdom Electric Telegraph Co. (1862), 31 L. J. M. C. 166; *Re Bidder & North Staffordshire Ry.* (1878), 4 Q. B. D. 412; *Harvey v. Truro R. D. Co.* [1903] 2 Ch. 638; *Shetlingham U. D. C. v. Halsey* (1904), 68 J. P. 395.

1388. ————]—A.-G. v. BARKER, No. 1334, *ante*.

## 1389. ———— Temporary line during repairs.]

Raised rails laid down by contractors in a thoroughfare for the temporary continuance of tramway traffic during the operation of reconstructing the tramlines for electric traction are not authorised by London County Tramways Electrical Power Act, 1900, s. 6, as work "necessary for adapting" the line "to be so worked."—*TILLING (T.), LTD. v. DICK, KEIR & Co.* [1905] 1 K. B. 562; 71 L. J. K. B. 359; 92 L. T. 731; 69 J. P. 172; 53 W. R. 380; 21 T. L. R. 281; 49 Sol. Jo. 209; 3 L. G. R. 369.

*G. Breaking Open or Failing to Reinstall Road.*

1390. Breaking open—Digging in highway.]—*R. v. SHILDETON (INHABITANTS)* (1667), 2 Keb. 221; 84 E. R. 138.

1391. ———— Defective replacement.] Deft. employed P. to clean out a drain which was on deft.'s land. P. was not in deft.'s service, but was a common labourer, selected by deft. on account of his having dug the drain originally. P. cleaned out the drain without assistance from any other person, & without the further direction or inspection of deft. He received 6s. for the job, from deft. In the course of cleaning out the drain, P. took up part of an adjoining highway, & replaced the same in an improper manner & with insufficient materials, in consequence of which pltf.'s horse, passing along the highway, was injured:—*Held*: P. was not an independent contractor, but was acting as the servant & under the control of deft., & deft. was responsible to pltf. for the injury.—*SADLER v. HENLOCK* (1855), 4 E. & B. 570; 3 C. L. R. 760; 24 L. J. Q. B. 138; 24 L. T. O. S. 233; 1 Jur. N. S. 677; 3 W. R. 181; 119 E. R. 209.

*Annotations*:—*Consol.* Turner v. G. E. Ry. (1875), 33 L. T. 431. *Reid.* Wiggott v. Fox (1856), 11 Exch. 832; *Arthy v. Coleman* (1857), 6 W. R. 34; *Abraham v. Reynolds* (1860), 5 H. & N. 143; *Johnson v. Lindsay*

(1889), 23 Q. B. D. 508; *Donovan v. Laing, Wharton, & Down Construction Syndicate*, [1893] 1 Q. B. 629; *Bargwell v. Daniel* (1907), 98 L. T. 257; *Simmons v. Heath Laundry Co.* [1910] 1 K. B. 543; *Soc. Maritime Francaise v. Shanghai Dock & Engineering Co.* (1920), 90 L. J. P. C. 85. *Mentd.* Performing Right Soc. v. Mitchell & Booker, [1924] 1 K. B. 762.

*Compare* No. 1403, *post*.

1392. ———— Ploughing.]—*GRIESLY'S CASE* (1669), 1 Vent. 4; 86 E. R. 4.

*Annotations*:—*Expld.* Mercer v. Woodgate (1869), 10 B. & S. 833. *Reid.* A.-G. & Monmouthshire County Council v. Scott (1905), 74 L. J. K. B. 803; *Dennis v. Good* (1918), 88 L. J. K. B. 388.

1393. ———— For water pipes—Negligence.]—An action on the case may be maintained against an incorporated waterworks co., where workmen employed by persons who contract with the co. to lay down pipes for conducting water through a public street do the work in a negligent manner, whereby an individual passing along the street receives an injury.—*MATTHEWS v. WEST LONDON WATER WORKS CO.* (1813), 3 Camp. 403, N. P.

*Annotations*:—*Expld.* Hall v. Smith (1824), 2 Bing. 156; *Rapson v. Cubitt* (1842), 9 M. & W. 710. *Consol.* Overton v. Freeman (1852), 11 C. B. 867.

1394. ———— For gas pipes.]—*A.-G. v. SHEFFIELD GAS CONSUMERS CO.*, No. 1663, *post*.

1395. ————]—*R. v. LONGTON GAS CO.*, No. 1618, *post*.

1396. ———— Highway Act, 1835 (c. 50), s. 72.]

—A gas co., not established by any statute, obtained the consent of the local board acting under 11 & 12 Vict. c. 63, to take up the streets to lay pipes to supply the inhabitants with gas. The manager was proceeded against under Highway Act, 1835 (c. 50), s. 72, for causing injury & damage to the highway:—*Held*: deft. was liable to a penalty, as this was not work authorised by the local board under 11 & 12 Vict. c. 63, s. 68. —*HAWKINS v. ROBINSON* (1872), 37 J. P. 662.

1397. ———— For sewage purposes—Accident due to contributory cause—Waterspout in unfenced sewer.]—An incorporated water co. created a nuisance in a public highway by leaving unfenced a stream of water which they had caused to spout up in it. The horses of pltf. were frightened, & swerving from it fell into an unfenced excavation in the highway made by contractors who were constructing a sewer, & were thereby injured:—*Held*: the water co. & not the contractors were the parties liable.—*HILL v. NEW RIVER CO.* (1868), 9 B. & S. 303; 18 L. T. 355.

*Annotations*:—*Reid.* Child v. Hearn (1871), L. R. 9 Exch. 176; *Clark v. Chambers* (1878), 3 Q. B. D. 327. *Mentd.* Weld-Blundell v. Stephens, [1920] A. C. 956; *Re Polemis & Furness, Withy*, [1921] 3 K. B. 569.

1398. ———— Grant of private road as public road—Rights reserved regarding drainage—Trenches unnecessary for drainage.]—*NICOL v. BEAUMONT*, No. 443, *ante*.

1399. ———— New road not dedicated to public—Trenches for drainage.]—Deft. while erecting houses upon land adjoining a new road, which had not been dedicated to the public, had dug a trench across the road for the purpose of making drains. Pltf.'s servant, while driving pltf.'s horses along the road after dark drove into the trench, no lights having been placed to warn persons using the road:—*Held*: deft. had not been guilty of any negligence, there being no duty cast upon him to protect any one using the road

city, having selected cars with a standard wheel, used grooved rails constructed for carrying the wheels:—*Held*: the placing of the grooved rail on the public street did not constitute a nuisance.—*REGINA CARTAGE CO.*

*LTD. v. REGINA (CITY)* (1916), 31 W. L. R. 1141.—*CAN.*

o. ———— Switch & service track.]—*Re SURREY MUNICIPALITY & GREAT NORTHERN RY. CO.* (1913), 25 W. L. R. 881.—*CAN.*

**PART IX. SECT. 1, SUB-SECT. 1.—G.**  
p. Breaking open—For telegraph posts.]—*HALIFAX (CITY) v. NOVA SCOTIA ELECTRIC TELEGRAPH CO.* (1859), Coch. 83.—*CAN.*

without licence.—**MURLEY BROTHERS v. GROVE** (1882), 40 J. P. 360, D. C.

*Annotations*.—**Expld. & Apld.** Lowery v. Walker, [1910] 1 K. B. 173. **Refd.** Grand Trunk Ry. of Canada v. Barnett, [1911] A. C. 361.

**1400. Stones & earth removed—Improperly guarded.**—If A. employs B. to do an act which necessarily involves the committing a public nuisance, A. is liable for damages sustained by a third person from the negligence of B. in doing the act; as where A. employs B. to open a public street, & lay down gas-pipes under circumstances which necessarily create a public nuisance, & B. leaves the stones & earth removed from the excavations improperly guarded & lighted at night, if a third person at night fall over the stones & rubbish where B. placed them, & sustain damage, A. will be liable in an action to such third person for the damages.—**ELLIS v. SHEFFIELD GAS CONSUMERS CO.** (1853), 2 E. & B. 767; 2 C. L. R. 249; 23 L. J. Q. B. 42; 22 L. T. O. S. 81; 17 J. P. 823; 18 Jur. 146; 2 W. R. 19; 118 E. R. 955.

*Annotations*.—**Expld. & Distd.** Sadler v. Henlock (1855), 4 E. & B. 570. **Consd.** Hole v. Sittingbourne & Sheerness Ry. (1861), 6 H. & N. 488. **Refd.** R. v. Longton Gas Co. (1860), 6 Jur. N. S. 601; Butler v. Hunter (1862), 7 H. & N. 826; Blake v. Thurst (1863), 2 H. & C. 20; Gray v. Pullen (1864), 5 B. & S. 970; Crawford v. Consett L. R. (1891), 55 J. P. 218; Belvedere Fish Guano Co. v. Ramlam Chemical Works, Feldman & Partridge, Ind Cope v. Ramlam Chemical Works, Feldman & Partridge [1920] 2 K. B. 487. **Menfd.** Pickard v. Smith (1861), 10 C. B. N. S. 470; Serandati v. Sarsse (1866), L. R. 1 P. C. 152; Bower v. Peate (1876), 1 Q. B. D. 321.

**1401. Defective reinstatement—Company with statutory powers.**—Where a public co. has the right by law of taking up the pavement of the street for the purpose of laying down pipes, the workmen they employ are bound to use such care & caution in doing the work as will protect the King's subjects, themselves using reasonable care, from injury, & if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when in fact they are not so, the co. will be answerable in damages for any injury such person may sustain in consequence.—**DREW v. NEW RIVER CO.** (1831), 6 C. & P. 751, N. P.

**1402.** ——— **Gasworks Clauses Act, 1847 (c. 15), s. 11.**—A gas co., in laying down a main along the side of a public road, filled up the trench so carelessly & defectively that the wheel of the vehicle in which plff. was driving sank into the trench, whereby the vehicle was upset & plff. injured. A jury having found not only that the co. were guilty of negligence in the filling up of the road, but also that they left the road in such a state as to constitute a nuisance & a danger to those using the road: **Held**: as the co. had left the road in a condition which amounted to a public nuisance, they were liable to plff., notwithstanding above sect.—**GOODSON v. SUNBURY GAS CONSUMERS' CO., LTD.** (1890), 75 L. T. 251; 60 J. P. 585; 40 Sol. Jo. 730.

**1403.** ——— **By sub-contractor—Who liable.**—If one employs another to do an act which may be done in a lawful manner, & the latter in doing it unnecessarily commits a public nuisance, whereby injury results to a third person, the employer is not responsible. A. employed B. to construct a drain in a public highway; B. employed C. to fill in the earth over the brick-work, & to carry away the surplus; C. in performing his work, left the earth raised so much above the level of the road, that D., driving by in the dark, was thereby upset, & sustained injury: **Held**: A. was not responsible for the negligence of C.—**PEACHEY v. ROWLAND**

(1853), 13 C. B. 182; 22 L. J. C. P. 81; 20 L. T. O. S. 208; 17 Jur. 764; 138 E. R. 1167.

*Annotations*.—**Expld.** Ellis v. Sheffield Gas Consumers Co. (1853), 23 L. J. Q. B. 42. **Distd.** Sadler v. Henlock (1855), 4 E. & B. 570.

**1404.** ——— **By highway authority—Accident in avoiding defect—Obstruction in other part of road.**

—Defts., who were both the highway & sanitary authority, dug a trench along a road under their control for the purpose of laying a sewer. When the sewer was laid, they filled in the trench & opened the road for traffic. About a week after the road was thrown open plff. was driven along it in a cab. The cab-driver found that that part of the road where the trench had been filled in was soft, he crossed to the off side to avoid that danger, & ran into a heap of rubbish which had been deposited by a wrong-doer upon that side of the road, with the result that the cab was overturned & plff. suffered injuries. Defts. knew that the heap of rubbish had been deposited upon the road. The jury found that at the time of the accident that part of the road where the trench had been filled in was dangerous for traffic: **Held**: defts. were liable on the ground that they were guilty of misfeasance in throwing open the road when it was not fit for traffic, & that misfeasance was the cause of the accident. **SHOREDITCH CORPN. v. BULL** (1904), 90 L. T. 210; 68 J. P. 415; 20 T. L. R. 251; 2 L. G. R. 756, H. L.; *affg.* 8 C. sub nom. **BULL v. SHOREDITCH CORPN.** (1902), 67 J. P. 37, C. A.

*Annotations*.—**Distd.** Holloway v. Birmingham Corpn. (1905), 69 J. P. 358. **Consd.** Maguire v. Liverpool Corpn. (1905) 1 K. B. 767; Gould v. Birkenhead Corpn. (1909), 74 J. P. 105. **Apld.** Dawson v. Blunley U. D. C. (1911) 2 K. B. 149. **Folld.** McClelland v. Manchester Corpn. (1912) 1 K. B. 115. **Apld.** Baldwin v. Ltd. v. Hallfax Corpn. (1916), 85 L. J. K. B. 1769. **Refd.** Short v. Hammersmith Corpn. (1910), 104 L. T. 70; Barker v. Herbert (1911), 75 J. P. 355; Thompson v. Bradford Corpn. & Tinsley (1915), 79 J. P. 361.

**1405.** ——— **Resulting in subsidence Omission by highway authority to rectify Liability of original wrong-doer.**—The more passive omission by a road authority to rectify a subsidence in a road in their area which has been originally occasioned by the neglect of a water co. to make good the road after having broken it up for the purposes of their undertaking does not exonerate the water co. from liability for an injury caused to a person using the road by reason of the subsidence.—**HARTLEY v. ROCHDALE CORPN.**, [1908] 2 K. B. 591; 77 L. J. K. B. 881; 99 L. T. 275; 72 J. P. 313; 24 T. L. R. 625; 6 L. G. R. 858, D. C.

**Ploughing up footway—Under claim of right.**—*See* Sub-sect. 1, D., ante.

#### H. Subsidence of Road.

**1406. Subsidence through working of mines—At level crossing—Level maintained by railway company—Resulting embankment obstructing road—Whether mining or railway company liable.**—

Plffs. were the sanitary authority for the B. district, & as such were surveyors of highways within the district, & responsible for the maintenance & repair of highways. By reason of the working of defts.' mines the surface of a highway within plffs.' district, together with the adjoining land, had been caused to subside; but no injury had been done by the subsidence to the surface of the highway. The highway had previously to the subsidence been crossed on the level by a railway. As the highway subsided the railway co. placed ballast underneath the railway, so as to maintain it at the original level, with the result that an embankment ten feet high was formed across the highway rendering it impassable. The



**Sect. 1.—Nuisances: Sub-sect. 1, H., I., J. & K.**  
**(a), (b) & (c) i. & ii.]**

highway was a public carriage-way at & before the time when the railway was constructed. The special Act under which the railway was constructed did not authorise the co. to make a level crossing at the place in question; but the Act contained a general power to the co. to make & maintain the railway on the levels shown on the deposited plans:—*Held*: the obstruction was caused by the railway co., & not by defts.

An action for nominal damages for subsidence would lie at the suit of an ordinary owner of land without proof of special damage; plffs., as highway authority had the same rights as an ordinary owner of land, & were, therefore, entitled to judgment against defts. for nominal damages (*COLLINS, J.*).—*A.-G. v. CONDUIT COLLIERIES CO.*, [1895] 1 Q. B. 301; 64 L. J. Q. B. 207; 71 L. T. 771; 59 J. P. 70; 43 W. R. 366; 11 T. L. R. 57; 15 R. 267, D. C. *Annotations*:—*Reid*. *Wednesbury Corp'n. v. Lodge Holes Colliery Co.*, [1905] 2 K. B. 823. *Mentd.* *Weid-Blundell v. Stephens*, [1920] A. C. 956.

**1407. Subsidence of pavement—Defective reinsurance by water company—Omission to repair by road authority Who liable.**—*HARTLEY v. HOCHDALE CORPN.*, No. 1405, *ante*.

**1408. Undermining road—Causing subsidence Statutory authority.**—*BENFIELDSIDE LOCAL BOARD v. CONSETT IRON CO.*, No. 1715, *post*.  
*See, further*, Sub-sect. 17, *post*.

#### I. Playing Games on Highway.

**1409. Highway Act, 1835 (c. 50), s. 72.—Football in street.**—W. was charged with playing a game of football on the street, a highway. A constable proved that deft. played with hundreds of persons, & two horses drawing carts near the place were frightened. No third parties were called who proved they were annoyed. The justices convicted W., & it was contended that everybody was delighted, & ready to join in the game, & among others the constable himself:—*Held*: there was ample evidence before the justices to sustain the conviction. *WOOLLEY v. CORBISHLEY* (1860), 24 J. P. 773.

**1410. Mock hunt Whether a "game."**—Where a number of persons assembled together in a public highway to enjoy a diversion called "a stag hunt," which consisted in one of the number representing a stag, & the others chasing him, whereby an obstruction was caused:—*Held*: this was "a game" within Highway Act, 1835 (c. 50), s. 72. *PAPPIN v. MAYNARD* (1863), 9 L. T. 327; 27 J. P. 745.

#### J. Swing Bridges.

**1411. Traffic unnecessarily delayed.**—A dock co. having a swing bridge on a public highway are bound, in the passing of vessels, to use all reasonable means, both as to the number of men employed & the number of ships passed at a time, to prevent unnecessary delay; & if they do not do all which can be expected of reasonable men, & any one is obstructed in consequence, such obstruction will make them liable in damages for the injury sustained. —*WIGGINS v. BODDINGTON* (1828), 3 C. & P. 514, N. P.

*Annotation*:—*Reid*. *Wilkes v. Hungerford Market Co.* (1835), 2 Bing. N. C. 281.

#### PART IX. SECT. 1, SUB-SECT. 1. I.

**g. Motor cycle races on public highway.**—Motor cycle races were held on the public highway. McK. was standing at the verge of the road, at about the middle of the course, watching the

races, when a motor bicycle ridden by M. hit a bump in the road, wobbled, & struck McK. & killed him. No sanction had been given by the proper authority to hold these races on the public highway:—*Held*: the holding

#### 1412. Bridge open—Ends left unguarded.]—

Certain undertakers of a navigation being incorporated for the purpose of making a canal, & empowered by 28 Geo. 2, c. viii., to take tolls to their own use & behoof, were authorised "to make such & so many bridges as & where they should think requisite & convenient; & to amend, heighten or alter any bridges, & to turn or alter any highways in, through, upon or near the rivers, cuts or canals, as may in any ways hinder the navigation or passage thereon." The co. made a cut through an ancient public highway near H., which was then a small village, & carried the highway over the cut so made by a swivel bridge. By a subsequent Act, 11 Geo. 4, c. i., s. 1, to consolidate & amend the former Act, it was recited "that the navigation cut or canal, & other the works authorised to be made by the recited Act, have been long since made & completed; & by sect. 48, the co. were empowered to maintain the canal, bridges, etc. By 11 Geo. 4, c. i., s. 124, all persons were to have free liberty with boats to navigate the said canal for the purpose of conveying any goods, etc. By sect. 141, penalties were imposed on persons leaving open drawbridges, etc., after boats had passed. A boatman having opened the swivel bridge to allow his boat to pass through, a person who was coming along the road walked into the water just as the boat was coming up to the bridge, & was drowned. It appeared that when the bridge was open the end of the highway abutting on the canal was wholly unfenced. Two lamps had formerly been kept burning, of which one had been removed & the other was out of repair. The jury found that deceased was drowned by reason of the neglect of reasonable precautions on the part of the canal co., without any negligence on his own part: *Held*: (1) defts. having a beneficial interest in the tolls were liable to an action, as any other proprietors of private property would be, for a nuisance arising from it; (2) the bridge at the time of the accident was in the possession of defts., & the action was therefore properly brought against them & not against the boatman; (3) whether or not the bridge was sufficient at the time it was built, the co. were bound to maintain a bridge sufficient with reference to present state of circumstances; & the jury were warranted in finding a bridge to be insufficient which, when open, left an unfenced gulf in the highway into which a person passing along the road without any fault of his own was liable to fall. —*MANLEY v. ST. HELENS CANAL & RY. CO.* (1858), 2 H. & N. 840; 27 L. J. Ex. 159; 6 W. R. 297; 157 E. R. 340.

*Annotations*:—*As to* (1) *Reid*. *Vaughan v. Taff Vale Ry.* (1858), 3 H. & N. 743; *Cowley v. Sunderland Corp'n.* (1861), 6 H. & N. 565. *As to* (3) *Durd.* *Great Central Ry. v. Hewlett*, [1916] 2 A. C. 511. *Reid*. *Birkett v. Whitehaven Junction Ry.* (1859), 28 L. J. Ex. 348; *Hardcastle v. South Yorkshire Ry. & River Dun Co.* (1859), 4 H. & N. 67; *Kearns v. Cordwainers' Co.*, *Cordwainers' Co. v. Kearns* (1859), 6 C. B. N. S. 388; *A.-G. v. Oxford Canal Navigation* (1903), 72 L. J. Ch. 283; *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. Worcester Corp'n.*, *A.-G. v. Sharpness New Docks & Gloucester & Birmingham Navigation Co.*, [1913] 1 K. B. 422.

#### K. Use of Road for Trade Purposes.

##### (a) In General.

**1413. Cutting up logs in highway.**—*FOWLER v. SANDERS*, No. 1580, *post*.

of the motor speed trials rendered the highway on which they were held dangerous for persons lawfully using it & the competition was a nuisance in law.—*McKEE v. MALCOLMSON*, [1925] N. 120.—*IR.*

**1414.** —[It is an indictable offence for a timber merchant to cut logs of timber in the street adjoining his timber yard; though he should not be able otherwise to get them into his premises, or to carry on his business there.—*R. v. JONES* (1812), 3 Camp. 230, N. P.]

*Annotations*:—*Reid*, *R. v. Carille* (1834), 6 C. & P. 636; *R. v. Longton Gas Co.* (1860), 2 E. & E. 651; *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Wilkins v. Day* (1883), 12 Q. B. D. 110; *Barber v. Penley*, [1893] 2 Ch. 447; *A.-G. v. Brighton & Hove Co.-op. Assocn.*, [1900] 1 Ch. 276; *A.-G. v. Smith* (1910), 8 L. G. R. 679.

**1415. Use of street as stable yard.**—To entitle a reversioner to maintain a suit for a private nuisance, the wrong complained of must be of a necessarily permanent character. *Pltf.* was entitled in reversion to two houses in a street. Defts. carried on an extensive business in a newly-built warehouse, at which carts & vans were constantly loading & unloading goods. The carts & vans obstructed the carriage-way & occasioned a nuisance to the tenants of *pltf.*'s houses & their lodgers, so that some of the lodgers quitted, & the apartments could not be let, except at a lower value:—*Held*: a suit for an injunction to restrain the nuisance could not be maintained, for the injury complained of was not in itself of a permanent character, & there was nothing to lead to the inference that it would be permanent, except the presumed intention of defts. to continue the nuisance.—*MOTT v. SHOOLBRED* (1875), L. R. 20 Eq. 22; 44 L. J. Ch. 380; 23 W. R. 545.

*Annotations*:—*Reid*, *Fritz v. Hobson* (1880), 14 Ch. D. 542. *Mentl*, *Leader v. Moody* (1875), 11 L. J. Ch. 711; *Smith v. Smith* (1875), 44 L. J. Ch. 640; *Broder v. Sallard* (1876), 2 Ch. D. 692; *Cooper v. Crabtree* (1881), 19 Ch. D. 193; *Byass v. Bettam* (1885), 2 T. L. R. 88; *House Property & Investment Co. v. H. P. Horse Nail Co.* (1885), 29 Ch. D. 190.

**1416. Building materials dumped in passage—Giving access to site of building.**—*Fritz v. Hobson*, No. 664, *ante*.

**1417. Coffee stall erected in street.**—*R. v. BARTHOLOMEW*, No. 1632, *post*.

#### (b) Markets and Fairs.

*See, generally*, MARKETS.

**1418. Long continued user.** *R. v. SMITH*, No. 1581, *post*.

**1419. Invalld removal of market elsewhere—User of old site.**—*B.*, being entitled to a market in the manor of *K.*, which was held in the public street on *B.*'s soil, removed it to another site in *K.*, which site he had demised, without demising the franchise, for a term of years. It appearing that no toll had ever been taken in the old market, but that the lease, after a covenant by the lessees to allow the soil to be used solely for the market, empowered them to impose rents at their discretion for the liberty of selling in the market:—*Held*: the removal was bad, & the site of the old market, on the King's highway, might be used on market days as it was before the removal.

This is an indictment for an obstruction, & it appears that *def.*'s act would be justifiable except for the supposed removal of the market (*LORD DENMAN, C.J.*).—*R. v. STARKEY* (1837), 7 Ad. & El. 95; 2 Nev. & P. K. B. 169; *Will. Woll. & Dav.* 502; 6 L. J. K. B. 202; 1 J. P. 265; 1 Jur. 672; 112 E. R. 406.

*Annotations*:—*Reid*, *Gingell v. Stepney B. C.* (1907), 77 L. J. K. B. 347. *Mentl*, *Ellis v. Bridgnorth Corp.* (1863), 15 C. B. N. S. 52.

**1420. Dedication subject to market rights.**—*LAWRENCE v. HITCH*, No. 1591, *post*.

**1421. Construction of grant—Earlier origin of market.**—*A.-G. v. HORNER*, No. 1592, *post*.

**1422. Old street widened & extended—**

**Adjoining new streets subject to rights.**—*STEPNEY CORPN. v. GINGELL, SON & FOSKETT, LTD.*, No. 1593, *post*.

*Compare Sect. 2, sub-sect. 6, post.*

#### (c) Goods Exposed or Deposited in Street.

##### i. In General.

**1423. Exposure for sale on pavement—Dedication to public—Before origin of practice.**—*SPICE v. PEACOCK*, No. 1597, *post*.

**1424.** ———— *WHITTAKER v. RHODES*, No. 1598, *post*.

**1425.** ———— *After origin of practice.*—*JONES v. MATTHEWS*, No. 1599, *post*.

**1426.** ———— *Space becoming vacant—House set back on rebuilding.*—*HITCHMAN v. WATT*, No. 1601, *post*.

**Costermongers' barrows.**—*See* Nos. 1428 1435, *post*.

##### ii. Streets in Metropolitan Area.

**1427. Movable shed & seats—For convenience of customers—Dedication subject thereto—Metropolis Management Act, 1855 (c. 120), ss. 119, 120.**—*LE NEVE v. MILE END OLD TOWN VESTRY*, No. 1594, *post*.

*See, also*, No. 1597, *post*.

**1428. Costermonger's vehicle—What is Metropolitan Streets Acts, 1867.**—*Appl.*, who was a refreshment-house keeper in Ranelagh Road Westminster, also kept a street stall in Lupus Street, Westminster, by the side of the kerb, where he sold butcher's meat through an employee. The stall was stationary throughout the day, being set up in the morning & removed at night. It consisted of a two-wheeled barrow, on one end of which a stall board rested, the other end resting on trestles, & it complied with the regulations made by the Comr. of Police. The barrow was similar to the barrows used by costermongers:—*Held*: *appl.* was not a costermonger, street hawk, or itinerant trader, within Metropolitan Streets Act. Amendment Act, 1867 (c. 5), s. 1, so as to exempt him from the operation of Metropolitan Streets Act, 1867 (c. 131), s. 6, which prohibited the depositing of goods in the streets. —*BAKER v. BRADLEY* (1910), 103 L. T. 253; 74 J. P. 311; 8 L. G. R. 832, D. C.

**1429. Metropolitan Paving Act, 1817 (c. xxix), s. 65—Refusal to move.**—*Metropolis Management Amendment Act, 1862 (c. 102)*, s. 73, extends to the metropolis the powers of improving & regulating streets, & for suppressing nuisances, contained in the above Act. *S.* kept a barrow of chestnuts several hours standing in a street in the F. district, which was outside the area of 30 & 31 Vict. c. 134, but within the metropolis, & an officer of the local board desired him to remove, but he refused:—*Held*: *S.* was liable to be convicted of an offence contrary to the above Act, s. 65, his refusing to remove being within the nuisances or annoyances there described.—*FULHAM BOARD OF WORKS v. SMITH* (1884), 48 J. P. 375.

*Annotation*:—*Reid*, *Keop v. St. Mary's, Newington, Vestry*, *Austin v. St. Mary's, Newington, Vestry*, [1891] 2 Q. B. 524.

**1430.** ———— *Powers of pavement authorities.*—The power given by Metropolitan Paving Act, 1817 (c. xxix), s. 65, to the authority having control of the pavements in districts within the Act, to seize wares, merchandise, & other matters placed on footways or carriageways & not removed when required by the authority, is not dependent upon the existence of a conviction under

that sect., but may be exercised although there has not been such a conviction.—BRACKLEY v. ST. MAHY, BATTERSEA, VESTRY (1889), 23 Q. B. D. 486; 58 L. J. Q. B. 589; 54 J. P. 105; 38 W. R. 28, C. A.

*Annotation:* **Reid.** *Keep v. St. Mary's, Newington, Vestry,*  
*Austin v. St. Mary's, Newington, Vestry, [1894] 2 Q. B.*  
*521.*

1431. --- - - Effect of Metropolitan Streets Acts, 1867 (c. 134), s. 6 -- & Metropolitan Streets Act Amendment Act, 1867 (c. 5), s. 1.]— Metropolitan Paving Act, 1817 (c. xxix), s. 65, which empowered vestries in the metropolis to take certain summary proceedings against persons placing stalls & goods upon the carriageways or footways in streets or public places, is impliedly repealed, with respect to costermongers, by the operation of Metropolitan Streets Act, 1867 (c. 134), s. 6, & Metropolitan Streets Act Amendment Act, 1867 (c. 5), s. 1.—  
SUMMERS v. HOLBORN BOARD OF WORKS, [1893] 1 Q. B. 612; 62 L. J. M. C. 81; 68 L. T. 220; 57 J. P. 320; 41 W. R. 415; 9 T. L. R. 274; 37 Sol. Jo. 270; 5 R. 281, D. C.

**Annotations:** **Consd.** *Keop v. St. Mary's, Newington, Vestry*, *Austin v. St. Mary's, Newington, Vestry*, [1894] 2 Q. B. 521. **Reid.** *Wyatt v. Gems*, [1893] 2 Q. B. 225; *Baker v. Bradley* (1919), 103 L. T. 253.

**1432.** — — — — —. — Plff., a costermonger, sued defts., who were the street authority of the district, for damages for seizing his truck. Notice had been given to plff. to remove his truck, as it caused an obstruction to the traffic, & on his refusal to do so it was seized. Defts. purported to act under the powers conferred by Metropolitan Paving Act, 1817 (c. xxix), s. 65. At the time when the truck was seized plff. was plying his trade in accordance with the police regulations relating to costermongers: — *Held*: under Metropolitan Streets Act, 1867 (c. 131), & Metropolitan Streets Act Amendment Act, 1867 (c. 5), costermongers were at liberty to ply their trade in the way in which they invariably did carry it on, viz. with trucks & barrows, so long as they conformed to the police regulations, & could not be interfered with under Metropolitan Paving Act, 1817 (c. xxix), s. 65, & to that extent, & to that extent only, sect. 65 of the latter Act was not impliedly repealed, but, if they violated those regulations, they could be proceeded against under that Act, or the above Acts of 1867.— *KEEP v. ST. MARY'S, NEWINGTON, VESTRY, AUSTIN v. ST. MARY'S, NEWINGTON, VESTRY*, [1891] 2 Q. B. 524; 63 L. J. Q. B. 369; 70 L. T. 509; 58 J. P. 748; 10 T. L. R. 330; 38 Sol. Jo. 305; 9 R. 340, C. A.

*Annotation* :— **Reid**. *Baker v. Bradley* (1910), 103 L. T. 293.

1433. - **Metropolitan Police Act, 1839 (c. 47), s. 60 (7)** **Effect of police regulations under Metropolitan Streets Act Amendment Act, 1867 (c. 5), s. 1.]** The penalty imposed by Metropolitan Police Act, 1839 (c. 47), s. 60 (7), on exposing anything for sale in any carriageway or footway so as to cause annoyance or obstruction is not impliedly repealed or superseded by the 6th Police Regulation of Dec. 28, 1860, made under Metropolitan Streets Act Amendment Act, 1867 (c. 5), s. 1.—**WANDSWORTH BOARD OF WORKS v. PRETTY**, [1800] 1 Q. B. 1; 68 L. J. Q. B. 193, 63 J. P. 132; 47 W. R. 250; 43 Sol. Jo. 13, D. C.

**Folld.** R. v. Francis, *Ex p.* Walton (1899), 68 L. J. Q. B. 609.

**1434.** ———— ]--The penalty imposed by Metropolitan Police Act, 1839 (c. 47), s. 60 (7), for exposing anything for sale in any carriageway or footway so as to cause annoyance or obstruction is not impliedly repealed or superseded by the 6th

Police Regulation of Dec. 28, 1809, made under Metropolitan Streets Amendment Act, 1867 (c. 5), s. 1. A private person who is aggrieved by such annoyance or obstruction can take proceedings by way of summons to recover the penalty imposed by the sect. The magistrate has to decide as a matter of fact whether such annoyance or obstruction exists.—*R. v. FRANCIS, Ex p. WALTON* (1899), 68 L. J. Q. B. 609; 63 J. P. 469; 15 T. L. R. 323; 43 Sol. Jo. 439, D. C.

1435. —[—]—Applt., an inspector of streets in the employ of the borough council of Southwark, laid an information against resp't., a postermonger, for unlawfully exposing certain articles for sale upon a highway within the limits of the said borough, upon & so as to hang over the carriageway or footway of the said highway, & causing annoyance & obstruction, contrary to Metropolitan Police Act, 1839 (c. 47), s. 60 (7). The magistrate dismissed the summons on the ground that a corp'n. could not be a common informer unless expressly or impliedly authorised by statute, & could not, therefore, lay the information or instruct applt., their official, to do so on their behalf:—*Held*: the offence under above Act, being an offence against the public, any person might prosecute, &, therefore, applt. was entitled to prosecute.—*ALLMAN v. HARDCASTLE* (1903), 89 L. T. 553; 67 J. P. 440; 2 L. G. R. 13; 20 Cox, C. C. 567, D. C.

**Annotation** :- *Apld.* Giebler v. Manning, [1906] 1 K. B. 709.  
As to parties entitled to prosecute, see Sect. 3, *post*.

1436. Prohibition against loading coal—Within stipulated hours—Coke loaded during prohibited hours—Metropolitan Streets Act, 1867 (c. 134), s. 15.]—Coke is not "coal" within above sect., which prohibits the loading or unloading of "coal" on or across the footway between certain hours, and imposes a penalty for so doing.—FLETCHER v. FIELDS, [1881] 1 Q. B. 790; 60 L. J. M. C. 102; 64 L. T. 472; 55 J. P. 502; 39 W. R. 655; 17 Cox, C. C. 264, D. C.

Loading & unloading vehicles, see Sub-sect. 1,  
L., *ante*.

**1437. Articles hung from house—Metropolitan Paving Act, 1817 (c. xxix), s. 65—Effect of Metropolitan Management Act, 1855 (c. 120), s. 119.**—Metropolitan Paving Act, 1817 (c. xxix), s. 65 (*inter alia*), empowers vestries in the metropolis to take summary proceedings against persons hanging out or exposing anything whatsoever from any house over any part of the pavement, or over any area, & refusing to remove such thing when required to do so.

By Metropolis Management Act, 1855 (c. 120), s. 119, if any projection or obstruction placed against or in front of any house, "shall be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street," the vestry have power to compel its removal :—*Held* : Metropolis Management Act, 1855 (c. 120), s. 119, was not inconsistent with, & therefore did not impliedly repeal, Metropolitan Paving Act, 1817 (c. xxix), relating to the particular offence created by that sect.—*WYATT v. GEMS*, [1893] 2 Q. B. 225 62 L. J. M. C. 158; 69 L. T. 456; 57 J. P. 665 42 W. R. 28; 9 T. L. R. 546; 37 Sol. Jo. 001 17 Cox. C. C. 679; 5 R. 507, D. C.

<sup>1</sup> *Annotation*.—**Reid**. Keep r. St. Mary's, Newington, Vestry, Austin r. St. Mary's Newington, Vestry, [1894] ? Q. B. 524.

1438. — — — Reflector light projecting over pavement.]—Metropolitan Paving Act, 1817 (c. 10, s. 65 (*inter alia*), prohibits any person from

"hanging out or exposing, or causing or permitting to be hung out or exposed, any meat or offal or other matter or thing whatsoever from any house, buildings, or premises belonging to or occupied by them over any part of either of such pavements or over any area of any houses or other buildings or premises":—*Held*: a reflector light fixed by staples in the brickwork of a house over the pavement was not within the sect.—*WINSBORROW v. LONDON JOINT STOCK BANK, LTD.* (1903), 88 L. T. 803; 67 J. P. 289; 19 T. L. R. 500; 1 L. G. R. 531; 20 Cox, C. C. 478, D. C.

**1439. Vacuum cleaner in street.**—"Wilful obstruction"—*Metropolitan Police Act, 1839* (c. 47), s. 54 (6).—*DUNN v. HOLT*, No. 1340, *ante*.

As to what constitutes "Wilful obstruction," see Sub-sect. 1, B., *ante*.

#### L. Vehicles.

**1440. Stationary vehicles—Goods loaded & unloaded.—For unreasonable time.**—A waggoner occupying one side of a public street in a city before his warehouse in loading & unloading his waggons for several hours at a time both day & night, & having one waggon at least usually standing before his warehouses so that no carriage could pass on that side of the street & sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side ready for loading, is indictable for a public nuisance; although there was room for two carriages to pass on the opposite side of the street. *R. v. RUSSELL* (1805), 6 East, 427; 2 Smith, K. B. 421; 102 E. R. 1350.

*Annotations*:—*Consd.* A.-G. v. Brighton & Hove Co-op. Asscn., [1900] 1 Ch. 276. *Refd.* R. v. Carlile (1831), 6 C. & P. 636; *Harris v. Mobbs* (1878), 3 Ex. D. 268; *Fritz v. Hobson* (1880), 11 Ch. D. 512.

**1441. — Dwelling incommoded by horses' habits.**—(1) To entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than & beyond the general injury to the public, & that such damage is direct & substantial.

*Pltf.* kept a coffee-house in a narrow street near C. Defts. carried on an extensive business as auctioneers in the same neighbourhood, having an outlet at the rear of their premises next adjoining *pltf.*'s house, where they were constantly loading & unloading goods into & from vans. The vans intercepted the light from *pltf.*'s coffee-shop to such an extent that he was obliged to burn gas nearly all day, & access to the shop was obstructed by the horses standing in front of the door, & the stench arising from their frequent staling there rendered *pltf.*'s dwelling inconvenient & uncomfortable:—*Held*: the evidence disclosed such a direct & substantial private & particular damage to *pltf.* beyond that suffered by the rest of the public, as to entitle him to maintain an action.

(2) The declaration alleged that, in consequence of the nuisance complained of, *pltf.*'s premises had been rendered "unhealthy & inconvenient" as well as a house of business as also as a dwelling-house:—*Held*: evidence that the premises were rendered uncomfortable by reason of the offensive smells arising from the staling of the horses which were kept constantly standing opposite to them, was properly admitted.—*BENJAMIN v. STORR* (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362; 22 W. R. 631.

*Annotations*:—As to (1) *Consd.* *Fritz v. Hobson* (1880), 11 Ch. D. 512; *Barber v. Penley*, [1893] 2 Ch. 447. *Refd.*

*Lyon v. Fishmongers' Co.* (1875), 10 Ch. App. 681, n.; *Martin v. L. C. C.* (1899), 80 L. T. 866; *Boyce v. Paddington B. C.*, [1903] 2 Ch. 556; *Malone v. Laskey*, [1907] 2 K. B. 141; *Heaths' Garage v. Hodges* (1915), 14 L. G. R. 195.

**1442. — Succession of vehicles.**—In a case of doubt or difficulty the right of the occupier of premises abutting on a highway to make a reasonable use of it, for the purpose of loading & unloading goods at his premises, must yield to the public right of unobstructed passage along the highway. It is in each case a question of degree whether the exercise of this private right of access to premises, which must of necessity involve some obstruction of the highway, is or is not reasonable, & in determining this question regard must be had to all the facts of the case.

Traders carrying on a large business in a populous town, at premises situate in a street the roadway of which was less than twenty feet wide, kept as many as six vans at once during every alternate hour in the daytime loading & unloading goods at their premises, thus occupying half the width of the street, & seriously obstructing the passage of vehicles through it:—*Held*: this was an unreasonable use of the highway, & it amounted to a public nuisance the continuance of which must be restrained by injunction.—*A.-G. v. BRIGHTON & HOVE CO-OPERATIVE SUPPLY ASSCN.*, [1900] 1 Ch. 276; 69 L. J. Ch. 201; 81 L. T. 762; 48 W. R. 314; 16 T. L. R. 111; 61 J. P. Jo. 68, C. A.

*Annotations*:—*Refd.* A.-G. v. Scott, [1905] 2 K. B. 160; *R. v. E. Ry. & L. C. C.* (1906), 71 J. P. 95. *Mentd.* *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 411; *Morgan v. Jeffreys*, [1910] 1 Ch. 620.

**1443. — Materiality of width of street.**—S., a firm of wholesale stationers, had business premises at the corner of A. street, Strand. The highway authority expended £500,000 in widening the Strand at this point. S. then allowed vans to occupy a strip of roadway sixty-two feet in length in front of their premises, extending fourteen feet from the kerb; these vans were there constantly throughout the day for the purpose of loading & unloading. An action was brought to restrain *defts.* from causing a nuisance to the public thereby:—*Held*: upon the evidence, (1) the character of *defts.*' user was legitimate & not excessive for the purposes of their business; & having regard to the width of the road at this point, there was no nuisance to the public; the question whether the user was reasonable or not was a question of fact & not of law; (2) having regard to the above findings, *defts.*' user was reasonable, & the action must be dismissed.—*A.-G. v. SMITH (W. H.) & SONS* (1910), 103 L. T. 96; 74 J. P. 313; 26 T. L. R. 482; 8 L. G. R. 679.

**1444. — Under care of attendant.—Highway Act, 1835** (c. 50), s. 78.] *HINDE v. EVANS*, No. 1311, *ante*.

— *Costermongers' barrows.*—See Sub-sect. 1, K. (c) ii., *ante*.

**1445. — Plying for hire.** It is an indictable offence for stage coaches to stand plying for passengers in the public streets. Is there any doubt that if coaches on the occasion of a rout wait an unreasonable length of time in the public street & obstruct the transit of His Majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause & permit such coaches so to wait are guilty of a nuisance? A stage coach may set down or take up passengers

PART IX. SECT. 1, SUB-SECT. 1.—L. taking licences.] Deft. was convicted for unlawfully incumbering a street by placing & leaving thereon a cart used by him for taking licences. —*R. v. DAVIS* (1875), 24 C. P. 575. — CAN.

r. Stationary vehicles.—Cart used for

**Sect. 1.—Nuisances: Sub-sect. 1, L., M., N., O., P. & Q.; sub-sect. 2.]**

in the street, this being necessary for public convenience, but it must be done in a reasonable time; & private premises must be procured for the coach to stop in during the interval between the end of one journey & the commencement of another (LORD ELENBOROUGH, C.J.).—R. v. CROSS (1812), 3 Camp. 224, N. P.

**Annotations.—**Consid. Walker v. Brewster (1867), L. R. 5 Eq. 25; Wilkins v. Day (1883), 12 Q. B. D. 110; Barber v. Penley, [1893] 2 Ch. 447. **Reid.** R. v. Carlile (1834), 6 C. & P. 630; Rich v. Basterfield (1847), 16 L. J. C. P. 273; Brackenborough v. Thorpeby (1869), 33 J. P. 565; Mercer v. Woodgate (1869), 31 J. P. 261; Harris v. Mobbs (1878), 3 Ex. D. 268; Fritz v. Hobson (1880), 14 Ch. D. 542; A.-G. v. Brighton & Hove Co-op. Assocn., [1900] 1 Ch. 276; Butterworth v. West Riding of Yorkshire Rivers Board (1908), 78 L. J. K. B. 203.

**Compare** No. 1506, *post*.

**1446. — At society functions.]—R. v. Cross, No. 1445, *ante*.**

**1447. — — — —.]—**It is not unreasonable that your neighbour should give an evening party occasionally & that there should be a file of carriages across your door, or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come up to your own door, & still more unreasonable if, instead of giving parties occasionally as people do, your neighbour were to turn his house into an assembly room, or for some private purpose, in consequence of which a file of carriages came every day & obstructed the carriage way to your house. The law is quite clear. The question of reasonableness has been said to be a question for the jury. It must be reasonable user & nothing else (L., M.R.).—ORIGINAL HARTLEPOOL COLLIERS' CO. v. GIBB (1877), 5 Ch. D. 713; 46 L. J. Ch. 311; 36 L. T. 433; 41 J. P. 600; 3 Asp. M. L. C. 411.

**Annotations.—**Consid. Barber v. Penley, [1893] 2 Ch. 447. **Reid.** A.-G. v. Brighton & Hove Co-op. Assocn. (1900), 81 L. T. 762; Land Securities Co. v. Commercial Gas Co. (1902), 18 T. L. R. 405; Lowndes v. Keaveney (1902), 47 J. P. 378; Gill v. Carson & Nield, [1917] 2 K. B. 671. **Mend.** Fritz v. Hobson (1880), 42 L. T. 225; Beddall v. Maitland (1881), 17 Ch. D. 174; Toke v. Andrews (1882), 8 Q. B. D. 428; Jones v. Simes (1890), 59 L. J. Ch. 351.

**1448. Carriage cleaned in street—No inconvenience caused—Metropolitan Police Act, 1839 (c. 47), s. 54.]—**The above sect. imposes a penalty on any person who in any thoroughfare or public place shall, to the annoyance of the inhabitants or passengers, clean a carriage. A., in a street which had formerly been a news, cleaned a carriage, & in doing so would have splashed any passenger if near, but there was no one passing:—**Held:** there being no actual annoyance, A. could not be convicted of the offence.—ALLEN v. BALDOCK (1867), 31 J. P. 311.

**Compare** Nos. 1338–1311, *ante*, Nos. 1523, 1537, *post*.

**1449. Assembly of vehicles.—At exhibition.]—**Where cabs, under the direction of the police authorities, assembled in P. Gardens every night between 9 & 11 p.m. for the purpose of taking persons home from an exhibition, the ct. refused on motion to grant an injunction against defts., the proprietors of the exhibition.—GERMAINE v. LONDON EXHIBITIONS, LTD. (1890), 75 L. T. 101 40 Sol. Jo. 703.

**1450. Use of carriages on footway—Perambulators.]—R. v. MATHIAS, No. 1641,**

**1451. — Barrows & carts.]—SHERINGHAM URBAN DISTRICT COUNCIL v. HOLSEY, No. 374 *ante*.**

**1452. — Motor cars on parade.]—**By a local Act, passed in 1865, the corpn. of B. were

authorised to make & maintain a carriage drive & a promenade, called "the parade," by the sea. It was provided by sect. 13 of the Act that the carriage drive should be a public highway, by sect. 7 that the parade should not be a public highway, & by sect. 18 that the parade should be "kept & used exclusively for the purposes of recreation by persons on foot, & with or without carriages, in respect of which toll is authorised to be taken."

Sect. 19 authorised a toll of twopence for every bath-chair, etc., or like carriage driven by human power. By a later Act, passed in 1899, additional works were authorised, including a new carriage way, absorbing the original parade, a new road with a tramway thereon alongside the said carriage way, & a new parade alongside the tramroad. By sect. 7 it was provided that the corpn. might appropriate the whole or such part of the new parade as they might think fit for the exclusive use of foot passengers, & by sect. 8 it was provided that the new road should be for the exclusive purpose of the tramways laid thereon. The parade was, in fact, used exclusively for foot passengers & bath-chairs, etc. The corpn., in 1900, gave their approval to motor car races being held on the parade, & gave permission for part of the tramway road to be used for the purpose of cars returning to the starting point. They also undertook to keep the portion of the parade over which the races were to be run clear of traffic, & to erect a barrier & provide the necessary police control. This action was brought by the A.-G., at the relation of a ratepayer, for an injunction to restrain the corpn. from organising or promoting motor races on the sea front:—**Held:** the corpn. were in the position of trustees of the parade for limited public purposes, namely, for the purpose of use by foot passengers, perambulators, invalid carriages, & similar vehicles, & it was an abuse of the prade to allow it to be used for either horses or motor cars, & a fortiori motor races.—A.-G. v. BLACKPOOL CORPN. (1907), 71 J. P. 478.

**1453. Driving in manner to interfere with business—& likely to result in obstruction—Rival omnibus companies.]—**In an action against a corpn., who were incorporated for the purpose of driving omnibuses, for interfering with pltf.'s business of a carrier of passengers, by driving the omnibuses of the corpn. in such a manner as to molest him in the use of the highway, the declaration set out various acts of such interference, which were all connected with the driving of such omnibuses, & were alleged to have been wrongfully & maliciously committed by the corpn.:—**Held:** the action would lie against the corpn., although the acts complained of were done wilfully, since they were done within the purposes of the incorporation, & in such a manner as to constitute an actionable wrong, if done by an individual.—GREEN v. LONDON GENERAL OMNIBUS CO., LTD. (1859), 7 C. B. N. S. 290; 29 L. J. C. P. 13; 1 L. T. 95; 6 Jur. N. S. 228; 8 W. R. 88; 141 E. R. 828.

**Annotations:** **Consid.** Edwards v. Mid. Ry. (1880), 6 Q. B. D. 287; Allen v. Flood, [1898] A. C. 1. **Reid.** Cowley v. Sunderland Corpn. (1861), 30 L. J. Ex. 127.

**1454. Traction engine—Causing greater obstruction than ordinary traffic.]—R. v. CHITTENDEN, No. 1497, *post*.**

**1455. — — —.]—A.-G. v. SCOTT, No. 1499, *ont*.**

**Offences other than obstruction in regard to vehicles.]—**See Sub-sect. 15, *post*.

**Danger arising from locomotive traffic.]—**See Sub-sect. 4, *post*.

*M. Refuse.*

**1456. Logs & stones placed in highway.]—**IVESON v. MOORE (1899), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K. B. 10; 1 Salk. 15; 91 E. R. 1224; *sub nom.* JEVESON v. MOOR, 12 Mod. Rep. 262.

*Annotations—*Consd. Beckett v. Mid. Ry. (1867), L. R. 3 C. P. 82; Winterbottom v. Derby (1867), L. R. 2 Exch. 316; Fritz v. Hobson (1880), 14 Ch. D. 512. *Refd.* Wilkes v. Hungerford Market Co. (1835), 2 Bing. N. C. 281; Rose v. Groves (1843), 1 Dow. & L. 61; Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605; Cameron v. Charing Cross Ry., Bourhill v. Charing Cross Ry. (1865), 13 W. R. 390; Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175; Benjamin v. Storr (1874), 30 L. T. 362; Metropolitan Board of Works v. McCarthy (1874), L. R. 7 H. L. 243; Lyon v. Fishmongers Co. & Thames Conservators (1875), 44 L. J. Ch. 408; Cule, Ry. v. Walker's Trustees (1882), 7 App. Cas. 259; Campbell v. Paddington Corp., [1911] 1 K. B. 869. *Mentd.* Walmsley v. Russel (1704), 6 Mod. Rep. 200; Dobson v. Blackmore (1847), 9 Q. B. 991; Soltau v. De Held (1851), 2 Sim. N. S. 133; Buccleuch & Queensbury v. Metropolitan Board of Works (1868), 18 L. T. 906; Ratcliffe v. Evans, [1892] 2 Q. B. 524; Boyce v. Paddington B. C., [1903] 1 Ch. 109.

*Compare Nos.* 1400, 1403, *ante*.

**1457. Dirt & rubbish—Accumulation.]—**A declaration stated that deft. wrongfully caused to be kept & continued large quantities of dirt & rubbish, before then wrongfully placed upon a public highway near a wall & a canal; by means whereof, pltf. passing along the highway was induced & caused to walk over the rubbish & to fall into the canal:—*Held*: the declaration was good.—GOLDTHORPE v. HARDMAN (1844), 13 M. & W. 377; 2 Dow. & L. 442; 14 L. J. Ex. 61; 153 E. R. 156.

*Annotation: Mentd.* R. v. Waters (1848), 1 Den. 356.

**1458. — Swept into street—Bye-law under Municipal Corporations Act, 1882 (c. 15), s. 23—& Local Government Act, 1888 (c. 41), s. 16.]—**By a bye-law of the London County Council made under Municipal Corporations Act, 1882 (c. 15), s. 23, & Local Government Act, 1888 (c. 41), s. 16: "No person shall sweep or otherwise remove from any shop, house, or vehicle into any street any waste paper, shavings, or other refuse, or, being a costermonger, news-vendor, or other street trader, throw down & leave in any street any waste paper, shavings, or other refuse. . . Any person who shall offend against any of these bye-laws shall be liable for each offence to a fine not exceeding 40s." An information was preferred within the metropolis for contravening this bye-law, which was dismissed on the ground that the bye-law was *ultra vires* as dealing with a nuisance already punishable when the bye-law was made, under Metropolitan Police Act, 1839 (c. 47), s. 60, which imposed a penalty on any person "who in any thoroughfare shall throw or lay . . . any litter or rubbish":—*Held*: the bye-law was good.—BACHELOR v. STURLEY (1905), 93 L. T. 539; 60 J. P. 398; 3 L. G. R. 1056; 21 Cox, C. C. 35, D. C.

**1459. Flow of offensive matter—Across highway.]—**CROASDILL v. RATCLIFFE, No. 1313, *ante*.

**1460. Refuse from brewery.]—**During the removal of refuse grains from a brewery, in pursuance of a contract, & under the superintendence of the foreman of the brewers, so far as the

removal inside the brewery was concerned, some of the grains were spilt upon the footpath in front of the brewery. Pltf. while passing the brewery slipped upon the grains & fell, & sustained injuries. In an action for damages against the brewers:—*Held*: it was no answer on their part to say that the accident arose through the negligence of the contractor's men.—DUKE v. COURAGE & CO. (1882), 40 J. P. 453, D. C.

**1461. Soil due to landslide—Omission to remove after notice—Highway Act, 1835 (c. 50), s. 72.]—**GULLY v. SMITH, No. 1340, *ante*.

**1462. Refuse dump diverting rain water—Causing holes in street.]—**PRIEST v. MANCHESTER (CORPN., No. 1022, *post*.

*See, further*, Sect. 2, sub-sect. 7,

*N. Trees.*

**1463. Trees growing on highway Liability of adjoining owner to lop.]—**ANON. (1493), Y. B. 8 Hen. 7, fo. 5, pl. 2.

*Annotations:—Refd.* Repair of Bridges, Highways, etc. (Case 1609), 13 Co. Rep. 33; Hudson v. Tabor (1876), 45 L. J. Q. B. 190.

**1464. — — For twenty-five years.]—**TURNER v. RINGWOOD HIGHWAY BOARD, No. 476, *ante*.

**1465. Trees overhanging highway—Special damage.]—**THORNE v. ROBERTS (1900), 128 L. T. Jo. 155.

**1466. Suffering trees to grow—Causing obstruction—Highway Act, 1835 (c. 50), s. 72.]—**WALKER v. HORNER, No. 1311, *ante*.

**1467. Tree blown across road—Duty of owner—Highway Act, 1835 (c. 50), s. 72.]—**HUDSON v. BRAY, No. 1349, *ante*.

*Removal of obstruction.]—See* Sect. 3, sub-sect. 7, D., *post*.

*O. Materials for Road Repairs.*

**1468. Stones in highway—Omission to fence or illuminate.]—**FEARNEY v. ORMSBY, No. 1315, *ante*.

**1469. — — — — —]—**CURTIS v. WILKINSON (1880), 2 T. L. R. 839.

*P. Assembly of Crowds.*

**1470. Public speaking—Collection of crowd—Highway Act, 1835 (c. 50), s. 72.]—**HORNER v. CADMAN, No. 1317, *ante*.

**1471. — — — — — Application of Act to metropolis.]—**BACK v. HOLMES, No. 1318, *ante*.  
**Crowds collecting at theatres & exhibitions.]—***See* Sub-sect. 2, *post*.

**Rights of public meeting.]—See** Pt. V., Sect. 1, *ante*.

**Unlawful assembly.]—See** CRIMINAL LAW, Vol. XV., pp. 612 *et seq*.

*Q. Dedication Subject to Obstruction.*

*See* Sect. 2, sub-sect. 6, *post*.

## SUB-SECT. 2.—NUISANCES ARISING FROM THEATRES, EXHIBITIONS, ETC.

**1472. Assembly of crowd—Theatres—Injunction.]—(1) Qu.: if a licenced playhouse, from the**

## PART IX. SECT. 1, SUB-SECT. 1.—P.

**a. Street procession—Liability of participant.]—**Where a person taking part in a street procession is charged with the statutory offence of "wilfully preventing & interrupting the free passage of persons & carriages," the real question for the magistrates to decide is whether or not the user of the street was under the circumstances

reasonable. The fact that the natural result of such a procession was to cause an obstruction is not sufficient to justify a conviction.—LOWDEN v. KEAVENEY (1902), 67 J. P. 378.—IR.

**t. Crowds collecting & refusing to disperse.]—**Under a power to pass bye-laws "for preventing & abating public nuisances," a municipal council may impose penalties for obstructing public

thoroughfares by congregating thereon in crowds & for refusing to disperse when so requested by the police, for such an obstruction is a public nuisance at common law.—R. v. TAYLOR (1909), 14 B. C. R. 235.—CAN.

**a. Crowd collected by addressing meeting.]—**A public meeting must be conducted so as not to interfere with other public uses of a street. ALDRID v. MILLER, [1924] 8 C. (J.) 117.—SCOT.

Sect. 1. - Nuisances: Sub-sects. 2 & 3.]

great concourse of persons resorting to it, become a public nuisance, whether the Ct. of K. B. can grant a prohibitory writ to suppress it, or whether it must be left to the common mode of prosecution by indictment.

(2) Playhouses are not in their own nature nuisances; but only as they draw together great numbers of people & coaches, & sharpers thither, which prove generally inconvenient to the places adjacent (HOLT, C.J.).—BETTERTON'S CASE (1695), Holt, K. B. 538; 90 E. R. 1196; *sub nom.* R. v. BETTERTON, 5 Mod. Rep. 142; Skin. 625.

*Annotations:—*As to (1) *Reid*, Lyons v. Gulliver, [1914] 1 Ch. 631. As to (2) *Reid*, Barber v. Penley, [1893] 2 Ch. 447; Lyons v. Gulliver, [1914] 1 Ch. 631.

1473. ————.—The lessee of a theatre held liable for obstruction to access to adjacent premises, by reason of the assembling of a crowd previously to the opening the doors of the theatre.

The ct. refused an injunction to the occupier of the adjacent premises, where such obstruction existed at time of action brought, but had since ceased by reason of the action of the police, but gave *plff.* costs. *BARBER v. PENLEY*, [1893] 2 Ch. 447; 62 L. J. Ch. 623; 68 L. T. 602; 9 T. L. R. 359; 37 Sol. Jo. 355; 3 R. 489.

*Annotations:—**Consid.* Riess v. The Oxford (1893), 37 Sol. Jo. 812. *Fold*, Warkstaff v. Edison Bell Phonograph Corp., [1893], 10 T. L. R. 80. *Distd.* Germaine v. London Exhibitions (1896), 75 L. T. 101. *Consid.* Lyons v. Gulliver, [1914] 1 Ch. 631. *Mentd.* Anglo-Algerian S.S. Co. v. Houlder Line, [1907] 1 K. B. 639.

1474. ————.—*RIESS v. THE OXFORD, LTD.* (1893), 37 Sol. Jo. 812.

1475. ————.—In consequence of a popular performance daily at depts. theatre of varieties, the access to *plffs.* adjacent premises was obstructed during important periods of the day by reason of the assembling of a crowd & the formation of a queue, at times five deep, on the kerb or in the gutter in front of *plffs.* premises previously to the opening of the doors of the theatre: *Held*: the obstruction was an actionable nuisance & depts. were liable to be restrained by injunction, & the failure of the police to prevent the obstruction by regulating the crowd & keeping proper gaps for the passage of the public through the queue did not afford a good defence.—*LYONS, SONS & CO. v. GULLIVER*, [1914] 1 Ch. 631; 83 L. J. Ch. 281; 110 L. T. 284; 78 J. P. 98; 30 T. L. R. 75; 58 Sol. Jo. 97; 12 L. G. R. 194, C. A.

1476. ————.—*Shooting ground near highway - Indictment.*—Indictment charged deft. with keeping certain inclosed lands near the King's highway, for the purpose of persons frequenting the same to practice rifle shooting, & to shoot at pigeons with firearms; & that he unlawfully & injuriously caused divers persons to meet there for that purpose, & suffered & caused a great number of idle & disorderly persons armed with firearms to meet in the highways, etc., near the said inclosed grounds discharging firearms, making a great noise, etc., by which the King's subjects were disturbed, & put in peril. At the trial it was proved, that deft. had converted his premises, which were situate near a public highway, into a shooting ground, where persons came to shoot with rifles at a target, & also at pigeons; & that as the pigeons which were fired at frequently escaped, persons collected outside of the ground & in the neighbouring fields to shoot at them as they strayed, causing a great noise & disturbance, & doing mischief by the shot:—*Held*: the evidence supported the allegation, that deft. caused such persons to assemble, discharging firearms, etc., inasmuch as their so doing was a probable conse-

quence of his keeping ground for shooting pigeons in such a place.—*R. v. MOORE* (1832), 3 B. & Ad. 184; 1 L. J. M. C. 30; 110 E. R. 68.

*Annotations:—**Apld.* Walker v. Brewster (1867), L. R. 5 Eq. 25. *Distd.* Inchbald v. Robinson, Inchbald v. Barrington (1869), 4 Ch. App. 388. *Apld.* Chibnall v. Paul (1881), 29 W. R. 536. *Consid.* Barber v. Penley, [1893] 2 Ch. 447. *Distd.* Chase v. L. C. & Leslie Co. (1898), 62 J. P. 184. *Consid.* Lyons v. Gulliver, [1914] 1 Ch. 631. *Reid*, Rich v. Basterfield (1847), 4 C. B. 783; Bellamy v. Wells (1890), 60 L. J. Ch. 156; Stearn v. Prentice, [1919] 1 K. B. 394. *Mentd.* R. v. Pedly (1831), 1 Ad. & El. 822; R. v. Warwick (1837), 6 L. J. M. C. 96; Simpson v. Savage (1856), 1 C. B. N. S. 317; R. v. Stephens (1866), L. R. 1 Q. B. 702; Scholes v. North London Ry. (1870), 21 L. T. 835; Haigh v. Sheffield Corp., (1874), L. R. 10 Q. B. 102; Whitney v. Mognard (1890), 24 Q. B. D. 630; A.-G. v. Horner (1912), 107 L. T. 547; Weld-Blundell v. Stephens, [1920] A. C. 956.

1477. ————.—*Exhibition in shop windows - Indictment.*—If a party, having a house in a street, exhibit effigies at his windows, & thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable nuisance, & it is not at all essential that the effigies should be libellous; & *semble*, it is not necessary to show that the crowd consisted of idle, disorderly, & dissolute persons.—*R. v. CARLILE* (1834), 6 C. & P. 636.

*Annotations:—**Consid.* Barber v. Penley, [1893] 2 Ch. 447; Lyons v. Gulliver, [1914] 1 Ch. 631. *Rich v. Basterfield* (1847), 16 L. J. C. P. 273; Walker v. Brewster (1867), L. R. 5 Eq. 25; Fritz v. Hobson (1880), 14 Ch. D. 542. *Mentd.* Malzy v. Eichholz & Castiglione (1916), 115 L. T. 9.

1478. ————.—*Exhibition in shop premises - Injunction.*—*WAGSTAFF v. EDISON BELL PHONOGRAPH CORPN., LTD.* (1893), 10 T. L. R. 80.

*Annotation:—**Reid*, Lyons v. Gulliver, [1914] 1 Ch. 631.

1479. ————.—*Exhibition of fireworks - Injunction.*—The collection of a crowd of noisy & disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music & fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable to an injunction, even though he has excluded all improper characters from the grounds, & the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police. *WALKER v. BREWSTER* (1867), L. R. 5 Eq. 25; 37 L. J. Ch. 33; 17 L. T. 135; 32 J. P. 87; 16 W. R. 59.

*Annotations:—**Distd.* Inchbald v. Robinson, Inchbald v. Barrington (1869), 4 Ch. App. 388. *Apld.* Winter v. Baker (1887), 3 T. L. R. 569. *Consid.* Barber v. Penley, [1893] 2 Ch. 447. *Reid*, Bellamy v. Wells (1890), 60 L. J. Ch. 156; Lyons v. Gulliver, [1914] 1 Ch. 631.

*See, further*, CRIMINAL LAW, Vol. XV., pp. 747 *et seq.*

1480. *Distribution of handbills—On pavement - Indictment.*—Indictment for setting a person on the footway to distribute handbills quashed.—*R. v. SARMON* (1758), 1 Burr. 516; 97 E. R. 426.

1481. *Noise from crowd & vehicles Outside club - Injunction.*—A proprietary club was established at which entertainments consisting of pugilistic encounters were given, which caused the collection of large crowds outside the club. The noise of the shouting of the crowd, & the frequency on all nights, & until early in the morning, of whistling from the club for cabs, which, in their turn, created much noise in driving to the club, prevented the tenants & occupiers of adjoining houses from sleeping at night. In an action brought by the owners, lessees & occupiers of a neighbouring house against the proprietor of the club:—*Held*: the nuisance from the crowds & cabs was the reasonable & probable consequence of deft.'s acts, & an injunction ought to issue to restrain it, as well as the whistling for cabs during certain hours.—*BELLAMY v. WELLS*



*Annotation*:—**Consd.** Barber v. Penley, [1893] 2 Ch. 447.

**1483. Erection of stand to view procession—Obstruction of view from house—Damages.**—Pltf. was in possession of a house from the windows of which there was an uninterrupted view of part of a certain main thoroughfare along which it was announced that a public procession was to pass. G. agreed to take & pay for seats on the first & second floors of the house in order to see the procession. Defts. in pursuance of a resolution of their council to that effect, caused a stand to be erected across a certain highway (in which pltf.'s house was situate) to enable the members of the council & their friends to view the procession. This stand was a public nuisance, & it obstructed the view of the main thoroughfare from the windows on the first floor of pltf.'s house. G. when he saw the stand in process of erection, asked to be released from his contract as to the seats on the first floor, & pltf., thinking it would be unfair to hold him bound, released him. Several other persons came to the house to apply for seats, but when they saw the obstruction refrained from taking seats. In an action by pltf. to recover damages for the wrongful interference with the use & enjoyment of her house & the special loss she had sustained by the wrongful act of defts. : —*Held* : she was entitled to recover as damages the profit which but for defts.' act she might have made by letting seats. —*CAMPBELL v. PADDINGTON CORPN.*, [1911] 1 K. B. 809; 80 L. J. K. B. 739; 101 L. T. 391; 75 J. P. 277; 27 T. L. R. 232; 9 L. G. R. 387, D. C.

1485. — — — — —.] - R. v. RICHARDSON  
(1896), *Times*, Sept. 12.

See, generally, ANIMALS, Vol. II., pp. 229 *et seq.*

attributable to the animals straying on the highway.—MILLAR v. O'DOWN, [1871] N. Z. L. R. 716. —N.Z.

b. Under care of keeper.—Whether “at large.”—51 Vict. c. 29 (D), s. 271.—[“At large” are “at large” within 51 Vict. c. 29 (D), s. 271, when the herdsman

**Annotations :—**Consd. Turner v. Coates, [1917] 1 K. B. 670.  
Reid. Manton v. Brooklebank, [1923] 2 K. B. 212.

**1487. Under care of keeper—Whether turned loose—Metropolitan Police Act, 1839 (c. 47), s. 54.**  
—The owner of land on both sides of a highway, who claimed the grass & herbage growing on such parts of it as were not gravelled, put his cattle under the care of a servant, but who had no hold of them, to graze upon it:—**Held:** they were not turned loose within clause 2 of above sect.

1488. — Whether "straying or lying about" — 4 Geo. 4, c. 95, s. 75). — Horses grazing on the side of a turnpike road, with a man in charge of them, they being under his control, are not liable to be impounded under above sect. as "wandering, straying, or lying" about the road. *Norris v. JEFFRIES* (1800), 1 L. R. 1 Q. B. 261; 35 L. J. M. C. 143; 30 J. P. 198; 14 W. R. 310; *sub nom.* *NORRIS v. JEFFRIES*, 13 L. T. 629.

*Annotation:* *Consol. Lawrence v. King* (1868), 1 L. R. 3 Q. B. 315.

*Annotation:—***Reld.** *Horwood v. Goodall, Horwood v. Hill* (1872), 36 J. P. 486.

*Annotation*:—**Folid.** *Freestone v. Casswell* (1869), L. R. 4 C. B. 519.

1491. *S. P. FREESTONE v. CASSWELL* (1860),  
L. R. 4 Q. B. 519; 10 B. & S. 351; 20 L. T. 918;  
33 J. P. 581.

In following one of the herd which has strayed gets so far from the main body that he is unable to reach them in time to prevent their loitering or stopping on the highway at its intersection with a railway when he sees a train approaching.—THOMPSON v. GRAND TRUNK RY.

*Sect. 1.—Nuisances: Sub-sects. 3 & 4.]*

**1492.** ————.]—A shepherd was driving a hundred sheep from one farm to another along the highway. One day he was seen to rest for a quarter of an hour, when the sheep began to eat the grass & hedges, & some to stand on the highway. On another day the sheep had got half a mile ahead of him, & were eating the grass & standing on the highway when he came up to them. On a complaint under above sect.:—*Held*: the justices could only lawfully convict the owner for his sheep being found straying on the highway if they were satisfied that the shepherd was not *bond fide* driving the sheep all the while, for that resting occasionally during the progress was not inconsistent with driving.—*HORWOOD v. GOODALL, HORWOOD v. HILL* (1872), 30 J. P. 486.

**1493. Right of pasturage on roadside—Animals straying on to road.]** The owner of cattle found straying on the metalled part of a highway is liable to a penalty under Highway Act, 1864 (c. 101), s. 25, notwithstanding he had a right of pasturage on the sides of it.—*FREESTONE v. CASSWELL* (1869), L. R. 4 Q. B. 519; 10 B. & S. 351; 20 L. T. 918; 33 J. P. 581.

**1494. Highway across uninclosed ground—Highway Act, 1864 (c. 101), s. 25.]**—By a private Act a certain barrier bank, made for drainage purposes in L., together with a road thereon, is vested in trustees who are directed & required from time to time to let the herbage of the bank to be grazed with sheep only, at such yearly rent as can be reasonably had for the same. The road which runs along the top of the bank is an open public highway. Sheep owned by a renter of the herbage, & depastured on the sides of the barrier bank, were found upon the metalled part of the highway, & the owner was convicted & fined under above sect.:—*Held*: the conviction was right.

In all cases where a highway runs through a common, or waste, or uninclosed ground, the legislature seems to have thought that the cattle which were depastured on that open common or uninclosed ground must sometimes naturally come on to the road & that it would be wrong to impose a penalty on the owner in such cases. But where the road is not one passing over any common or waste or uninclosed ground, although there may be a right of pasturage on the sides, they thought fit to leave the enactment providing that cattle are not to stray unqualified. Then how is that consistent with the right of pasturage? It does not take it away, but the effect of the sect. is, that though the owners of animals may depasture them, they must somehow take precautions for herding them. . . . Here sheep are found on the highway, & therefore the conviction of the owner is correct, unless it were clear that the spot where the animals were straying passes through the uninclosed ground so as to be within the exception in sect. 25. That is a question of degree. Every road where a right of pasturage is on either side, is, in one extreme sense of the word, uninclosed, because of the plot of ground at the sides of the actual roadway. But that is not what is meant. Where the highway runs through an extent of ground of some magnitude, then it is within the exception, but when the quantity of ground is of so small an acreage compared with the highway as to be merely accessory to the road, it would

be otherwise (*BLACKBURN, J.*).—*BOTHAMLEY v. DANBY* (1871), 24 L. T. 656; 36 J. P. 135.

**1495.** ————.]—The presumption that the soil of a highway is vested in the owners of the adjoining land is a rebuttable presumption. *Semle*: even if the presumption be not rebutted, the wayside strips may still be "common or waste land" within above sect.

The justices have held that "it was not proved that the length of road in question passed over any common or waste or uninclosed land." . . . Now if they had stopped there the ct. would have been bound by their finding, as being on the face of a finding of fact, but they have proceeded to give their reason for coming to such a conclusion. . . . In the first place they appear to have merely considered whether the presumption was rebutted & to have omitted to notice that a *bond fide* claim of right to the pasturage of the wayside strips would oust their jurisdiction (*LORD ALVERSTONE, C.J.*).—*PLUMBLEY v. LOCK* (1902), 67 J. P. 237; 19 T. L. R. 14; 1 L. G. R. 54, D. C.

—*See, also*, Nos. 1487, 1490, *ante*.

Duty to fence land adjoining highway, *see* BOUNDARIES, Vol. VII., p. 283.

Liability for damage by animals upon highway, *see* ANIMALS, Vol. II., pp. 220 *et seq.*

#### SUB-SECT. 4.—LOCOMOTIVES, ETC., ON HIGHWAY.

**1496. Traction engine—Whether a nuisance—Question of fact.]**—The owner of a traction engine which is a nuisance & causes damage is liable in an action, even though all statutory requirements have been complied with. Whether or not a traction engine on a highway is a nuisance is a question of fact, the answer to which depends on the circumstances of each particular case.

Compliance with the statutory provisions does not relieve the owner from action for a nuisance at common law. The evidence shows that the engine was calculated to frighten ordinary horses by emitting steam & sparks (*DAY, J.*).—*BANTWICK v. ROGERS* (1891), 7 T. L. R. 542.

**1497. — Narrow road—Obstruction.]**—Persons using a traction engine & trucks on a highway may be indicted for a nuisance if they create a substantial obstruction & occasion delay & inconvenience to the public, substantially greater than such as would arise from the use of the carts & horses. The owners are responsible for the general management of the engine by their servants.—*R. v. CHITTENDEN* (1885), 49 J. P. 503; 15 Cox, C. C. 725.

*Annotations.*—*Reid, A.-G. v. Scott*, [1905] 2 K. B. 160; *Glasgow Corp'n v. Barclay*, (Curlie) (1923), 130 L. T. 33.

**1498. — Damage to road—Road out of repair—Injunction.]**—In an action by the A. G., on the relation of a county council, for an injunction to restrain deft. from using a traction engine upon a road in such a way as to cause a public nuisance:—*Held*: nothing in Locomotives Act, 1898 (c. 29), had affected the prohibition in Locomotive Act, 1861 (c. 70), s. 13, against causing a nuisance by the user upon a highway of a locomotive engine; & it was no answer to an application for an *interim* injunction that the damage to the road would not have happened but for the neglect of the county council to keep it in a proper state of repair.—

Co. of Canada (1895), 22 A. R. 453.—*CAN.*

e. Dog—Making kennel or lair for.]

—Making a kennel or a lair for a dog upon a highway is far removed from any kind of lawful use of it, even though the dog's owner may be lawfully

employed upon the highway all the time the dog might be so kennelled or laired there.—*BIRDALL v. MERRITT* (1917), 38 O. L. R. 587.—*CAN.*

**A.-G. v. Scott**, [1904] 1 K. B. 404; 73 L. J. K. B. 196; 89 L. T. 720; 68 J. P. 137; 2 L. G. R. 461, C. A.

**Annotations**.—**Refd.** High Wycombe R. D. C. v. Palmer (1905), 69 J. P. 167; Bromley R. D. C. v. Croydon Corpn. (1907), 24 T. L. R. 132; Billericay R. C. v. Poplar Grdns. & Keeling (1911), 80 L. J. K. B. 1241.

**1499.** ————.]—In an action by the A.-G., on the relation of a county council, to restrain deft. from using a traction engine upon a road in such a way as to cause a public nuisance, it was at the trial found as a fact that the condition of the road was not caused primarily by deft.'s traction traffic, but partly by the traction traffic, partly by stone haulage by carts & horses, partly by the ordinary traffic, & partly by the weather, but primarily & chiefly by the failure of the county council to maintain the road in a fit state to bear the traffic (including the traction traffic), which was not more unusual or onerous than they ought to have expected to come upon it:—**Held**: upon the facts so found plffs. were not entitled to a perpetual injunction to restrain deft. from bringing his traction traffic upon the road, & an interlocutory injunction which had been granted upon affidavit evidence must be dissolved. — **A.-G. v. Scott**, [1905] 2 K. B. 160; 71 L. J. K. B. 803; 93 L. T. 249; 69 J. P. 109; 21 T. L. R. 211; 49 Sol. Jo. 221; 3 L. G. R. 272, C. A.

**Annotations**.—**Refd.** High Wycombe R. D. C. v. Palmer (1905), 69 J. P. 167; **Chichester Corpn. v. Foster**, [1906] 1 K. B. 167; **A.-G. Sharpness New Docks & Gloucester & Birmingham Navigation Co.**, [1914] 3 K. B. 1; **Worsborough U. D. C. v. Barnsley, British Co-op. Soc.** (1914), 111 L. T. 429.

**1500.** — **Damage to pipes laid in road.**—Plffs., who were the road authority within their district, were also the owners of the water mains beneath the roads. A duly licensed traction engine belonging to deft., weighing upwards of 10 tons, & drawing three trucks, broke the water main under one of the streets for which plffs. were the road authority. The main had been laid at least thirty years, but was found as a fact to be sufficiently strong & well laid to withstand the pressure of the ordinary traffic of the district. Plffs. had been guilty of no neglect or default in the execution of their duty as the road authority, & neither deft. nor his servants had been guilty of any neglect or want of skill or care in the construction or user of the traction engine. A county ct. judge found that the injury was caused by the excessive weight of deft.'s traction engine, & that deft. was liable for the cost of repairing the broken water main:—**Held**: in using an exceptionally heavy locomotive deft. was exercising his right to use the highway in a way that was not necessary in order to enable him to enjoy it, & the decision was right.—**CHICHESTER CORPN. v. FOSTER**, [1906] 1 K. B. 167; 75 L. J. K. B. 33; 93 L. T. 750; 70 J. P. 73; 54 W. R. 199; 22 T. L. R. 18; 4 L. G. R. 205, D. C.

**Annotations**.—**Consd.** **A.-G. v. Sharpness New Docks & Gloucester & Birmingham Navigation Co.**, [1914] 3 K. B. 1. **Refd.** **Bromley R. D. C. v. Croydon Corpn.** (1907), 24 T. L. R. 132; **Worsborough U. D. C. v. Barnsley British Co-op. Soc.** (1914), 111 L. T. 429; **Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.**, [1915] A. C. 654.

**1501.** — **Sparks causing damage.**—Deft was possessed of a traction engine, which was propelled by steam power. Whilst it was being driven by deft.'s servants along a highway some sparks escaping from it set fire to a stack of hay of plffs. standing on a neighbouring farm. The engine was constructed in conformity with Locomotive Acts, 1861 (c. 70), 1865 (c. 83); at the time of the accident it was being driven at a proper pace, & deft.'s servants were guilty of no negligence in the management of it:—**Held**: deft. was liable to compensate plffs. for the injury done to the stack upon the ground that the engine being a dangerous machine, an action was maintainable at common law, & the Locomotive Acts did not restrict the liability of deft.—**POWELL v. FELL** (1880), 5 Q. B. D. 597; 49 L. J. Q. B. 428; 43 L. T. 562; 45 J. P. 156, C. A.

**Annotations**.—**Consd.** **Galer v. Rawson** (1889), 6 T. L. R. 17. **Folld.** **Gunter v. James** (1908), 72 J. P. 448. **Refd.** **Gas Light & Coke Co. v. St. Mary Abbots, Kensington** (1884), Cab. & El. 368; **The European** (1885), 10 P. D. 99; **Bantwick v. Rogers** (1891), 7 T. L. R. 542; **Jeffery v. St. Pancras, Vestry** (1894), 63 L. J. Q. B. 618; **A.-G. v. Scott**, [1904] 1 K. B. 404; **Chichester Corpn. v. Foster** (1905), 70 J. P. 73; **Heath's Garage v. Hodges** (1915), 14 L. G. R. 195; **Manuel v. Webb** (1918), 88 L. J. K. B. 323; **Musgrove v. Pandellis**, [1919] 1 K. B. 314. **Mentd.** **Evans v. M. S. & L. Ry.** (1887), 36 Ch. D. 626; **Parker v. London General Omnibus Co.** (1909), 101 L. T. 623.

**1502.** — ———.]—A traction engine, driven by steam along a public highway, emitted sparks which set fire to certain agricultural produce on land adjoining the highway. There was no negligent user of the traction engine: **Held**: the owner of the traction engine was liable for the damage done, upon the ground that he took upon the highway a dangerous machine which was liable to emit sparks. — **GUNTER v. JAMES** (1908), 72 J. P. 448; 21 T. L. R. 808; 6 L. G. R. 1138, D. C.

**1503.** — ———.]—A steam locomotive engine passing along a highway set fire to a plantation by the emission of sparks. The engine had a special apparatus to prevent the emission of sparks:—**Held**: the owner of the engine, as he was using a thing of a dangerous nature, although in no way negligent, was liable in damages for the injury caused to the plantation.—**MANUEL v. WEBB** (1918), 88 L. J. K. B. 323; 120 L. T. 360, C. A.

**1504.** — — **Horses frightened—Knowledge of defendant.**—An action may be maintained by a person who has sustained an injury through his horses being frightened by a traction steam engine used on a highway, under Locomotive Act, 1861 (c. 70), the jury finding that the engine was likely to frighten horses, & that deft. knew it.

*Semble*: that the *scienter* was not material.

Plff. is entitled to your verdict, if the engine was calculated by its noise & appearance to frighten horses, so as to make the use of the highway dangerous to persons riding or driving horses. For deft. has clearly no right to make a profit at the expense of the security of the public (**ERLE, C.J.**).

I desire you to find separately (as there is an issue on the *scienter*) whether, before the accident, deft. knew of the danger, supposing you find it to exist. If he knew it from his men, or other

#### PART IX. SECT. 1, SUB-SECT. 4.

**1501 i.** **Traction engine—Sparks causing damage.**—A person who, without negligence, uses a traction engine on a highway is liable for injury to property adjoining the highway by fire from sparks emitted by the engine.—**MIKULANSKI v. SCOTCHEN** (1912), 21 W. L. R. 241; 2 W. W. R. 325, CAN.

**1501 ii.** ————.]—An action of damages was brought against the owners of a steam tractor by the owner of a house abutting on a public road for injury to his house & garden caused by burning particles from a cargo of compressed cork, which was being drawn by the tractor & took fire & was burnt on the road opposite the house:—**Held**: the use of a tractor emitting

sparks, combined with the proximity of an inflammable cargo, constituted, apart from negligence, a dangerous nuisance at common law, as well as a nuisance under Locomotive Act, 1861, s. 13; & defendants were liable to pursue in damages.—**SLATER v. M'JILLAN**, [1924] S. C. 854.—**SCOT.**

**d. Derrick—Horse frightened.**—Defts. had erected a derrick in the

Sect. 1.—Nuisances: Sub-sects. 4, 5 & 6.]

persons, it would be sufficient. So, if he knew it from the nature of the engine itself (ERLE, C.J.).—*WATKINS v. REDDIN* (1861), 2 P. & F. 629, N. P.

*Annotations* :—*Apprvd.* *Galer v. Rawson* (1889), 6 T. L. R. 17. *Refd.* *Harrier Mobbs* (1878), 3 Ex. D. 208; *Bantwick v. Rogers* (1891), 7 T. L. R. 542.

**1505.** ———— [If an engine of this sort [a traction engine] fulfils all the requirements of the statute, & yet is calculated to frighten horses of ordinary nerve & courage on a highway, the engine is a nuisance, & there is nothing in the statutes [Locomotive Acts, 1861 (c. 70), 1865 (c. 83)] to absolve the owner from liability to pay damages to those whose person or property is injured in consequence thereof (LORD ESHER, M.R.).—*GALER v. RAWSON* (1889), 6 T. L. R. 17, C. A.

*Annotations* :—*Consd.* *Bantwick v. Rogers* (1891), 7 T. L. R. 512. *Refd.* *Jeffery v. St. Pancras Vestry* (1894), 63 L. J. Q. B. 618.

**1506. Motor omnibus—Excessive user.**—The excessive user of certain streets by defts. for turning, shunting, standing, adjusting, & repairing their motor omnibuses:—*Held*: an actionable nuisance.—*ROBINSON v. LONDON GENERAL OMNIBUS CO., LTD.* (1910), 74 J. P. 161; 26 T. L. R. 233.

**1507. Steam roller—Whether a nuisance—Question of fact.**—The owners of a steam roller are liable in damages if it is a nuisance to a person using the highway. Compliance with the statute, & absence of negligence, do not constitute a defence to the action. The question whether a steam roller on a highway is a nuisance dangerous to the public is one of fact, depending upon the circumstances of each particular case.

If this steam roller upon the occasion in question was a nuisance, & if in consequence, it caused pltf.'s horse to bolt & the accident to take place, there is a cause of action made out. . . . The mere presence of this machine upon the road is not sufficient, because it was lawfully there, but in each case it must be a question for the jury as to whether it was or was not a nuisance. Now was there any evidence that it was a nuisance? Counsel contends there was none because the only evidence was that pltf.'s horse was frightened by the steam roller & that there was not sufficient to establish a nuisance to the highway. . . . But according to the county ct. judge's notes the evidence was that the horse was of a quiet disposition, & not one likely to be frightened easily (CHARLES, J.).—*JEFFERY v. ST. PANCRAS VESTRY* (1894), 63 L. J. Q. B. 618; 10 R. 551, D. C.

*Annotation* :—*Refd.* *Chichester Corp'n. v. Foster* (1905), 70 J. P. 73.

**1508.** ———— **Damage to pipes laid in road.**—[Pltfs., a gas co., laid down pipes under the surface of certain streets, as they were bound by statute to do, for the purpose of supplying gas to light the streets & houses in the streets. The streets were vested in defts., the vestry of the parish, by certain statutes which gave them the authority of the surveyor of highways, & with the duty to repair, but without prescribing any particular mode of repair. Defts. used steam-rollers for the repair of the streets, as being a mode of repair most advantageous to both the ratepayers & the public, but the rollers they used were so heavy as frequently to injure pltfs.' pipes, though the pipes were sufficiently below the surface as not to have been injured by the ordinary mode of repair if

such rollers had not been used:—*Held*: pltfs. were entitled not only to recover damages for the injury which had been done, but also to have an injunction to restrain defts. from using steam-rollers in such a way as to injure the pipes of pltfs.—*GAS LIGHT & COKE CO. v. ST. MARY ABBOTT'S, KENSINGTON, VESTRY* (1885), 15 Q. B. D. 1; 54 L. J. Q. B. 414; 53 L. T. 457; 49 J. P. 470; 33 W. R. 892; 1 T. L. R. 452, C. A.; *affg.* (1884), 1 Cab. & El. 368.

*Annotations* :—*Distd.* *Bristol Waterworks Co. v. Bristol Corp'n.* (1889), 5 T. L. R. 551; *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603. *Consd.* *Chichester Corp'n. v. Foster*, [1906] 1 K. B. 167. *Refd.* A.-G. (on Relation of Monmouthshire County Council) & Monmouthshire County Council v. Scott (1901), 89 L. T. 726. *Mentd.* *Grosvenor Hotel Co. v. Hamilton* (1891), 63 L. J. Q. B. 661.

**1509.** ———— **Spark causing damage—Measure of damages.**—A rural district council, the highway authority in their district, used a steam-roller under statutory powers. Whilst the roller was travelling on the highway to a place where rolling was to be done a spark flew from it which set fire to the thatch of a wayside cottage, let on a weekly tenancy, which with its contents was almost wholly destroyed. Upon a question as to the principle upon which damages were to be assessed:—*Held*: the measure of damage for the injury to the cottage was not the fair cost of reinstatement, but the difference between the money value of the owner's reversionary interest before the fire & after the fire.—*MOSS v. CHRISTCHURCH RURAL COUNCIL, ROGERS v. CHRISTCHURCH RURAL COUNCIL*, [1925] 2 K. B. 750; 23 L. G. R. 331, D. C.

**1510. Tram car—Horse frightened—Improper conduct of driver.**—*RATTEE v. NORWICH ELECTRIC TRAMWAY CO.* (1902), 18 T. L. R. 562, C. A.

#### SUB-SECT. 5.—DANGEROUS AND EXTRAORDINARY TRAFFIC.

**1511. Excessive load on waggon.**—[Information against a common carrier, setting forth that no waggon ought to carry more than 2,000 weight, & that deft. used a waggon with four wheels, etc., *cum inusitato numero equorum*, in which he carried 3,000 or 4,000 weight at one time, by which he spoiled the highway leading from Oxford to London, viz. at L. in the parish of H.; this was adjudged good, though it was laid generally at L. without showing how many perches in length, because the nuisance was alleged, for all the way leading from Oxford to London, & L. was mentioned only for the venue; & though there was no particular measure expressed how much of the way was spoiled, it shall be intended all L. was spoiled likewise, though it said that he went *inusitato numero equorum* without setting forth what number, yet the information is good, because it was the excessive weight which he carried that made the nuisance.—*EGGERLY'S CASE* (1611), 3 Salk. 183; 91 E. R. 764.

*Annotation* :—*Refd.* *Glasgow Corp'n. v. Barclay, Curle* (1923), 93 L. J. P. C. 1.

*Locomotives.*—See Sub-sect. 4, *ante*.

**1512. Motor vehicle—Skidding.**—The mere fact that the proprietor of a motor omnibus places such a vehicle on the road to ply for passengers knowing that it has a tendency to skid when the road is in a greasy or slippery condition is not evidence of

street without placing a hoarding round it. While the derrick was at work & making an unusual noise, pltf.'s horse took fright & ran away, pltf. being

thrown out of the carriage, & injured. The jury found that the derrick was of a nature to frighten horses, & that defts. had not taken proper precautions

to guard against accidents:—*Held*: defts. were liable for the injury sustained by pltf.—*LAWSON v. ALLISTON VILLAGE* (1890), 19 O. R. 655.—CAN.

negligence or nuisance where an accident happens to a passenger owing to the motor omnibus skidding.—*WING v. LONDON GENERAL OMNIBUS CO.*, [1909] 2 K. B. 552; 78 L. J. K. B. 1063; 101 L. T. 411; 73 J. P. 429; 25 T. L. R. 729; 53 Sol. Jo. 713; 7 L. G. R. 1093, C. A.

*Annotations*.—*Apld.* *Parker v. London General Omnibus Co.* (1909), 101 L. T. 623. *Refd.* *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539. *Mentd.* *Newberry v. Bristol Tramways & Carriage Co.* (1912), 11 L. G. R. 69.

1513. ———.]—A motor omnibus was proceeding at a moderate speed along a road in London, which was in a greasy condition, when pltf., a boy five years of age, stepped off the pavement into the street about 4 or 5 feet in front of the omnibus. In order to avoid running over pltf., the driver of the omnibus steered to his off-side, took out the clutch, put on the brakes, & locked the back wheels, with the result that the omnibus skidded & its near side struck & injured pltf. In an action to recover damages for the personal injuries, the jury found that there was no negligence on the part of the driver, but they disagreed upon the question whether the omnibus was a nuisance:—*Held*: there was no evidence that the motor omnibus was a nuisance. —*PARKER v. LONDON GENERAL OMNIBUS CO., LTD.* (1909), 101 L. T. 623; 74 J. P. 20; 26 T. L. R. 18; 53 Sol. Jo. 867; 7 L. G. R. 1111, C. A.

1514. ———.]—*Defective condition—Resulting in collision.*—Owing to a defect in the axle of defts.' motor lorry a wheel came off while the lorry was being driven in a public highway, & damaged pltf.'s van. Two days before the accident defts. had received back the lorry from the makers, a firm of known competence, to whom it had been sent to be overhauled & repaired. In an action by pltf. for the damage sustained, the county ct. judge found that defts. were not, but that the repairers were, negligent, & he gave judgment for the pltf. on the ground that there had been a breach of Motor Cars (Use & Construction) Order, 1904, art. 11, reg. 6, which breach caused the damage:—*Held*: (1) the mere breach of Motor Cars (Use & Construction) Order, 1904, art. 11, reg. 6, did not of itself afford a cause of action to pltf.; (2) defts. did not at common law owe an absolute duty to pltf. that the lorry should be in a safe & proper condition; (3) the lorry was not in itself a nuisance; (4) pltf. having failed to establish knowledge or negligence on the part of defts. was not entitled to recover.—*PHILLIPS v. BRITANNIA HYGIENIC LAUNDRY CO.*, [1923] 1 K. B. 539; 92 L. J. K. B. 389; 128 L. T. 690; 39 T. L. R. 207; 67 Sol. Jo. 365; 21 L. G. R. 168, D. C.; *affd.*, [1923] 2 K. B. 832, C. A.

*Annotations*.—*As to* (1) *Consd.* *Gaylor & Pope v. Davies*, [1921] 2 K. B. 75. *Generally, Mentd.* *Britannia Hygienic Laundry Co. v. Thornycroft* (1925), 94 L. J. K. B. 858.

1515. *Damage to pipes laid in road.*]—*GAS LIGHT & COKE CO. v. ST. MARY ABBOTT'S, KENSINGTON, VESTRY, No. 1508, ante.*

1516. ———.]—*CHESTER CORPN. v. FOSTER, No. 1500, ante.*

*Vehicle causing obstruction.*]—*See* Sub-sect. 1, L., *ante.*

*Furious & wanton driving.*]—*See* CRIMINAL LAW, Vol. XV., pp. 863 *et seq.*

*Extraordinary traffic.*]—*See* Part XI., *post.*

#### PART IX. SECT. 1, SUB-SECT. 6.

*a. Raised platform—Assumption of road by company.*]—*Deft.* erected a platform in front of a row of shops upon the highway, & raised about three feet above it, with a flight of steps leading down from one end & into the side road

which intersected it. The road on which the shops were had been a public highway for forty years until about fifteen years before the erection of the platform, when it was gravelled by a joint stock road co., who had since kept it in repair & collected tolls. *Deft.*

was convicted for obstructing the highway, the jury having found that the platform was a nuisance.—*Held*: the road being a highway, its assumption by the road co. was no answer to the indictment.—*R. v. DAVIS* (1874), 35 U. C. R. 107.—*CAN.*

#### SUB-SECT. 6.—DANGERS ARISING FROM BUILDINGS.

1517. *Danger to persons on highway—House in disrepair.*]—Indictment for suffering a house on the highway to be likely to fall down, lies against tenant at will.—*R. v. WATTS* (1703), 1 Salk. 357; 91 E. R. 311; *sub nom.* *R. v. WATSON*, 2 Ld. Raym. 856.

*Annotations*.—*Apld.* *Tarry v. Ashton* (1876), 1 Q. B. D. 314; *R. v. Barker* (1890), 59 L. J. M. C. 105. *Refd.* *R. v. Lister & Biggs* (1857), Dears. & B. 209; *Todd v. Flight* (1860), 9 C. B. N. S. 377; *Fisher v. Prowse, Cooper v. Walker* (1862), 2 B. & S. 770; *Owen v. De Winton* (1894), 58 J. P. 833; *A.-G. v. Tod Heatley*, [1897] 1 Ch. 560; *A.-G. v. Roe*, [1915] 1 Ch. 235. *Mentd.* *Chauntler v. Robinson* (1849), 4 Exch. 163; *Reedie v. N. W. Ry.*, *Hobbit v. N. W. Ry.* (1849), 13 Jur. 659; *Gandy v. Jubber* (1864), 5 B. & S. 78; *Saxby v. M. S. & L. Ry.* (1869), 17 W. R. 293.

1518. ———.]—*Property abutting on highway.*]—Where property abutting on a highway becomes through the wrongful act of strangers a nuisance to the public lawfully using the highway, the owner of such property has a duty cast upon him from the moment he becomes aware of the danger to take steps to prevent his property becoming a source of injury to the public.—*SILVERTON v. MARRIOTT* (1888), 59 L. T. 61; 52 J. P. 677.

*Annotation*.—*Refd.* *Leicester Urban S. A. v. Holland* (1888), 52 J. P. 788.

1519. *Lamp projecting over pavement—Falling on passer-by—Want of repair known to defendant.*]—

*Deft.* had a lamp projecting from his premises over the footway in a street. It fell on pltf., who was passing underneath, & injured her. *Deft.* had shortly before employed a competent person C., to put the lamp in good repair, but at the time it fell it was, though not to his knowledge, in a dangerous & decayed state. The jury found there was no personal negligence in *deft.*, but there was negligence in C.:—*Held*: (*LUSH, & QUAIN, J.J.*) it was the absolute duty of *deft.* as occupier of premises, having a lamp in such position, to prevent its becoming dangerous to the public; & if, in fact, it did become dangerous it was a nuisance, & for any injury caused by such nuisance *deft.* was liable; & he could not shift the liability arising from such a duty from himself by having employed a competent person to do the necessary repairs; (*BLACKBURN, J.*), as *deft.* had express knowledge shortly before of the lamp needing repair, he was then bound to put it into reasonable repair; & was liable for the consequences of its not being in repair, arising from the breach of duty in the person, however competent, whom he had employed.—*TARRY v. ASHTON* (1876), 1 Q. B. D. 314; 45 L. J. Q. B. 260; 31 L. T. 97; 40 J. P. 439; *sub nom.* *TERRY v. ASHTON*, 24 W. R. 581.

*Annotations*.—*Apld.* *Silverton v. Marriott* (1888), 59 L. T. 61. *Consd.* *Barker v. Herbert*, [1911] 2 K. B. 633. *Distd.* *Pritchard v. Peto*, [1917] 2 K. B. 175; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539. *Afford U.D.C. v. Boul & Judd*, [1925] 1 K. B. 671. *Refd.* *A.-G. v. Roe*, [1915] 1 Ch. 235. *Mentd.* *Bower v. Peate* (1876), 1 Q. B. D. 321; *Nichols v. Marsland* (1876), 46 L. J. Q. B. 174; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Ivay v. Hedges* (1882), 9 Q. B. D. 80; *Hughes v. Percival* (1883), 8 App. Cas. 413; *The European* (1885), 10 P. D. 99; *Kiddle v. Lovett* (1885), 16 Q. B. D. 605; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Blake v. Woolf* (1898), 47 W. R. 8; *Cox v. Coulson*, [1916] 2 K. B. 177; *Cole v. De Trafford* (No. 2), [1918] 2 K. B. 523.

*Projections over street in metropolitan area.*]—*See* Part XIII., Sect. 1, sub-sect. 10, *post.*

*See, also, BOUNDARIES, Vol. VII., p. 280, Nos. 152–156.*

*Cellar flaps.*]—*See* Nos. 1362–1368, *ante.*

**Sect. 1.—Nuisances: Sub-sects. 7, 8, 9, 10 & 11.]****SUB-SECT. 7.—DANGEROUS WALLS AND FENCES.**

See **BOUNDARIES**, Vol. VII., pp. 284–286, 295, Nos. 145, 146, 152–156, 208.

**1520. Injury not occurring on highway.]**—There is no authority establishing the proposition that an invitee upon private premises is entitled to damages for an injury caused by something which is a public nuisance to an adjoining highway.

**Defts.** were the owners of a house & yard abutting on a highway, & separated therefrom by a wall which was in such a defective state of repair as to constitute a public nuisance in the highway. **Pltf.**, a child of nine years of age, who was visiting the tenant of the premises, while playing in the yard was injured by a heavy stone which fell from the wall upon her. In an action against the owners for damages for the injuries so sustained:—**Held:** as **pltf.** was not using the highway when the accident occurred she was not entitled to recover damages from **defts.**—**BROMLEY v. MERCER**, [1922] 2 K. B. 126; 91 L. J. K. B. 577; 127 L. T. 282; 38 T. L. R. 496, C. A.

**Spiked guard round trees—Unlighted—Defence of realm regulations.]**—See No. 1623, *post*.

**SUB-SECT. 8.—OMISSION TO FENCE DANGEROUS PLACES.**

**Excavations adjoining highways.]**—See **BOUNDARIES**, Vol. VII., pp. 283–286, Nos. 138–151.

**House areas.]**—See **BOUNDARIES**, Vol. VII., pp. 284, 285, Nos. 142–146, 150.

**Holst hole.]**—See **BOUNDARIES**, Vol. VII., p. 285, No. 147.

**Excavations not adjoining highways.]**—See **BOUNDARIES**, Vol. VII., pp. 288, 289, Nos. 164–168.

**Duty to fence abandoned mines.]**—See **MINES**.

**Duty to fence quarries near highways.]**—See **MINES**.

**SUB-SECT. 9.—EXPLOSIVE AND INFLAMMABLE SUBSTANCES.**

**1521. Storage near highway—Wood naphtha—Liability to ignition ab extra.]**—Keeping wood naphtha in a warehouse near to streets, highways & dwelling-houses, in such large quantities as to endanger the lives & properties of the Queen's subjects therein, is indictable as a nuisance at common law. The jury are entitled to take into consideration the liability to ignition *ab extra*.—**R. v. LISTER & BIGGS** (1857), **Dears. & B.** 209; 26 L. J. M. C. 196; 21 J. P. 422; 3 Jur. N. S. 570; 5 W. R. 626; 7 Cox, C. C. 342, C. C. R.

**Annotations:**—**Apld.** **Heppburn v. Lordan** (1865), 2 Hem. & M. 345. **Consd.** **R. v. Chilworth Gunpowder Co.** (1888), 4 T. L. R. 557. **Refd.** **Todd v. Flight** (1860), 9 C. B. N. S. 377; **Murray v. Cadwell** (1889), 6 T. L. R. 76; A.-G. v. Manchester Corp'n., [1893] 2 Ch. 87; **Bolvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind, Coopers v. Saine**, [1920] 2 K. B. 487. **Mentd.** **Cowper-Essex v. Acton L. B.** (1889), 14 App. Cas. 153.

**1522. Explosives used near highway—Blasting in quarry.]**—**Deft.** was engaged in blasting a stone quarry, & by using an excessive charge of powder, eleven inches instead of five in a hole only fifteen yards from the highway, caused a great quantity of stones to fall upon a public highway & upon houses adjacent to the quarry & highway:—**Held:**

he was rightly convicted upon an indictment which charged him with a nuisance to the highway.—**R. v. MUTTERS** (1864), **Le. & Ca.** 491; 34 L. J. M. C. 22; 11 L. T. 387; 28 J. P. 804; 13 W. R. 100; 10 Cox, C. C. 6, C. C. R.

**1523. Firing gun across highway—Whether actual "injury or danger" must result—Highway Act, 1835 (c. 50), s. 72.]**—Where a shoot extends across a highway, & a constable is stationed there to see that there shall be no interruption to passengers, the firing of a gun on the highway at a time when no person other than the constable & members of the shoot is on or near the highway is not an offence against the above sect., inasmuch as in such circumstances the firing is not done "to the injury or interruption or personal danger of any person travelling thereon."—**LEES v. STONE** (1919), 88 L. J. K. B. 1159; 121 L. T. 154; 83 J. P. 163; 35 T. L. R. 380; 17 L. G. R. 416; 26 Cox, C. C. 430, D. C.

**Compare** Nos. 1338–1341, *ante*, No. 1537, *post*.

**SUB-SECT. 10.—INFECTED PERSONS OR ANIMALS ON HIGHWAY.**

*See, generally,* **PUBLIC HEALTH**.

**1524. Infected persons in highway—Liability of person causing exposure—Small-pox.]**—It is an indictable offence in an apothecary unlawfully & injuriously to inoculate children with the small-pox, & while they are sick of it, unlawfully & injuriously to cause them to be carried along a public street.—**R. v. BURNETT** (1815), 4 M. & S. 272; 105 E. R. 835.

**Annotations:**—**Refd.** **Hill v. Balls** (1857), 2 H. & N. 209; **Ward v. Hobbs** (1877), 2 Q. B. D. 331; **Metropolitan Asylum District v. Hill** (1881), 6 App. Cas. 193; A.-G. v. Manchester Corp'n., [1893] 2 Ch. 87.

**1525.** ———— **]**—A person may be indicted for unlawfully & injuriously carrying a child infected with the small-pox along a public highway, in which persons are passing, & near to the habitations of the King's subjects.—**R. v. VANTANDILLO** (1815), 4 M. & S. 73; 105 E. R. 762.

**Annotations:**—**Consd.** **R. v. Henson** (1852), **Dears. C. C.** 24. **Refd.** **Hill v. Balls** (1857), 2 H. & N. 209; **R. v. Lister & Biggs** (1857), **Dears. & B.** 209; **Ward v. Hobbs** (1877), 2 Q. B. D. 331; **Metropolitan Asylum District v. Hill** (1881), 6 App. Cas. 193; A.-G. v. Manchester Corp'n., [1893] 2 Ch. 87. **Mentd.** **R. v. Hicklin** (1868), L. R. 3 Q. B. 360; **R. v. Clarence** (1888), 22 Q. B. D. 23.

**1526.** ———— **Person "having charge" of patient—Public Health Act, 1875 (c. 55), s. 126 (2).]**—A medical man in practice in T. sent a patient who was suffering from scarlet fever to the fever hospital there with a certificate, directing him to walk in the middle of the road, & not to talk to any one, but, in consequence of an alleged informality in the certificate, the patient was refused admission; whereupon the medical man walked with him through the streets of the town to the residence of the chairman of the local board, from whom after some delay he obtained an order for the man's admission to the hospital. He then returned with the patient to the police-station to procure the ambulance to convey him thither. Upon an information against the medical man for an alleged infringement of the above statute, the justices were of opinion that it was not proved before them that the medical man "had charge of" the patient, that he had not wilfully exposed the patient in any street or public place "without

**PART IX. SECT. 1, SUB-SECT. 7**

**1. Defective wall—Defendant's knowledge—Necessity to prove.]**—A wall on and abutting on a public highway

was blown down during a severe storm, & killed three persons on the highway. In an action against the owner of the land:—**Held:** the wall being a nuisance

**pltf.** need not prove that **deft.** knew, or ought reasonably to have known, of its defective condition.—**MULLEN v. FORNESTER**, [1921] 2 I. R. 412.—**IR.**

proper precaution," & that he had made the best use of the means at his disposal to prevent the spread of the fever; & they refused to convict him.—*Held*: their decision was right.—*TUNBRIDGE WELLS LOCAL BOARD v. BISSHOFF* (1877), 2 C. P. D. 187.

1527. Infected horse in public place—Glanders.]—To bring a horse infected with the glanders into a public place to the danger of infecting the Queen's subjects is a misdemeanour at common law.—*R. v. HENSON* (1852), *Dears. C. C.* 24; 20 L. T. O. S. 63; 16 J. P. 711.

*Annotations*:—*Refd.* *Hill v. Balls* (1857), 2 H. & N. 299; *Ward v. Hobbs* (1877), 2 Q. B. D. 331.

*See, generally, ANIMALS, Vol. II., pp. 295 et seq., Nos. 657 et seq.*

#### SUB-SECT. 11.—ENCROACHMENTS.

*See Highway Acts, 1835 (c. 50), s. 69; 1864 (c. 101), s. 51.*

1528. Encroachment actually on highway—Removal by surveyor—Highway Act, 1772 (c. 78), ss. 6, 64.]—*LOWEN v. KAYE* (1825), 4 B. & C. 3; 3 Dow. & Ry. M. C. 170; 6 Dow. & Ry. K. B. 20; 3 L. J. O. S. K. B. 123; 107 E. R. 960.

*Annotation*:—*Fold.* *Evans v. Oakley* (1843), 7 J. P. 660.

1529. Encroachment within fifteen feet of road centre—Highway Act, 1835 (c. 50), s. 69—Ground useless as carriage way.]—To justify a surveyor of highways in taking down a fence under the above sect. two things must concur: first, the fence must be within fifteen feet of the centre of the road; & secondly, it must be on the road.

A road was nine feet wide; & there being a piece of unenclosed land at the side of it, also nine feet wide, which land was so rough & uneven that no carriage ever did or could go over it, the owner of the adjoining field took this land into his field, & put a fence round it. The surveyor of the highways took down the fence:—*Held*: he was not justified in so doing, under the above sect., as the fence was not on the road.—*EVANS v. OAKLEY & PHILLIPS* (1843), 1 Car. & Kir. 125; 1 L. T. O. S. 648; 7 J. P. 660, N. P.

*Annotation*:—*Apprvd.* *Easton v. Richmond Highway Board* (1871), L. R. 7 Q. B. 69.

1530. ——— Cottage built on disused ground.]—An information against C. was laid before justices, under the above sect., for that he encroached on a carriage way by making a cottage within fifteen feet of the centre of the carriage way. It appeared that the carriage way was metalled, & that the cottage had been made within fifteen feet of the centre of the road so metalled; but that it was not made on a part which had been metalled or repaired by the surveyor within six months, but upon land which, though open to the metalled part of the highway, & forming part of it, & liable to be used by the public, had not been so used for many years. The justices having convicted:—*Held*: the conviction was wrong; for, in order to justify a conviction under the above sect., the encroachment must be upon a highway as defined in sect. 63, that is, on a highway repaired by the surveyor within six months.—*CHAPMAN v. ROBINSON* (1858), 1 E. & E. 25; 28 L. J. M. C. 30; 32 L. T. O. S. 89; 23 J. P. 228; 5 Jur. N. S. 434; 7 W. R. 12; 120 E. R. 817.

*Annotations*:—*Expld.* *Easton v. Richmond Highway Board* (1871), L. R. 7 Q. B. 69. *Mentd.* *Simpson v. Johnson*

(1859), 23 J. P. Jo. 756; *Ashdown v. Curtis* (1862), 26 J. P. 319; *Stanhope v. Thorsby* (1866), 35 L. J. M. C. 182; *Walker v. Delacombe* (1894), 63 L. J. M. C. 77; *R. v. Kettle, Ex p. Ellis*, [1906] 1 K. B. 212.

1531. ——— Highway Act, 1864 (c. 101), s. 51—Open ditch fenced.]—Appl. erected a fence upon the site of an open & unenclosed ditch, which was his property, which, however, was within fifteen feet of the centre of a carriage way:—*Held*: this was not an encroachment within the above sect.—*FIELD v. THORNE* (1869), 20 L. T. 503; *sub nom.* *THORNE v. FIELD*, 33 J. P. 727.

*Annotation*:—*Distd.* *Chorley Corp'n. v. Nightingale*, [1906] 2 K. B. 612.

1532. ——— Claim of right.]—B. was charged under the above sect. with causing to be made a fence on the side of a carriage way within fifteen feet of centre thereof. B., as the owner of the adjoining land, claimed the site of the fence to be his property, being on the highway edge of a ditch at the roadside; but the justices found that the site was part of the highway & convicted B.:—*Held*: the justices had jurisdiction to decide whether the site was a highway or no highway, & whether they were right or wrong, the conviction could not be set aside on *certiorari*, as the statute took away the *certiorari*.—*R. v. BRADLEY* (1891), 63 L. J. M. C. 183; 70 L. T. 379; 58 J. P. 199; 10 T. L. R. 346; 17 Cox, C. C. 739; 10 R. 183, D. C.

1533. ——— Temporary fence as guard—Intention to make permanent fence beyond fifteen feet.]—A. erected on a highway, for a distance of two hundred & forty yards, a post & wire fence within eight feet from the centre, which he intended to keep up for five years as a guard to a quick fence to be laid down at a distance of fifteen feet from the centre:—*Held*: the justices were wrong in refusing to convict A. of unlawfully encroaching contrary to the above sect. —*CLARSON v. ARNOLD* (1890), 51 J. P. 630, D. C.

1534. — - Not continuing offence.]—*RANKING v. FOWLES*, No. 1756, *post*.

1535. — - ]—*COGGINS v. BENNETT*, No. 1757, *post*.

1536. Encroachment on "sides of carriage or cartway"—Ground not part of metalled road—Included if dedicated to public.]—Upon a case stated under Highway Act, 1864 (c. 101), s. 51, by magistrates, who had convicted the owner of the neighbouring soil of encroaching upon a highway by building a wall within fifteen feet of its centre, but upon part of a green which the carriage way crossed, & which had never been dedicated to the public:—*Held*: "the sides of any carriage or cartway" meant any land forming part of the highway, though not part of the metalled road; but did not extend to land which, though by the side of the road, had not been dedicated as highway to the use of the public.—*EASTON v. RICHMOND HIGHWAY BOARD* (1871), L. R. 7 Q. B. 69; 41 L. J. M. C. 25; 25 L. T. 586; 30 J. P. 485; *sub nom.* *R. v. RICHMOND (YORKS.) J.J., EASTON v. RICHMOND HIGHWAY BOARD*, 20 W. R. 203, D. C.

*Annotations*:—*Refd.* *Tottenham U. D. C. v. Rowley*, [1912] 2 Ch. 633. *Mentd.* *Finch v. Bannister*, [1908] 1 K. B. 485.

**Powers to remove encroachments.**—*See Sect. 3, sub-sect. 1, B., post.*

**Time for taking proceedings.**—*See Sect. 3, sub-sect. 7, E., post.*

#### PART IX. SECT. 1, SUB-SECT. 11.

**B. Balcony projecting over street.**—A balcony projecting over a street is an encroachment within Municipal Corporations Act, 1876, s. 189.—*PLIMMER v. LOUGHERY* (1886), 4 N. Z. L. R. C. A. 73.—**N.Z.**



## SUB-SECT. 12. — FIRES NEAR HIGHWAY.

See Highway Act, 1835 (c. 50), s. 72.

**1537. Actual "Injury, interruption or personal danger."—Necessity to prove—Fire within fifty feet of highway.**—In order to constitute an offence under Highway Act, 1835 (c. 50), s. 72, it must be shown that the fire made was to the injury of the highway, or to the injury, interruption, or personal danger of any person travelling thereon.

It is not a nuisance *per se* but only if done to the injury of the highway or passers-by, & to prove the offence, it must be shown not only that applt. did it, but that he did it "to the injury of the highway or to the injury, interruption or personal danger of any person travelling thereon." In reading the passage it might be said that it would be a nuisance in any case if it was to the annoyance of the public, but we are not dealing with a section creating an offence but one giving a summary means of proceeding when the nuisance is within fifty feet (WILLIS, J.).—STINSON v. BROWNING (1860), L. R. 1 C. P. 321; Har. & Ruth. 203; 35 L. J. M. C. 152; 13 L. T. 799; 30 J. P. 312; 12 Jur. N. S. 262; 14 W. R. 395.

**Annotations:**—*Expld.* Horner v. Cadman (1886), 55 L. J. M. C. 110. *Folld.* Hill v. Somerset (1887), 51 J. P. 742. *Expld.* Brotherton v. Tiffensor (1896), 60 J. P. 72. *Consd.* Smith v. Perry (1905), 94 L. T. 140. *Refd.* Mayhew v. Sutton (1901), 71 L. J. K. B. 46; Hindle v. Evans (1906), 70 J. P. 518.

**1538. — — — — Tar barrel on highway.**—H. was charged under Highway Act, 1835 (c. 50), s. 72, with unlawfully assisting in making a fire on the highway. He was rolling a tar barrel which was alight, & causing it to burn on Guy Fawkes Day, but no one was injured or endangered: *Held*: the justices were wrong in convicting H., as it was essential to the offence that passengers should be endangered or interrupted.—HILL v. SOMERSET (1887), 51 J. P. 742, D. C.

**Annotations:**—*Consd.* Smith v. Perry (1905), 94 L. T. 140. *Refd.* Mayhew v. Sutton (1901), 71 L. J. K. B. 46.

*Compare* Nos. 1338–1310, 1118, 1523, *ante*.

**1539. Unguarded fire pail—For repairing of gas main—Accident due to third person.**—Workmen employed by defts., a gas co., for the purpose of carrying out repairs to a gas main in a highway, placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. Pltf., a young child, was playing with other children near the fire when a passer-by accidentally knocked over the fire pail, & the molten lead was spilled on pltf., causing her injury:—*Held*: defts. were liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger.—CRANE v. SOUTH SUBURBAN GAS CO., [1916] 1 K. B. 33; 35 L. J. K. B. 172; 114 L. T. 71; 80 J. P. 51; 82 L. R. 74; 60 Sol. Jo. 222; 14 L. G. R. 3821, D. C.

## SUB-SECT. 13. — ENGINES AND MACHINERY NEAR HIGHWAY.

**1540. Railway engine—Horses frightened.**—By a private statute a co. was incorporated for the making of a railway in a line parallel to & in some places within five yards of a highway, from which line no deviation was to be made exceeding one

hundred yards. A subsequent Act authorised the use of locomotive engines on the railway. Upon an indictment for using the engines, whereby horses were frightened & accidents occasioned on the highway, the alleged nuisance was found by verdict, but it was also found that the engines were of the best construction & used with due care, & that by reason of these engines the public obtained better & cheaper coal:—*Held*: such a restriction of the rights of the public was not unreasonable, & must be presumed to have been contemplated by the legislature when authorising the use of locomotive engines without words of qualification.—R. v. PEASE (1832), 4 B. & Ad. 30; 1 Nev. & M. K. B. 690; 1 Nev. & M. M. C. 535; 2 L. J. M. C. 26; 110 E. R. 366.

**Annotations:**—*Expld.* Lawrence v. G. N. Ry. (1851), 16 Q. B. 643. *Consd.* Vaughan v. Taft Vale Ry. (1860), 5 H. & N. 679. *R. v. Bradford Navigation Co.* (1865), 6 B. & S. 631. *Distd.* Jones v. Festinog Ry. (1868), L. R. 3 Q. B. 733. *Apprvd.* Hammersmith & City Ry. v. Brand (1869), L. R. 4 H. L. 171. *Consd.* L. B. & S. C. Ry. v. Truman (1885), 11 App. Cas. 45; Evans v. M. S. & L. Ry. (1887), 36 Ch. D. 636; Cowper-Exeter v. Acton L. B. (1889), 14 App. Cas. 153. *Distd.* Rattee v. Norwich Electric Tram Co. (1902), 18 T. L. R. 562. *Refd.* R. v. Scott (1812), 3 Q. B. 543; Pilgrim v. Southampton & Dorchester Ry. (1819), 7 C. B. 205; Ricketts v. East & West India Docks & Birmingham Junction Ry. (1852), 12 C. B. 160; Manley v. St. Helens Canal & Ry. (1858), 2 H. & N. 840; Kearns v. Cordwainers Co., Cordwainers Co. v. Kearns (1859), 5 Jur. N. S. 1216; Croft v. L. & N. W. Ry. (1863), 3 B. & S. 436; Dungee v. London Corp. (1869), 38 L. J. C. P. 298; A.-G. v. Leeds Corp. (1870), 5 Ch. App. 583; Bueclench v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221; A.-G. v. Gas Light & Coke Co. (1877), 37 L. T. 746; Smith v. Mid. Ry. & L. & Y. Ry. (1877), 37 L. T. 224; Gas Light & Coke Co. v. St. Mary Abbots, Kensington, Vestry (1881), Cab. & El. 368; Lowther v. Curwen (1887), 58 L. T. 168; Harrison v. Southwark & Vauxhall Water Co., [1891] 2 Ch. 409; A.-G. v. Met. Ry., [1894] 1 Q. B. 384; Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1899] 2 Ch. 217; West v. Bristol Tramways & Carriage Co. (1908), 72 J. P. 145. *Mentd.* *Re* Penny (1857), 7 K. & B. 660; Cole. Ry. v. Lockhart (1860), 3 L. T. 65; Stockport Waterworks Co. v. Potter (1861), 7 H. & N. 160; Parry v. Croydon Commercial Gas & Coke Co. (1863), 28 J. P. 86; Stapley v. L. B. & S. C. Ry. (1865), 35 L. J. Ex. 7; Measey Docks Trustees v. Gibbs, Mersey Docks Trustees v. Penhallow (1866), L. R. 1 H. L. 93; Matson v. Baird (1878), 3 App. Cas. 1082; Nitro-Phosphate & Odum's Chemical Manure Co. v. London & St. Katharine Docks Co. (1878), 9 Ch. D. 503; Powell v. Fall (1880), 5 Q. B. D. 597; Metropolitan Asylum District v. Hill (1881), 6 App. Cas. 193; R. v. Sheward (1882), 9 Q. B. D. 741; C. & S. L. Ry. v. L. C. C. (1891), 65 L. T. 362; Holiday v. Wakefield Corp., [1891] A. C. 81; Sheller v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co. (1894), 64 L. J. Ch. 216; Long Eaton Recreation Grounds Co. v. Mid. Ry. (1901), 71 L. J. K. B. 74; Canadian Pacific Ry. v. Roy, [1902] A. C. 220; G. C. Ry. v. Hewlett, [1916] 2 A. C. 511.

**1541. — — — — ]**—In an action against defts., a railway co., it appeared that pltf. were leaving a station belonging to defts. in a carriage, when the horse was frightened by the sight & sound of a locomotive engine at the station which was blowing off steam, & the carriage was upset & pltf. injured. It did not appear that the engine was defective or that it was used in an improper manner, or that the approach to the station was inconvenient, but the jury found that defts. were guilty of negligence in not screening the railway from the roadway leading to the station, & that such negligence had caused the accident:—*Held*: defts. were not liable, as there was no evidence of any obligation on their part to screen the railway from the road.—SIMKIN v. LONDON & NORTH WESTERN RY. CO. (1888), 21 Q. B. D. 453; 59 L. T. 797; 53 J. P. 85; 4 T. L. R. 699, C. A.

**Annotations:**—*Apld.* Ramsden v. L. & Y. Ry. (1888), 53 J. P. 183. *Consd.* Norman v. G. W. Ry., [1915] 1 K. B. 584. *Refd.* Brackley v. Mid. Ry. (1916), 111 L. T. 1150.

## PART IX. SECT. 1, SUB-SECT. 13.

**b. Steam engine—Whistle—Horse frightened.**—ROX v. LUCKNOW VILLAGE (1893), 21 A. R. 1.—CAN.

**1542. Steam threshing machine—Highway Act, 1835 (c. 50), s. 70—Knowledge of defendant.]—**Deft. was the owner of a steam threshing machine, which he lent to hire to a farmer, & sent his man with it, who superintended it. The machine was erected within a distance of twenty-five yards from the highway, but there was no evidence to show that deft. directed it to be so erected, & he was himself not present at the time. Being convicted under the above sect.:—*Held*: the conviction was bad.—**HARRISON v. LEAPER** (1862), 5 L. T. 640; 26 J. P. 373.

**1543. ——— Portable engine.]—**A portable steam engine, upon wheels & drawn by horse power, used to drive a threshing machine within a barn, but not fixed thereto or to the soil, is within the above sect.—**SMITH v. STOKES** (1863), 4 B. & S. 84; 2 New Rep. 278; 32 L. J. M. C. 199; 8 L. T. 425; 27 J. P. 535; 11 W. R. 753; 122 E. R. 391.

**1544. Steam pump — Horses frightened.]—**Adjoining a public highway was a pump-house of deft. railway co., which, when worked, created much noise, & ejected steam in such a manner as to render it impossible to take some horses along that part of the highway in safety. The pump-house had been in its present position for many years. While pltf.'s coachman, who was acquainted with that part of the highway, was driving pltf.'s carriage past the pump-house, the horses took fright, bolted, & met with an accident. In an action against defts. for damages resulting from such accident:—*Held*: there was nothing to show that there was any negligence or breach of duty on the part of defts. so as to enable pltf. to maintain his action.—**RAMSDEN v. LANCASHIRE & YORKSHIRE RY. CO.** (1888), 53 J. P. 183, D. C.

#### SUB-SECT. 11.—VEHICLES, ETC., LEFT ON ROADSIDE.

**1545. Steam plough & van Horse frightened.]—**A house-van attached to a steam plough was left for the night on the grassy side of a highway by deft. The van & plough were four or five feet from the metalled part of the way. During the evening pltf.'s testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the vans she shied at it, kicked, & galloped kicking for one hundred & forty yards, then got her leg over the shaft, fell, & kicked her driver as he rolled out of the cart. He afterwards died from the kick so received. In an action under Fatal Accidents Act, 1846 (c. 93), s. 1, by his exors. for wrongful & negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably, & negligently, & caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, & by the inherent vice of the mare combined, & that there was no contributory negligence:—*Held*: on these findings the verdict & judgment must be for pltf.; for the unauthorised, unreasonable, & dangerous user of the highway by deft. was the proximate cause of the

injury.—**HARRIS v. MOBBS** (1878), 3 Ex. D. 268; 39 L. T. 164; 42 J. P. 759; 27 W. R. 154.

*Annotations:—***Fold**, **Wilkins v. Day** (1883), 12 Q. B. D. 110. **Consd.** **Ellis v. Banyard** (1911), 106 L. T. 51. **Refd.** **Wilkinson v. Downton**, [1897] 2 Q. B. 57; **Dulleu v. White**, [1901] 2 K. B. 669; **Hadwell v. Righton**, [1907] 2 K. B. 345; **Heath's Garage v. Hodges**, [1916] 2 K. B. 370.

**1546. Farm roller—Horse frightened.]—**Deft. farmed land on either side of a highway. His servants removed a roller from one of his fields across the highway to the gate of the opposite field, & taking away the horses, left the roller on the greensward at the roadside with its shafts turned up, but projecting a few inches over the metalled part of the road, intending it to remain there until it should suit their convenience to draw it away. Pltf.'s wife drove past the spot, & her pony shied at the roller, overturned the carriage & caused her death. In an action under Fatal Accidents Act, 1846 (c. 93), the jury found that the accident was caused by an unreasonable user by deft. of the highway:—*Held*: the verdict was warranted by the evidence, & pltf. was entitled to judgment.—**WILKINS v. DAY** (1883), 12 Q. B. D. 110; 49 L. T. 399; 48 J. P. 6; 32 W. R. 123, T. C.

*Annotations:—***Refd.** **Wilkinson v. Downton**, [1897] 2 Q. B. 57; **Dulleu v. White**, [1901] 2 K. B. 669; **Heath's Garage v. Hodges** (1916), 14 L. G. R. 195.

#### SUB-SECT. 15.—OFFENCES IN CONNECTION WITH RIDING AND DRIVING.

See Highway Act, 1835 (c. 50), ss. 77, 78.

**1547. Stationary vehicle—"Riding" on shafts of vehicle.]—**ANON. (prior to 1820), cited in 3 B. & Ald. at p. 336; 106 E. R. 686.

*Annotation:—***Mentd.** **Parton v. Williams** (1820), 3 B. & Ald. 330.

**1548. — Whether "passing upon highway" — Horses unattended outside house.]—**Applt., the driver of a farm wagon, was convicted under Highway Act, 1835 (c. 50), s. 73, it appearing from the evidence that when he was driving along a highway he stopped his horses & went into a public-house. The horses remained standing outside the house while applt. was inside, & it was contended on his behalf that, as the horses were standing still, the cart was not passing upon the highway:—*Held*: the conviction was right.—**PHYTHIAN v. BAXENDALE**, [1895] 1 Q. B. 768; 64 L. J. M. C. 174; 72 L. T. 465; 59 J. P. 217; 43 W. R. 412; 30 Sol. Jo. 397; 18 Cox, C. C. 119; 15 R. 324, D. C.

**1549. — In care of attendant — "Leaving" so as to obstruct.]—****HINDE v. EVANS**, No. 1311, ante.

**1550. Refusal to disclose owner's name—Highway Act, 1772 (c. 78), s. 60—Remedy.]—**A magistrate seeing a person riding on a cart, without any person being with the horses to guide them, requested to know the name of the owner of the cart. The person not only refused the information, but placed himself before the board, on which the owner's name was painted, so that the magistrate could not read it. The magistrate then removed him from his situation & read the name. In an action for the assault:—*Held*: the magistrate was not justified under the above sect. in removing

unattended along the highway. The horses tore open some of the bags & ate of the wheat in such quantities that four of them died & others were injured:—*Held*: the teamster was not liable in damages for the loss of, & injury to, the horses on the ground of nuisance.—**McLARY v. HANNON**, [1914] V. L. R. 526.—**AUS.**

#### PART IX. SECT. 1, SUB-SECT. 14.

**k. Broken-down wagon—Left on highway for unreasonable time.]—**A broken down wagon left on the highway does not become a nuisance or obstruction, until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time.—**HOWDEN v. LAKE**

**SIMCOE ICE CO.** (1891), 21 A. R. 411.—**CAN.**

**1. Wagon loaded with wheat—('on assumption of wheel by horse—Death of horse.)—**A teamster left a wagon, loaded with wheat in bags, unguarded on a highway. A farmer, whose property adjoined the highway, turned his horses out to find their way home

**Sect. 1. — Nuisances: Sub-sects. 15, 16 & 17.]**

the driver of a cart from one part of it to another, in order to obtain the name of the owner of the cart, by reading it on the board attached to the cart. *JONES v. OWEN* (1823), 2 Dow. & Ry. K. B. 600; 1 Dow. & Ry. M. C. 200; 1 L. J. O. S. K. B. 139.

*See, now, Highway Act, 1835* (c. 50), s. 78.

**1551. Driving two vehicles together—Manner in which horses must be attached—Highway Act, 1835** (c. 50), s. 77.]—A. was driving two carts, & the horse of the hinder cart was attached by a rope from its head, which, after being passed over the back of the first cart, was fastened to the body of the first cart about the centre of it, & the horse's head was drawn close up to the back of the first cart: *Held*: a compliance with the provisions of the above sect. —*ROBERTSON v. BIRKETT* (1858), 32 L. T. O. S. 105; 7 W. R. 50; 22 J. P. Jo. 753.

**1552. "Driver" Whether rider included.]**—Applt. was convicted by justices of furiously riding on the back of a horse along a highway, & a penalty of £1 was imposed upon him:—*Held*: although the word "rider" was not mentioned in the penal clause of Highway Act, 1835 (c. 50), s. 78, the justices had jurisdiction to convict applt.

It may have been intended by the legislature that the word "driver" shall include "rider," because a person riding must "drive," that is, guide or conduct the horse. The word "drive" is sometimes popularly used in this sense; & it is applied to a rider at the beginning of this very sect., where it provides that, "if the driver of any waggon, cart, or other carriage of any kind shall ride . . . upon any horse or horses drawing the same" without the means of proper control, he shall commit an offence against the Act; it is also applied to the person who ought to be in charge of the vehicle, but who quits it & goes to the other side of the hedge. I therefore think it would not be an extravagant construction to hold that in the latter part of the penal clause "driver" means a person guiding or conducting, & therefore a "rider" (*GROVE, J.*).—*WILLIAMS v. EVANS* (1870), 1 Ex. D. 277; 35 L. T. 864; 41 J. P. 151. *Annotation: Refd. A.-G. v. Beauchamp*, [1920] 1 K. B. 650.

**1553. "Carriage"—Whether bicycle included.]**—A person riding a bicycle on a highway at such a pace as to be dangerous to the passers-by may be convicted of furiously driving a carriage under Highway Act, 1835 (c. 50), s. 78.—*TAYLOR v. GOODWIN* (1870), 4 Q. B. D. 228; 48 L. J. M. C. 104; 40 L. T. 458; 43 J. P. 653; 27 W. R. 489, D. C.

*Annotations:—Consd. Simpson v. Tadmouth & Shaldon Bridge Co.*, [1903] 1 K. B. 403. *Refd. Williams v. Ellis* (1880), 5 Q. B. D. 175; *Parkyn v. Preist* (1881), 7 Q. B. D. 313; *Hoddnott v. Newton, Chambers*, [1901] A. C. 49; *Pollard v. Turner* (1912), 11 L. G. R. 42.

**1554. — Cart conveying goods to market—Whether included—Highway Act, 1835** (c. 50), s. 76.]—The above sect. which requires the owner's name to be painted on every "waggon, cart, or

other such carriage" used on any highway, & imposes a penalty upon default only includes carriages *ejusdem generis* with a waggon or cart.

A light spring cart with two wheels, used by an agricultural implement maker for the conveyance of the owner & his family, & also of agricultural implements to market, & upon which duty under Revenue Act, 1869 (c. 14), s. 18, was paid:—*Held*: not to be *ejusdem generis* with a waggon or cart for the purposes of the above sect.—*DANBY v. HUNTER* (1879), 5 Q. B. D. 20; 49 L. J. M. C. 15; 41 L. T. 622; 44 J. P. 283; 28 W. R. 228, D. C.

*Annotations:—Refd. Moore v. Lewis* (1905), 70 J. P. 26; *French v. Champkin*, [1920] 1 K. B. 76.

**1555. Failure to keep on left side—Two vehicles only on road.]**—A waggon driven by applt. was so much beyond the centre of the road that there was not room for a motor car which approached from behind to pass the waggon on its off side. Applt. signalled to the driver of the motor car to pass him on his near side & it did so. The motor car was the only other vehicle on the road at the time, & its driver was not inconvenienced or delayed by the action of applt.:—*Held*: applt. had not committed an offence under Highway Act, 1835 (c. 50), s. 78.—*NUTTALL v. PICKERING*, [1913] 1 K. B. 14; 82 L. J. K. B. 38; 107 L. T. 852; 77 J. P. 30; 10 L. G. R. 1075; 23 Cox, C. C. 263, D. C.

**1556. Riding on footpath—Highway Act, 1835** (c. 50), s. 72—Footpaths to which Act applies.]—The above sect. applies only to footpaths, as well as causeways, by the side of roads & not to footways in general.—*R. v. PRATT* (1867), L. R. 3 Q. B. 64; 37 L. J. M. C. 23; 32 J. P. 246; 16 W. R. 146.

*Annotation:—Mentid. Buckley v. Crawford* (1892), 9 T. L. R. 85.

**1557. — — — Whether actual "injury or interruption" must be proved.]**—In an action by pltf. who had been convicted for riding a bicycle on the footpath contrary to the above sect., against the police constable who had arrested him, the county ct. judge held that it was necessary for deft. in order to justify his conduct to aver that pltf. was riding the bicycle "to the injury of such highway or the injury, interruption, or personal danger of any person travelling thereon":—*Held*: the county ct. judge was wrong, & the words forbidding riding on the footway were not governed by the words in the following part of the same sect.—*BROTHERTON v. TITTENSOR* (1896), 60 J. P. 72, D. C.

**1558. Furious driving or riding—Endangering passengers on highway—What must be proved.]**—A person, being the sole occupant of & in charge of a cart drawn by a horse, is under Highway Act, 1835 (c. 50), s. 78, responsible for the driving of it, & commits an offence within the sect. if he drive it so furiously as to endanger the life or limb of any passenger who might be expected to be on the highway. In such a case it is not necessary to prove that any passenger was in fact on the highway, & in a position in which he was in danger.—*CHATTERTON v. PARKER* (1914), 111 L. T. 380; 78

*ARCHIBALD* (1918), 29 Can. Crim. Cas. 146.—CAN.

**p. Riding on footpath—Whether actual obstruction must be proved.]**—A person riding a bicycle on a footpath along the side of a public road in a country district may although no evidence can be produced of obstruction to the free passage of foot passengers along that footpath or of any foot passenger on the same footpath being in sight of the person riding be summarily convicted under 14 & 15 Vict. c. 93, s. 13, s-a. 3, for wilfully

**PART IX. SECT. 1, SUB-SECT. 15.**

**1553 l. "Carriage"—Whether bicycle included.]**—*M'KEE v. McGRATH* (1892), 30 L. R. Ir. 41.—IR.

**m. Incumbering street—Riding on sidewalk—Velocepede.]**—The use of a velocipede on a sidewalk, though no one be near it, may be an obstruction, within a bye-law that no person shall by any vehicle incumber or obstruct the sidewalk.—*R. v. PLUMMER* (1870), 30 U. C. R. 41.—CAN.

**n. — — — Bicycle.]**—A bicycle

is a "vehicle," & riding it on the sidewalk is "incumbering" the street within Consolidated Municipal Act, s. 496 (27), & of a bye-law of a municipality passed under it.—*R. v. JUBIN* (1893), 24 O. R. 327.—CAN.

**o. Driving on sidewalk—Validity of municipal ordinance.]**—A. was prosecuted for driving a motor-car on a street sidewalk in H., contrary to Municipal Ordinance No. 4, s. 29:—*Held*: the municipal ordinance was not repealed by Nova Scotia Motor Vehicles Act, 1914, s. 41.—R. v.

J. P. 339; 12 L. G. R. 1205; 24 Cox, C. C. 312, D. C.

—[See CRIMINAL LAW, Vol. XV., pp. 863 et seq., & STREET & AERIAL TRAFFIC.

Obstruction.]—See Sub-sect. 1, *ante*.  
Dangerous traffic.]—See Sub-sect. 5, *ante*.

#### SUB-SECT. 16.—WATER OR SNOW ON HIGHWAY.

1559. Water from eaves—Flow across footway.]—CROASDILL v. RATCLIFFE, No. 1313, *ante*.

1560. Waterspout from water main—Not fenced.]—HILL v. NEW RIVER CO., No. 1397, *ante*.

1561. Water dripping from bridge on to highway.]—A complaint was made against appts., a railway co., under 18 & 19 Vict. c. 121, s. 8, in respect of a "nuisance" alleged to exist in & upon their premises, a railway bridge crossing over a public street, by reason of a want of proper & sufficient means to prevent the percolation & overflow of water upon persons passing under or near to the premises. It was proved that during rainy weather, & for some time afterwards, the water in a dirty state percolated through the bottom of the bridge, which was formed of wooden planks, & fell upon the persons passing along the street:—*Held*: although there might be a nuisance, in respect of which appts. were liable to be indicted, they were not liable to be proceeded against under this Act, inasmuch as the word "nuisance" in sect. 8 must be read in the sense of nuisances injurious to health & the percolation of water as above mentioned could only be said to be indirectly a nuisance injurious to health.—GREAT WESTERN RY. CO. v. BISHOP (1872), L. R. 7 Q. B. 550; 41 L. J. M. C. 120; 20 L. T. 905; 37 J. P. 5; *sub nom.* R. v. GLAMORGAN J.J., GREAT WESTERN RY. CO. v. BISHOP, 20 W. R. 969.

*Annotations*:—MEND. Malton L. B. v. Malton Farmers Manure Co. (1879), 4 Ex. D. 302; Dixon v. Metropolitan Board of Works (1881), 7 Q. B. D. 418; Bishop v. Uckland L. B. v. Bishop Uckland Iron & Steel Co. (1882), 10 Q. B. D. 138; Warman v. Tibbatts (1922), 128 L. T. 477.

1562. Snow on street—Liability of tramway company.]—A tramway co. after a heavy fall of snow cleared their track by means of a snow-plough & heaped up the snow upon the sides of the streets: they then scattered salt upon the rails & in the vicinity; the town council did not take any immediate steps to remove the briny slush so produced, & it was left upon the streets:—*Held*: a legal nuisance had been committed which was not sanctioned by either the special or the general Tramways Acts, & the default, if any, of the town council did not affect the primary liability of the tramway co.—OGSTON v. ABERDEEN DISTRICT TRAMWAYS CO., [1897] A. C. 111; 66 L. J. P. C. 1; 75 L. T. 633; 61 J. P. 436; 13 T. L. R. 123, H. L.

*Annotations*:—Consid. Acton U. D. C. v. London United

preventing & interrupting the free passage of persons along the road of which the footpath forms a part.—M'KEE v. M'GRATH (1892), 30 L. Ir. 41.—IR.

#### PART IX. SECT. 1, SUB-SECT. 16.

1559*i*. Water from eaves—Flow across footway.]—Defts. were the owners of a building upon a street. A pipe connected with the eave troughs conducted the water from the roof down the side of the building, & by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice upon which pltf. slipped & fell while walking in the street, & injured herself:—*Held*: defts. were not liable.

Tramways (1901), 100 L. T. 80. *Distd.* Montreal City v. Montreal Street Ry., [1903] A. C. 482.

1563. —[The removal of snow from the portion of a road lying between the rails of a tramway is not part of the "maintenance" of that portion within Tramways Act, 1870 (c. 78), s. 28, so as to cast upon the tramway co. the duty of removing it unless the fall of snow is of such a depth as to render the road impassable. The mere fact that the removal of the snow will render the passage over the road more convenient is not enough to bring the case within the sect.—ACTON DISTRICT COUNCIL v. LONDON UNITED TRAMWAYS, [1909] 1 K. B. 68; 78 L. J. K. B. 78; 100 L. T. 80; 73 J. P. 6; 53 Sol. Jo. 62; 7 L. G. R. 20, D. C.

#### SUB-SECT. 17.—UNDERMINING ROADS OR SUPPORTS.

1564. Mining operations underneath highway—By lessee of minerals—Highway Act, 1835 (c. 50), s. 72.]—PEASE v. PAYER (1875), 39 J. P. Jo. 407.

1565. —Under statutory powers—Liability for subsidence of surface.]—BENFIELDSIDE LOCAL BOARD v. CONSETT IRON CO., No. 1715, *post*.  
*See, generally*, MINES.

1566. Removal of supporting bank—Bank built to check landslides—Whether injunction proper remedy—Probability of further landslides remote.]—A public highway vested in the W. Corp'n. ran for some 1,200 feet along the top of a slope rising about 20 feet up from the river S., & the slope continued on the other side of the road at varying heights of about 300 feet. In 1875 a serious landslide occurred which destroyed the road & houses along this slope. Engineers advised that to prevent future landslides a great weight should be placed on the toe of the slope alongside the river, & accordingly the co. which then owned the land on which the slope was dumped over 40,000 tons of slag along the toe. Trees have since grown on the slope, & houses have been built on it, & no further landslide has taken place except for trivial local slips. Defts., the present owners of the land on which the slag is, having recently commenced to work it, the W. Corp'n. brought this action to restrain them by injunction from excavating, removing or working the slag so as to create a nuisance to the public or to cause damage to the road:—*Held*: pltf. had made out no case upon which the ct. ought to grant an injunction to prevent the user by a person of his own property, as it was necessary to show that substantial damage at no remote period would result; but on the evidence the land on which the road was, & the whole of the slope, had come to rest, & the removal of the slag heap would not have the slightest effect on the road if a sufficient buttress to the road which was at the higher level was left.—

SKELTON v. THOMPSON (1883), 3 O. R. 11.—CAN.

1562*i*. Snow on street—Liability of tramway company.]—TORONTO RY. CO. v. TORONTO (CITY) CORPN. (1895), 24 S. C. R. 589.—CAN.

1562*ii*. —[The city council of M. being bound as the road authority to remove the ice & snow on the streets from curb to curb including the snow thrown or falling therein from the roofs of houses & removed thereto from the sidewalks:—*Held*: the respondent street railway co. having contracted with the city to keep their track free from ice & snow did not commit a nuisance by sweeping their snow into the street.—MONTREAL (CITY) v. MON-

TRÉAL STREET RY. CO., [1903] A. C. 482.—CAN.

q. —From roof of adjoining building—Duty of owner.]—The owner or occupant of a building, the roof of which is so constructed that from natural causes the snow or ice which falls or collects upon it will naturally & probably slide from the roof, is bound, apart from any obligation imposed upon him by a municipal bye-law to take all reasonable means to prevent the snow or ice from falling upon an adjoining highway, & causing damage to person or property there.—MEREDITH v. PEER (1917), 39 O. L. R. 271; 12 O. W. N. 97; 35 D. L. R. 592.—CAN.

*Sect. 1.—Nuisances: Sub-sects. 17, 18, 19, 20, 21 & 22. Sect. 2: Sub-sects. 1, 2, 3, 4, 5 & 6.]*

A.-G. (AT RELATION OF WENLOCK CORPN.) & WENLOCK CORPN. v. HARPER & COALPORT COLD BLAST SLAG CO., LTD. (1925), 89 J. P. 80.

#### SUB-SECT. 18.—SANITARY CONVENIENCES.

**1567. Construction in mews constituting highway—Close to dwellings.**—*VERNON v. ST. JAMES, WESTMINSTER, VESTRY, No. 427, ante.*

*See, generally, NUISANCE; PUBLIC HEALTH.*

#### SUB-SECT. 19. NUISANCES ARISING FROM EXERCISE OF STATUTORY POWERS.

*See Sect. 2, sub sect. 7, post.*

#### SUB-SECT. 20.—MALICIOUS INJURY.

*See CRIMINAL LAW, Vol. XV., pp. 1020 et seq.*

#### SUB-SECT. 21.—HOARDINGS.

*See Part XIII, Sect. 1, sub-sect. 18; Sect. 2, sub-sect. 14, post.*

#### SUB-SECT. 22.—OTHER CASES.

**1568. Waterspout from water main Liability of owner.**—*HILL v. NEW RIVER CO., No. 1397, ante.*

### SECT. 2. DEFENCES.

#### SUB-SECT. 1. ABATEMENT BEFORE TRIAL OF INDICTMENT.

*See Part IX., Sect. 3, sub-sect. 6, post.*

#### SUB-SECT. 2. BENEFIT TO PUBLIC.

**1569. Benefit greater than inconvenience Obstruction.**—*R. v. MORRIS, No. 1385, ante.*

**1570. Tramways.**—*R. v. TRAIN, No. 1387, ante.*

**1571. Gas mains.**—A joint-stock co. established by deed for the purpose of supplying a town with gas, & registered under 7 & 8 Vict. c. 110, cannot justify the breaking up of the public

streets for the purpose of laying down their main pipes, on the ground that they have obtained the permission of the surveyor of highways, or of the local comrs. for lighting the town, or on the ground that the act is necessary for the mere convenient enjoyment of the adjoining houses; & they are liable to an indictment for the nuisance.

It lies on defts. to show they have a lawful excuse. [Counsel] relies on the Joint Stock Companies Act, but it is quite clear that that Act gives them no authority over the rights of other individuals or the public. It merely enables them to sue & be sued & to do such acts as other private individuals or partnerships might lawfully do. As to the Act for lighting Sheffield, it was not much relied on & it clearly furnishes no authority for what defts. have done. Then, is there any common law authority? Counsel pointed to the licence of the surveyor of highways; but he has authority only to do what is necessary for the repair of the highways—not to obstruct them; & unless he can authorise the obstruction, his licence is void (LORD CAMPBELL, C.J.).—*R. v. SHEFFIELD GAS CONSUMERS' CO. (1853), 1 C. L. R. 916; 21 L. T. O. S. 153; 18 Jur. 146, n.; 17 J. P. Jo. 371.*

*Annotations: Refd. Ellis v. Sheffield Gas Consumers' Co. (1853), 22 L. T. O. S. 84; R. v. Longton Gas Co. (1860), 8 Jur. N. S. 601; Preston Corp. v. Fullwood L. B. (1885), 53 L. T. 718.*

#### SUB-SECT. 3. CONSENT OF HIGHWAY AUTHORITIES.

**1572. Consent must be valid—Authority without power to consent—Licence to lay gas mains.**—*R. v. SHEFFIELD GAS CONSUMERS' CO., No. 1571, ante.*

**1573. — — — Licence to lay water pipes.**—The corpn. of the town of P. had for several years supplied water to the adjoining district of F. & for such purpose had entered upon & broken up the highways in F. whenever necessary. These acts were not authorised either by statute or by the charter of P.; but the corpn. relied upon irrevocable licences alleged to have been granted by the predecessors of the local board of F., i.e. the highway surveyors, & upon prescription:—*Held:* (1) the corpn. had no power by common law to break up the roads of the adjoining district; (2) the highway surveyors had no power to grant the alleged irrevocable licences; (3) as no legal grant could have been made, a prescriptive right did not exist; (4) the acquiescence of the local board did not empower the corpn. to continue their acts; (5) such acts amounted to a nuisance.—*PRESTON CORPN. v. FULLWOOD LOCAL BOARD*

### PART IX. SECT. 1, SUB-SECT. 22.

**r Moving building along highway (Obstruction of street railway)**—*Deft. J., agreed with his co-deft. D. for the removal of a frame tenement to another part of the city. Under a bye-law of the city, all persons were prohibited from moving any building along any street without the permission of the board of works. In this case no such permission was obtained, & in the course of hauling the building along the line of pths. track one of the sills was upset, thus preventing its further removal for two days, during which time pths. sustained loss by non-receipt of fares & damage to their property.—Held: J. & D. were liable for the loss.—TORONTO STREET RY. CO. v. DOLLERY & JEFFERIES (1886), 12 A. R. 679.—CAN.*

**a. Written assent—What amounts to.**—*Held:* defts., being indicted for obstructing streets in the town of S., were entitled to an acquittal under 22 Vict. c. 116, s. 15. Written assent given afterwards by the municipality would suffice, & might be inferred from their letters.—*R. v. GREAT WESTERN RY. CO. (1862), 21 U. C. R. 555.—CAN.*

**t. General rule.—Accompliance subject to existing state of things.**—*Defts. removed pth's porch as a nuisance, & justified as being a committee of the city council, duly authorised to remove anything which was a nuisance. The porch had been in existence for sixty years.—Held:* in the absence of evidence as to the original laying out of the street, its dedication to the public should be taken as subject to the encroachment.—*HAGARTY v. PRYOR (1872), 8 N. S. R. 532.—CAN.*

**a. Whether available as defence—Compensation for removal.**—The right of the public to the free & unobstructed use of a street cannot be taken away by the existence of an obstruction at the time when the street is dedicated; nor is the occupier of a house which constitutes such obstruction entitled to compensation from the municipality for its removal.—*BROWN v. FIMONSTON TOWN (1891), 23 S. C. R. 308.—CAN.*

**b. Effect on jurisdiction of justices.**—To a complaint before justices for obstructing a public footway it is a good defence that such footway was dedicated to the public subject to the right of deft. to commit the acts of obstruction complained of & such defence if raised *bona fide* ousts the jurisdiction of the justices.—*R. v. LONDONDERRY JJ., [1902] 2 I. R. 266.—IR.*

(1885), 53 L. T. 718; 50 J. P. 228; 34 W. R. 196; 2 T. L. R. 134.

1574. ——— [Permission to lay tram lines.]—*A.-G. v. BARKER*, No. 1334, *ante*.

1575. Informality in giving consent—Omission to enter in minute book.]—The omission to enter [in minute book] a consent by the trustees of a public highway to a private person to bring forward a fence on to the highway so as to straighten the road, does not render the act done under such consent unlawful, & such person cannot afterwards be indicted for encroaching on the public highway in respect of the act so done.—*R. v. BURRELL* (1867), 16 L. T. 572; 31 J. P. 438; 15 W. R. 879; 10 Cox, C. C. 462, C. C. R.

1576. Negligence in executing work—Shoring up house—Unprotected beams.]—Where obstructions are placed upon the footway, such as beams for shoring up a house, with the sanction of the local authority, reasonable precautions must be taken that such obstructions are not left in a dangerous condition so as to cause injury to foot passengers.—*HOARE v. KEARLEY* (1885), 1 T. L. R. 426.

#### SUB-SECT. 4.—CUSTOM OR USAGE.

1577. Erection of stall—During market or fair—Sufficient passage way left.]—A custom to erect a booth or stall, during the period of a fair or market on any part of a public street or highway, sufficient space being left for the public to pass, is a good custom, & such custom may be replied to a plea of a public highway & is not inconsistent with it.—*ELWOOD v. BULLOCK* (1841), 6 Q. B. 383; 13 L. J. Q. B. 330; 8 J. P. 473; 8 Jur. 1044; 115 E. R. 147; *sub nom.* *ELGOOD v. BULLOCK*, 3 L. T. O. S. 298.

*Annotations*:—*Reid*, *Dawes v. Hawkins* (1860), 7 Jur. N. S. 262; *Gerring v. Barfield* (1864), 16 C. B. N. S. 597; *Arnold v. Blaker* (1871), L. R. 6 Q. B. 433; *Simpson v. Wells* (1872), L. R. 7 Q. B. 214; *Neeld v. Hendon* U. D. C. (1899), 81 L. T. 405; *A.-G. v. Reimer* (No. 2), [1913] 2 Ch. 140.

*Compare* Nos. 1591–1593, *post*.

1578. ——— Statute sessions for hire of servants—Immemorial usage necessary.]—Appl. was charged under Highway Act, 1835 (c. 50), s. 72, with obstructing a public footway. He had put up a stall for the sale of refreshments at a statute sessions for the hiring of servants; this had been done for more than fifty years, & the statute sessions had been held before 5 Eliz. c. 4. Applt., thereupon, contended that he had a right by custom to erect his stall in the same way as at a fair, or, at all events, that he *bonâ fide* claimed such a right, & the justices' jurisdiction was therefore ousted. The justices having convicted applt.:—*Held*: the justices were right: for that, as the statute sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III., there could be no such custom by immemorial usage as was claimed.—*SIMPSON v. WELLS* (1872), L. R. 7 Q. B. 214; 41 L. J. M. C. 105; 26 L. T. 163; 36 J. P. 774.

*Annotation*:—*Reid*, *Mercer v. Denne*, [1904] 2 Ch. 534.

1579. "Grips" made at road side—For drainage—Unreasonableness of custom.]—*NICOL v. BEAUMONT*, No. 443, *ante*.

*See, generally*, CUSTOM & USAGE, Vol. XVII., pp. 9 *et seq.*

#### SUB-SECT. 5.—PRESCRIPTION.

1580. Placing logs in highway.]—A prescription to lay logs of wood for fuel in the highways before

the doors of ancient houses, leaving sufficient room to pass, is bad; & though it is a public nuisance, yet a person deriving any special damage may have a private action.—*FOWLER v. SANDERS* (1617), (Cro. Jac. 446; 79 E. R. 382).

*Annotations*:—*Reid*, *Jeynes v. Moor* (1699), 12 Mod. Rep. 262; *R. v. Bell* (1822), 1 L. J. O. S. K. B. 42; *Elwood v. Bullock* (1844), 13 L. J. Q. B. 330. *Mentd.* *Dowell v. Sanders* (1618), Cro. Jac. 490.

1581. Holding markets & fairs in highway—Period exceeding twenty years.]—Where a place has been used as a public fair or market for above twenty years, to which persons have resorted for the purpose of there exposing articles to sale, they shall not be liable to be indicted for a nuisance, as for obstructing the highway, if fairly engaged in using the place as a fair or market.—*R. v. SMITH* (1802), 4 Esp. 109, N. P.

1582. Dangerous excavation.]—It is universally the duty of the occupier of a house having an area fronting a public street, so to fence it as to make safe to passengers; & it is no defence to an action against him for neglecting to do so, whereby plff. fell down into the area & was hurt, that when he took possession of the house, & as long back as could be remembered, the area was in the same open state as when the accident happened.—*COUPLAND v. HARDINGHAM* (1813), 3 Camp. 398, N. P.

*Annotations*:—*Consd.* *Barnes v. Ward* (1850), 9 C. B. 392; *Fisher v. Prowse*, *Cooper v. Walker* (1862), 2 B. & S. 770. *Reid*, *Cornwall v. Metropolitan Sewers Comrs.* (1855), 10 Exch. 771; *A.-G. v. Roe*, [1915] 1 Ch. 235.

*Compare* Nos. 1591–1593, *post*.

1583. Encroachment on highway—Enclosure of adjoining land.]—*R. v. EDWARDS* (1810), 11 J. P. 602, n.

*Annotation*:—*Reid*, *Harvey v. Truro R. D. C.* (1903), 89 L. T. 90.

1584. ——— Trees.]—*TURNER v. RINGWOOD HIGHWAY BOARD*, No. 476, *ante*.

1585. Standing vehicles on highway—Convenience of customers of inn.]—The mere fact that a piece of ground, part of a public highway, has for twenty years been used by an innkeeper for the standing of the vehicles belonging to his guests, is no answer to a complaint for the obstruction under Highway Act, 1835 (c. 50), s. 72.—*GERRING v. BARFIELD* (1861), 16 C. B. N. S. 597; 11 L. T. 270; 28 J. P. 615; 143 E. R. 1261.

1586. Breaking open road—For water supply.]—*PRESTON CORPN. v. FULLWOOD LOCAL BOARD*, No. 1573, *ante*.

Ploughing up footway.]—*Compare* Nos. 515, 1356–1359, *ante*.

1587. Vehicles on footway.]—*SHERINGHAM URBAN DISTRICT COUNCIL v. HOLSEY*, No. 371, *ante*.

#### SUB-SECT. 6.—DEDICATION SUBJECT TO OBSTRUCTION.

Limited dedication generally, *see* Part III., Sect. 2, sub-sect. 6, *ante*.

1588. General rule—Acceptance subject to existing state of things.]—The corpn. of Yarmouth are, & have been since the time of King John, owners of the soil of the south quay, in that borough. The quay is bounded on the east by houses, & on the west by Yarmouth Haven. From the time of Charles I., there has been a common & public highway over the quay; & so far back as living memory, the occupiers of some of the houses have used a part of the quay fronting them for depositing thereon anchors, timber, boats & other incumbrances. Such user was in fact enjoyed,

Sect. 2.—Defences: Sub-sect. 6.]

as of right, for more than twenty years, but not immemorably; & though it caused some inconvenience to the public, it did not produce an actual obstruction of the highway. By the rolls of the court leet of the borough, from the year 1632 to 1653, it appeared that many persons had been amerced for "overburdening" the quay with anchors, timber, blocks, etc., & thereby obstructing the highway. An occupier of one of the houses in the exercise of an alleged right, placed upon a part of the quay in front of his house, anchors, timber & other incumbrances, whereby the free use of the highway was obstructed:—*Held*: (1) upon these facts, the ct., being at liberty to draw inferences, could not infer that the right claimed had been exercised by the occupiers of the houses before any dedication of the highway to the public; (2) a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon.—*MORANT v. CHAMBERLIN* (1861), 6 H. & N. 541; 30 L. J. Ex. 299.

*Annotations*:—As to (1) *Reid*, *Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26. As to (2) *Reid*, *Flisher v. Prowse, Cooper v. Walker* (1862), 2 B. & S. 770; *Spice v. Peacock* (1875), 39 J. P. 581; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Sallis v. Whitbread*, [1917] 1 K. B. 736.

1589. .] — *FISHER v. PROWSE, COOPER v. WALKER*, No. 66, *ante*.

1590. .] (1) If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have been a nuisance if placed upon an ancient way, as, a flight of steps, or a projecting flap, no action can be maintained against the person dedicating it for an injury caused thereby.

(2) Nor will an action lie against the owner of a house having a covered area adjoining a public footway, which area was in existence before & at the time of the dedication of the highway, & was dedicated to the public before Highway Act, 1835 (c. 50), for an injury to an individual from the giving way of the covering of the area in consequence of the wear & tear occasioned by public user.

In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses & this road was a space which was covered over, as a means of access to the houses, by a flagging in which were gratings to let light & air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level at the rear. The space so covered had become, by dedication prior to Highway Act, 1835 (c. 50), a part of the public footway, & was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging & grating in front of one of the houses, having become weakened by user, gave way, & several persons were precipitated into the area below, a depth of about 30 feet, & one of them was killed:—*Held*: in an action by the widow of deceased, under Fatal Accidents Act, 1846 (c. 93), there being under the circumstances no legal liability on the part of the lessee of the houses to keep the surface of this way in repair, the action was not maintainable, the gulf at the side of the causeway being the result of the road being raised by the makers of it, not by the land at the side being excavated by the proprietors of it.

(3) The artificial character of the flagging & grating did not make it more or less a way to be repaired by the parish.—*ROBBINS v. JONES* (1863),

15 C. B. N. S. 221; 3 New Rep. 85; 38 L. J. C. P. 1; 9 L. T. 523; 10 Jur. N. S. 239; 12 W. R. 248; 143 E. R. 768.

*Annotations*:—As to (1) *Distd. Silverton v. Marriott* (1888), 59 L. T. 61. As to (2) *Appld. Horridge v. Makison* (1915), 84 L. J. K. B. 1294. *Reid*, *Gautret v. Egerton* (1867), L. R. 2 C. P. 371; *Hamilton v. St. George, Hanover Square* (1873), L. R. 9 Q. B. 42. *Generally*, *Mentd. Lane v. Cox* (1896), 66 L. J. Q. B. 193; *Cavalier v. Pope*, [1906] A. C. 428; *Ryall v. Kidwell*, [1914] 3 K. B. 136; *Dobson v. Horsley*, [1915] 1 K. B. 634; *Bromley v. Mercer*, [1922] 2 K. B. 126; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74.

1591. Market rights in street—Subject to toll.]—*Pltf.* claimed under the lord of the manor of C. as lessee of the street tolls & markets of the town of C. The manor was granted by Henry III. to the inhabitants of C., with a market & fair there, for a term of four years from 1220. Charles I., by letters patent, granted it in fee to H., & all tolls & markets within it. From time immemorial till 1786 there was a market house belonging to the lord of the manor in the High Street of C., & tolls immemorably paid, "as well of the market as for articles hawked about the town, & for stalls & standings for the sale of articles erected in the streets." The right was recognised & confirmed by several local Acts. In 1807 the C. comrs. appointed under 46 Geo. 3, c. 116, became lessees of the tolls, which were taken of a certain amount from 1806 to the time of the present action. Upon one of the boards exhibited in 1841 it appeared that a toll was taken payable by all persons hawking about the town fish, fruit, vegetables, or any other article for which no toll had been before paid in the market, of (*inter alia*) 1s. for every cartload; & for many years previous to the year 1841, & as long as living witnesses could remember, & continuously down to the time of the action, a similar board with similar words & figures had always been fixed in a conspicuous part of the market house at C. for the time being. The ct. having power to draw inferences of fact:—*Held*: the claim of toll was good, because it ought to be inferred that the toll had existed from time immemorial; if not, still a lawful origin of the toll within the time of legal memory, by means of a contemporaneous dedication of the streets to the public & a reservation of the toll by the Crown, ought to be inferred; a toll reasonable in amount, but varying from time to time according to the value of money, is valid in law; although a toll traverse, *i.e.* a toll for the mere use of a public way, is bad, this toll was not merely for passing & repassing, as it imported a licence to rest & stay upon the land for the purpose of selling merchantable commodities.—*LAWRENCE v. HITCH* (1868), L. R. 3 Q. B. 521; 9 B. & S. 467; 37 L. J. Q. B. 209; 18 L. T. 483; 32 J. P. 451; 16 W. R. 813, Ex. Ch.

*Annotations*:—*Consd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Reid*, *Bryant v. Foot* (1868), L. R. 3 Q. B. 497. *Mentd.* *Mills v. Colchester Corpn.* (1867), L. R. 2 C. P. 476; *A.-G. v. Simpson*, [1901] 2 Ch. 671.

1592. — Dedication of new streets—New streets subject to market rights—Construction of grant.]—By letters patent in 1682 the King granted market rights, "*in sine iusta*" a certain place called "Spittle Square" to one who was lessee of the square & had acquired greater part of the reversionary interest in it. The grantee or his successors in title laid out the square as a market place with four internal streets. The land immediately surrounding the square was afterwards laid out in four external streets, but it did not appear to whom the property in this surrounding land at any time belonged. There was evidence of a usage from the time of living memory to grant licences & take tolls for the sale of market-



able articles over parts of the external streets as well as over the market place & the internal streets:—*Held*: under the grant "*in sine juxta*" the market rights extended into the four external streets & the inference from the documents & evidence was that the streets were dedicated to the public subject to the exercise of the market rights.

*Qu.*: how far a grant "in or near" a place can lawfully extend.—*A.-G. v. HORNER* (1885), 11 App. Cas. 60; 55 L. J. Q. B. 193; 54 L. T. 281; 50 J. P. 504; 34 W. R. 641; 2 T. L. R. 202, II. L.

*Annotations*:—*Consd. Gingell, Son & Foskett v. Stepany B. C.*, [1908] 1 K. B. 115; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Reid. Williams v. Wednesbury Overseers, etc.* (1890), Ryde, Rat. App., [1886-90] 327; *Selby v. Whitbread*, [1917] 1 K. B. 736. *Mentid. Simpson v. Godmanchester Corp.* (1895), 64 L. J. Ch. 837; *Lonsdale v. Lowther*, [1900] 2 Ch. 687; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *Newcastle v. Workshop U. C.*, [1902] 2 Ch. 145; *Horner v. Stepany Assmt. Com.* (1908), 6 L. G. R. 651; *A.-G. v. Exeter Corp.*, [1911] 1 K. B. 1092; *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A. C. 744; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 608; *Re Ellis & Rudslip-Northwood U. D. C.*, [1920] 1 K. B. 343; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854.

1593. ————].—The lord of the manor had from time immemorial held a market in W. for the sale of hay & straw. The market was held in High Street, W., & except that it must be held in the parish, was without metes & bounds, & on market days, when the High Street was overcrowded, carts loaded with hay & straw for sale were permitted to stand in streets adjacent to the High Street. Under the powers of Acts of Parliament passed in 1840 & 1865 the local authority constructed new streets adjoining the High Street, & these streets were dedicated to the public by the Acts of Parliament for use as public streets. On market days when the High Street was overcrowded, carts loaded with hay & straw for sale stood in these new streets:—*Held*: they had a right to stand in these streets subject to the direction & control of the local authority, & the statutory dedication of the new streets to the public must be presumed to have been made subject to their being used for the purposes of the market when the High Street was overcrowded.—*STEPNEY CORPN. v. GINGELL, SON & FOSKETT, LTD.*, [1909] A. C. 245; 78 L. J. K. B. 673; 100 L. T. 629; 73 J. P. 273; 25 T. L. R. 411; 7 L. G. R. 613; *sub nom. GINGELL, SON & FOSKETT, LTD. v. STEPNEY BOROUGH COUNCIL*, 53 Sol. Jo. 356, II. L.

*Annotations*:—*Reid. A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Selby v. Whitbread*, [1917] 1 K. B. 736.

*Compare* Nos. 1419, 1577, 1581, *ante*.

1594. *Business purposes of adjoining owners—Space between footway & carriageway—Movable seats & shed.*—*Ptlf.* occupied a house standing in a continuous line of houses, in a district within the provisions of Metropolitan Management Act, 1855 (c. 120). Immediately in front of these houses was a paved public footway, 15 feet wide, then a space 33 feet wide, then a public carriageway 50 feet wide, then an intermediate space 58 feet wide, then a paved public footway 10 or 12 feet wide, immediately in front of another continuous line of houses facing the first-mentioned line. The intermediate spaces between the footways & the carriage road had always been made use of by the owners of the houses opposite in such manner as suited their respective occupations: in some instances they had erected permanent structures; & *ptlf.*, whose houses was a public-house, had, before the Act came into operation, placed in the part opposite to his house a permanent horse-trough; & the carts of his customers stood on that space while

the drivers & horses were resting; he had also put there movable seats, & in summer a movable shed, & had fixed sockets which were let into the ground. The footway was always left clear. *Ptlf.* paid the owner of the soil for permission to use the intermediate space. The public passed over the intermediate space as of right, subject to the above described user of it by the owners of the houses. Persons wishing to get from the footway to the carriage road did so without objection, picking their way where the space was not obstructed. The vestry elected under the Act having removed *ptlf.*'s shed & seats as obstructions, within sect. 120:—*Held*: the sect. did not justify them because the intermediate space was not part of a street within the Act, & because the shed & seats were not projections or obstructions against or in front of any house within the Act.

The dedication to the public of the use of the intermediate space was subject to the rights of the landlord & his tenants (*WIGHTMAN, J.*).—*LE NEVE v. MILE END OLD TOWN VESTRY* (1858), 8 E. & B. 1054; 27 L. J. Q. B. 208; 31 L. T. O. S. 81; 22 J. P. 657; 4 Jur. N. S. 680; 6 W. R. 338; 120 E. R. 392.

*Annotations*:—*Consd. McIntosh v. Romford L. B.* (1889), 61 L. T. 185. *Reid. Morant v. Chamberlin* (1861), 6 H. & N. 511; *Spice v. Peacock* (1875), 39 J. P. 581; *Williams v. Deptford U. D. C.* (1921), 11 T. L. R. 47.

1595. ———— *Deposit of goods.*—*MORANT v. CHAMBERLIN*, No. 1588, *ante*.

1596. ———— *Ship's tackle deposited on quay—Inconvenience without obstruction.*—*MORANT v. CHAMBERLIN*, No. 1588, *ante*.

1597. ———— *Goods exposed for sale on pavement.*—A metropolitan street, which was immemorially a highway, had a strip of ground about 12 feet wide between the carriageway & the houses on either side. This strip had long been paved & raised above the level of the carriageway. The occupiers of houses having for many years exposed their goods on part of this strip of ground, were summoned for causing an obstruction. There was no evidence before the magistrate to show when the practice of thus exposing the goods commenced, but it prevailed as far back as 1838:—*Held*: the magistrate was justified in drawing the inference that the obstruction was not so ancient as the highway, so as to qualify the dedication, & the occupiers were properly convicted of obstructing the highway within Metropolitan Police Act, 1839 (c. 47), s. 60.

In the cases which have been cited there was a fair ground for presuming that the obstruction had been coeval with the dedication. When there is nothing to show that these two things existed at two different epochs, then we may safely presume that they came into existence together. The present case stands on this footing that the road had existed from time immemorial & the obstruction had not been so. Then the result is that *applt.* might well have been convicted of the offence stated (*COCKBURN, C.J.*).—*SPICE v. PEACOCK* (1875), 39 J. P. 581.

1598. ———— *Grid & cellar flap—Proof of limited dedication.*—*W.* was a draper, who had a shop with a grid in front & a cellar flap on which he exposed goods, about a foot & more from his outer wall. He & his predecessor had done the same for thirty years. Being summoned for exposing goods which projected over the footway, he set up a claim of right as owner of the street or soil, & also on the ground of the original owner having always used to do the same:—*Held*: there being no proof of the dedication by the original owner subject to such right, & no proof

**Sect. 2.—Defences: Sub-sects. 6 & 7.]**

of ownership of the soil, the justices rightly convicted W. WHITTAKER v. RHODES (1881), 48 J. P. 182.

**1599. — User for forty years.]—**An information having been laid against applt. for obstructing the passage of a footway in front of his shop, which had been dedicated to the public only thirty years, & where he & his predecessors in title had exercised the right of putting goods for sale of over forty years, the justices convicted him:—*Held*: the decision of the justices was erroneous, & pltt. had never been divested of the right to use part of the footway which he & his predecessors in title had enjoyed for forty years.—JONES v. MATTHEWS (1885), 1 T. L. R. 482, D. C.

**1600. — Onus of proof of limited dedication.]—**LEICESTER URBAN SANITARY AUTHORITY v. HOLLAND, No. 398, *ante*.

**1601. — Shop set back on re-building.]—**W. had a draper's shop, which, on re-building, was set back to the extent of 4½ feet to suit the line of building. The space thus added to the pavement had been open to the street for two years, & W. put goods for sale on this space, & was charged under the local Act with exposing goods outside his shop:—*Held*: the justices were right in holding that the intervening space so used was not part of the street, & W. had a right to use it as he did.—HITCHMAN v. WATT (1894), 58 J. P. 720, D. C.

**1602. — Evidence of prior dedication.]—**OPENSHAW v. PICKERING, No. 278, *ante*.

**1603. Obstruction of footpath by ploughing—Previous obstruction as of right.]—**BRACKENBOROUGH v. THORSBY, No. 1356, *ante*.

**1604. — Origin of right—As far back as living memory.]—**MERCER v. WOODGATE, No. 1357, *ante*.

**1605. — From time immemorial.]—**ARNOLD v. BLAKER, No. 1359, *ante*.

**1606. — Thirteen years.]—**HARRISON v. DANBY, No. 1358, *ante*.

**1607. — Effect of Defence of Realm Regulations.]—**(1) A footway across a field is a highway within Highway Act, 1835 (c. 50), s. 72, & it is, therefore, an offence to destroy or injure its surface.

(2) Reg. 2M (1) (c) of Defence of the Realm Regulations to require the occupier of land to cultivate a highway which runs over his land. DENNIS & SONS, LTD. v. GOOD (1918), 88 L. J. K. B. 388; 120 L. T. 88; 83 J. P. 110; 35 T. L. R. 93; 17 L. G. R. 9, D. C.

**1608. — Right of public to deviate.]—**ARNOLD v. HOLBROOK, No. 515, *ante*.

**1609. Cleaning drains.]—**R. v. LEAKE (INHABITANTS), No. 225, *ante*.

**1610. Gate—Prevention of cattle straying.]—**DAVIES v. STEPHENS, No. 219, *ante*.

**PART IX. SECT. 2, SUB-SECT. 7.**

**a. When a defence—Railway bridge.]—**Defts. were sued for erecting a bridge over a highway running through pltt.'s land, & for the injury to pltt.'s land in obstructing access to the highway:—*Semle*: there was no right of action, for defts. charter bound them to do what was complained of, for the safety & convenience of the public.—McDONNELL v. ONTARIO, SIMCOE, & HURON RY. UNION CO. (1853), 11 U. C. R. 271.—CAN.

**d. — Pltt. oo. applied for a mandatory injunction to compel deft. oo. to cease obstructing certain rivers, & to remove a temporary bridge built by it across a river, & to make**

openings in two permanent steel bridges crossing a river constructed by it under statutory authority:—*Held*: all the requirements of Railway Act of Canada had been complied with, & the Public Works Department of Canada had sanctioned the temporary obstruction of these streams. The interim injunction was refused.—BRITISH COLUMBIA EXPRESS CO. v. GRAND TRUNK PACIFIC RY. CO. (1914), 28 W. L. R. 460.—CAN.

**e. — Bridge across creek.]—***Held*: after 18 Vict. c. 176, pltt. could not maintain an action against defts. for unlawfully erecting a bridge across the T. M. Creek, & impeding the navigation.—WISMER v. GREAT WESTERN RY. CO. (1859), 17 U. C. R. 510.—CAN.

**1611. — Farm purposes.]—**A.-G. v. MEYRICK & JONES, No. 357, *ante*.

**1612. Tramroads across public road—Unreasonable number.]—**R. v. CHARLESWORTH, No. 1336, *ante*.

**1613. Cellar flap—Projection above pavement.]—**FISHER v. PROWSE, COOPER v. WALKER, No. 66, *ante*.

**1614. Doorstep—Level of street lowered—Additional step.]—**FISHER v. PROWSE, COOPER v. WALKER, No. 66, *ante*.

**1615. Swing-bridge—Opened when necessary.]—**MERCER v. WOODGATE, No. 1357, *ante*.

**1616. Overhead bridge—Insufficient height.]—**A railway bridge spanned a road within defts.' district. The road, having at the time the bridge crossing it, was dedicated to the public by the railway co., & it subsequently became vested in defts. At the time of dedication the road was higher at the entrance of the bridge than at the exit, & the road continued in a similar state up to the instituting of this action. Pltt. was driving along this road, & on passing under the bridge he met with an accident, his head coming in contact with the bridge in consequence of the road being higher at that part. In an action by him against defts. for damages for injuries sustained:—*Held*: as the road was dedicated subject to this obstruction, the action could not be maintained.—WARNER v. WANDSWORTH DISTRICT BOARD OF WORKS (1889), 53 J. P. 471.

**1617. User as mews—Proof of limited dedication.]—**HELSEA VESTRY v. STODDARD, No. 399, *ante*.

**SUB-SECT. 7.—EXERCISE OF STATUTORY POWERS.**

**1618. When a defence—Temporary obstruction—Laying service pipes for gas.]—**It is an indictable nuisance to obstruct or to employ others to obstruct a public highway or footway, by placing earth & bricks thereon, taking up the pavement & opening trenches for the purpose of laying down service pipes for the supply of gas from public mains to private houses, unless those who do or authorise such acts have parliamentary powers for the purpose. Such acts cannot be justified by the occupiers of the houses as an exercise of the right of every householder, to make such a temporary obstruction of a highway or footway as may be necessarily incident to the enjoyment of his property.—R. v. LONGTON GAS CO. (1860), 2 E. & E. 651; 29 L. J. M. C. 118; 2 L. T. 11; 24 J. P. 214; 6 Jur. N. S. 601; 8 Cox, C. C. 317; 121 E. R. 214; *sub nom.* R. v. KNIGHT, 8 W. R. 203.

*Annotations*: APLD. R. v. Train (1862), 2 B. & S. 610. *Consd.* A.-G. v. Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71; Preston Corpn. v. Fullwood L. B. (1855), 53 L. T. 718.

**f. — Lowering level of street.]—**A street ran into a road allowance, but did not cross it, & defts., being incorporated under 16 Vict. c. 190, for gravelling the road, so far lowered the level, in order to get the grade prescribed by the statute, as to make the approach from this street impassable:—*Held*: they were not guilty of a nuisance in obstructing the street.—R. v. WOODSTOCK & DEERHAM PLANK & GRAVEL ROAD CO. (1859), 18 U. C. R. 49.—CAN.

**g. — Railway.]—**R. v. GREAT WESTERN RY. CO. (1862), 21 U. C. R. 555.—CAN.

**h. — Piles in bed of river—For repair of bridge.]—**HOLSTON v. RED

1619. — **Altering steps to houses—Unreasonable time.**—*R. v. BURT*, No. 1337, *ante*.

1620. — **Highway & water authority—Protection of valve cover in road—Wear of road.**—*KENT v. WORTHING LOCAL BOARD*, No. 1312, *ante*.

1621. — **Highway & lighting authority—Post in footpath not lighted.**—*LAMLEY v. EAST RETFORD CORPN.*, No. 1171, *ante*.

1622. — **Authority to deposit refuse—Refuse diverting water into street.**—A sale of land to a local authority for the purpose of tipping refuse thereon by a vendor who retains adjoining land does not impliedly authorise the local authority to tip refuse in such a way as to cause a nuisance on the adjoining land when such tipping can be done without causing the nuisance. *Qu.*: whether, in the event of it being impossible to use the land for tipping without creating the nuisance, the local authority would be so authorised. An owner of land conveyed a portion thereof to a local authority for the purpose of tipping refuse thereon, the local authority purchasing the same under the powers given to them by the Public Health Act, 1875 (c. 55), & two local Acts. Subsequently the owner of the remaining portion sold it to a purchaser, who formed a street thereon & built houses abutting on the street. The local authority acting under their powers, from time to time deposited refuse on the land purchased by them, with the result that the deposit, gradually increasing in size & becoming impervious to rain water, caused the rain water, which previously to the deposit flowed in a direction away from the street, to be diverted & overflow into the street & form holes or gullies therein dangerous to passers-by. *Pltf.*, lawfully passing through the street, fell into one of these gullies & sustained personal injuries:—*Held*: the gully in the street was a nuisance caused by defts. without justification, & they were liable to *pltf.* in damages for the injuries sustained by him. *PRIEST v. MANCHESTER CORPN.* (1915), 84 L. J. K. B. 1731; 13 L. G. R. 605; 79 J. P. Jo. 112.

1623. — **Authority to plant trees in highway—Dangerous guards for trees.**—An urban authority which under the Public Health Acts Amendment Act, 1890 (c. 59), s. 43, caused trees to be planted on a highway, & erects guards for the protection of same, is bound to take reasonable care to protect the public from danger arising from the trees & guards, even if abnormal & unforeseen circumstances beyond their control arise.—*MORRISON v. SHEFFIELD CORPN.*, [1917] 2 K. B. 806; 86 L. J. K. B. 1156; 117 L. T. 520; 81 J. P. 277; 33 T. L. R. 492; 61 Sol. Jo. 611; 15 L. G. R. 667, C. A.

*Annotations*:—*Refd.* *Baldock v. Westminster City Council* (1915), 88 L. J. K. B. 502; *Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132.

1624. — **Electric tramway—Erections in foot-**

**path.**—A corpn. purporting to act in the exercise of their powers under their special tramways Act, which incorporated Tramways Act, 1870 (c. 78), & authorised the construction of an electric tramway, erected a pole & a fuse-box in the footpath close to the principal entrance of the *pltf.*'s premises:—*Held*: defts.' statutory powers authorised them to use the pavement for the purpose of doing that which was necessary for making their tramway an electrical tramway; the nuisance which defts. were authorised to commit could not be interfered with unless *pltf.*s. could prove that the powers conferred on defts. had been abused, which *pltf.*s. had failed to do; & therefore the action could not be maintained.—*GOLDBERG & SON, LTD. v. LIVERPOOL CORPN.* (1900), 82 L. T. 362; 16 T. L. R. 320, C. A.

1625. — **Street lighting—Lamp post in highway.**—*CHAPLIN (W. H.) & CO., LTD. v. WESTMINSTER CORPN.*, No. 619, *ante*.

1626. **Necessity for compliance with powers—Highway diverted & blocked—Substituted road inconvenient.**—By a railway Act a co. was empowered to divert or alter the course of any roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway. By sect. 97, it was enacted that in all cases, wherein, in the exercise of such power, any part of any carriage road, etc., should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, etc., or to the persons entitled to the use thereof, the co. should, at their own expense, before any such roads, etc., should be so cut through, etc., cause a good & sufficient carriage road, etc., to be set out & made instead thereof, as convenient for passengers & carriages as the former road, or as near thereto as might be. The co. had diverted a highway, & obstructed the old road by building a wall across it, & had made a new road, which was neither as convenient to the public as the old one, nor as near thereto as might be:—*Held*: they were indictable, in the common form, for so obstructing the highway.

The co. have done what the Act legalises only upon a condition which they have not performed. They stand convicted of the nuisance, & show no justification (*LORD DENMAN, C.J.*). *R. v. SCOTT* (1842), 3 Q. B. 543; 3 Ry. & Can. Cas. 187; 2 Gal. & Dav. 729; 11 L. J. Q. B. 254; 6 Jur. 1084; 114 E. R. 615.

*Annotations*:—*Consd.* *Watkins v. G. N. Ry.* (1851), 16 Q. B. 961. *Refd.* *R. v. Great North of England Ry.* (1846), 7 L. T. O. S. 468; *Re Royal British Bank* (1857), 29 L. T. O. S. 118; *Wyatt v. G. W. Ry.* (1865), 13 W. R. 837; *R. v. Lee* (1876), 24 W. R. 550. *Mentd.* *R. v. L. & N. W. Ry.* (1888), 58 L. T. 771.

1627. — **— — — — —**—A corpn. aggregate may be indicted for a nuisance, as, an incorporated railway co. for cutting through & obstructing a

RIVER BRIDGE CO. (1885), *Cass. Dig.* 2nd ed. 561.—*CAN.*

k. — **Digging drain.**—Action by an administratrix for breach of defts.' statutory powers in digging & opening a drain in a highway & leaving it at night uncovered, without any fencing, guard, or light, whereby deceased, passing along the street at night, was injured, & in consequence died:—*Held*: defts. were entitled to plead the general issue by statute.—*CARRIS v. OTTAWA (CITY) WATER COMRS.* (1876), 23 C. P. 551.—*CAN.*

l. — **Removal of snow from rail tracks.**—*ELLIOTT v. WINNIPEG ELECTRIC RY. CO.*, [1917] 3 W. R. 1120; 22 Can. Ry. Cas. 258; 38 D. L. R. 201.—*CAN.*

m. **Necessity for compliance with powers—Encroachment.**—*Held*: defts. proceeding to straighten a highway under a bye-law of the municipal council, & in so doing encroaching on *pltf.*'s possession, were not entitled to the protection of 50 Geo. III. c. 1.—*JOY v. MCKINN & GIBBS* (1850), 1 C. P. 13.—*CAN.*

n. — **Navigation of stream obstructed.**—The declaration charged defts. with obstructing the navigation of a stream by building a bridge across it. *Plts.*, after setting out the incorporation of defts. & the powers thereby given to them to cross streams, provided that the free & uninterrupted navigation thereof should not be interfered with, alleged that they had erected the

bridge under such powers for the purposes of their railway, & thereby unreasonably & little impeded the navigation for a short time:—*Held*: *plts.* bad, as showing no defence.—*SHURE v. GREAT WESTERN RY. CO.* (1889), 13 U. C. R. 376.—*CAN.*

o. — **Injury to private property—Overflow of water.**—A municipality cannot, for the purpose of repairing or draining a highway, commit an injury to private property, by collecting & conveying water to it, & justify under their statutory obligation to keep the road in repair.—*ROWE v. ROCHESTER TOWNSHIP* (1872), 22 C. P. 319.—*CAN.*

p. — **Felling trees.**—A statutory duty of opening the road

**Sect. 2.—Defences: Sub-sects. 7, 8, 9 & 10.]**

highway by works performed in a course not conformable to the powers conferred on the co. by Act of Parliament.—*R. v. (GREAT NORTH OF ENGLAND RY. CO. (1846), 9 Q. B. 315; 18 L. J. M. C. 16; 7 L. T. O. S. 468; 11 J. P. 21; 10 Jur. 755; 2 Cox, C. C. 70; 115 E. R. 1294.*

*Annotations:—* *Reid, Re Royal British Bank (1857), 29 L. T. O. S. 148; Whitfield v. S. E. Ry. (1858), E. R. & E. 115; R. v. Stephens (1866), 7 B. & S. 710; Pharmaceutical Soc. v. London Supply Assn. (1879), 4 Q. B. D. 313; R. v. Tyler & International Commercial Co., [1891] 2 Q. B. 588.*

**1628. Malicious act of third party—Causing dangerous obstruction.]—**Where the proximate cause of the raising of an iron plate, lid, or covering of a water apparatus in a street of the metropolis above the level of the pavement so as to be a dangerous obstruction by sticking up, is the malicious act of a third person against which precautions would have been inoperative, the Metropolitan Water Board is not liable to any one, thrown down by it & hurt, in the absence of a finding that the occurrence could or ought to have been foreseen & provided against. Although bound to exercise all reasonable care, the Board is not in the absence of such a finding responsible for damage, caused by the malicious acts of third persons.—*SIMPSON v. METROPOLITAN WATER BOARD (1917), 15 L. G. R. 629.*

**Liability for negligence of contractor.]—**See NEGLIGENCE.

**SUB-SECT. 8.—INAPPRECIABLE EXTENT OF NUISANCE.**

**1629. Obstruction Inappreciable — Whether a nuisance.]—**The judge, on the trial of an indictment, asked the jury whether they thought the erection would prove “a material nuisance,” in which case they were to find a verdict of guilty; but told them that, if they thought the “nuisance” was so slight, rare & uncertain that deft. ought not to be made criminally liable for it, they should acquit him: & the jury saying that they considered the erection, “although a nuisance, was not sufficiently so to render deft. criminally liable,” he directed an acquittal. On motion for a new trial for misdirection:—*Held:* the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; & the jury must be understood as finding that the obstruction in question was so insignificant, & therefore there was not a misdirection warranting a new trial.—*R. v. RUSSELL (1851), 3 E. & B. 942; 23 L. J. M. C. 173; 18 J. P. 807; 18 Jur. 1022; 2 W. R. 555; 118 E. R. 1394.*

*Annotations:—* *Reid, Dawes v. Hawkins (1860), 7 Jur. N. S. 262; R. v. Brailsford (1860), 2 L. T. 508; R. v. Johnson (1860), 2 E. & E. 613; R. v. Longton Gas Co. (1860), 6 Jur. N. S. 601; R. v. United Kingdom Electric Telegraph Co. (1862), 2 B. & S. 647, n.; R. v. Stephens (1866), L. R. 1 Q. B. 702; R. v. N. E. Ry. (1901), 70 L. J. K. B. 548. *Mentd.* *R. v. Simpson, [1914] 1 K. B. 66.**

**1630. ——— Widening bridge over lane.]—**WANDSWORTH BOARD OF WORKS v. LONDON & SOUTH WESTERN RY. CO., No. 628, *ante*.

**1631. ——— Encroachment on highway.]—**

upon which trees grow is no answer to an action for injury caused to pltf.'s land by the felling of the trees.—*Rowe v. ROCHFESTER TOWNSHIP (1872), 22 C. P. 319.—CAN*

**PART IX. SECT. 2, SUB-SECT. 9.**  
q. *Whether applicable to public right*

*of way.]—*Obstruction of a public right of way during twenty-two years does not, on the ground of acquiescence exclude a claim on the part of the public to have the obstruction removed.—*CUTHBERTSON v. YOUNG (1854), 17 Duml. (Cl. of Sess.) 2; 26 Sc. Jur. 310; 1 Macq. 455.—SCOT.*

Upon an indictment tried upon the civil side at the assizes for a nuisance to a highway by an obstruction, etc., the jury found as follows: “We find that a portion of the site of the chapel mentioned in the indictment, & of the land inclosed by iron railings also mentioned in the indictment, to the extent in the whole of 187 feet, was part of the parish highway, but that the obstruction to the public was inappreciable.”—*Held:* such a finding amounted to “not guilty,” & such verdict having been directed by the learned judge who tried the indictment to be entered, this ct. refused to disturb it.—*R. v. LEFINE (1866), 15 L. T. 158; 15 W. R. 45; 30 J. P. Jo. 723.*

*Annotation:—* *Consd. R. v. Bartholomew, [1908] 1 K. B. 554.*

**1632. ——— Coffee stall in street.]—**Deft. unlawfully erected & maintained in the middle of the roadway of a public street a coffee stall. The stall was of a permanent character, having gas & water laid on to it from the mains, & being assessed to the rates at £32. There was sufficient room for the passage of traffic up & down the street on either side of the stall. On an indictment of deft. for a nuisance in thereby obstructing the highway, the jury found that the coffee stall was an obstruction, but that it did not appreciably interfere with the traffic in the street:—*Held:* the findings did not justify the entry of a verdict of guilty.—*R. v. BARTHOLOMEW, [1908] 1 K. B. 554; 77 L. J. K. B. 275; 98 L. T. 284; 72 J. P. 79; 24 T. L. R. 238; 52 Sol. Jo. 208; 6 L. G. R. 262; 21 Cox, C. C. 556, C. C. R.*

*Compare* No. 1733, *post*.

**SUB-SECT. 9.—ACQUIESCENCE BY PLAINTIFF IN NUISANCE.**

**1633. Acquiescence for eighteen years—Injunction.]—**Pltf. & defts. held under the same superior lease. One of the covenants of the lease was that nothing should be hung, placed or exposed for sale or otherwise outside the premises. Pltf. brought an action for damages & injunction for breach thereof, complaining that defts. greatly interfered with the comfort of the people coming to his shop. The jury found that defts. had been guilty of a breach of the covenant in question, & also that there was such an unreasonable use of the highway as to amount to a public nuisance, & pltf. had in consequence sustained damage, but to what amount they were unable to say. During the eighteen years for which the nuisance had existed, pltf. had only once complained to defts. about it. Pltf. upon the findings of the jury asked for an injunction:—*Held:* there was such acquiescence on the part of pltf. in the nuisance that an injunction could not be granted.—*ROGERS v. GREAT NORTHERN RY. CO. (1889), 53 J. P. 484; 5 T. L. R. 264.*

*See, generally, INJUNCTION.*

**SUB-SECT. 10.—CONTRIBUTORY NEGLIGENCE OF PLAINTIFF.**

*See, generally, NEGLIGENCE.*

**1634. Obstruction leading to accident.]—**One who is injured by an obstruction in a highway

**PART IX. SECT. 2, SUB-SECT. 10.**

**1634 I. Obstruction leading to accident.]—**BRADLEY v. BROWN & FRELET (1872), 32 U. C. R. 463. *CAN.*

**1634 II. ———.]—**HUTTON v. WINDSOR TOWN (1874), 34 U. C. R. 487.—*CAN.*

against which he fell, cannot maintain an action if it appear that he was riding with great violence & want of ordinary care, without which he might have seen & avoided the obstruction.—**BUTTERFIELD v. FORRESTER** (1809), 11 East, 60; 1 Man. & G. 571, n.; 103 E. R. 926.

**Annotations**.—**Consd.** *Deane v. Clayton* (1817), 7 Taunt. 489; *Marriott v. Stanley* (1840), 1 Man. & G. 568; *Lynch v. Nordin* (1841), 1 Q. B. 29. **Expld.** *The Vera Cruz* (No. 1) (1881), 9 P. D. 88. **Consd.** *The Bernina* (2) (1887), 12 P. D. 58. **Refd.** *Bridge v. Grand Junction Ry.* (1838), 3 M. & W. 244; *Davies v. Mann* (1842), 10 M. & W. 546; *Caswell v. Worth* (1856), 5 E. & B. 849; *Tuff v. Warman* (1858), 5 C. B. N. S. 573; *Witherley v. Regent's Canal Co.* (1862), 12 C. B. N. S. 2. **Mentd.** *General Steam Navigation Co. v. Tonkin* (1844), 4 Moo. P. C. C. 314; *Holden v. Liverpool New Gas & Coke Co.* (1846), 3 C. B. 1; *Thorogood v. Bryan, Catlin v. Hills* (1849), 3 C. B. 115; *Clarke v. Holmes* (1862), 8 Jur. N. S. 992; *The Thuringia* (1872), 41 L. J. Adm. 44; *Dublin, Wicklow & Wexford Rly. v. Slattery* (1878), 39 L. T. 365; *White v. Victoria Lumber & Manufacturing Co.* [1910] A. C. 606; *Ellerman Lines v. Grayson*, [1919] 2 K. B. 514.

**1635.** —[—]—If the proximate cause of damage be pltf.'s unskillfulness, although the primary cause be the misfeasance of deft., he cannot recover. At least if the mischief be in part occasioned by the misfeasance of a third person not sued. A. placed lime rubbish in a highway, the dust blown from it frightened the horse of B., & nearly carried him into contact with a passing waggon, in avoiding which he unskillfully drove over other rubbish placed in the road by C., & was overthrown & hurt:—**Held**: upon a count stating these facts B. could not recover against A.—**FLOWER v. ADAM** (1810), 2 Taunt. 314; 127 E. R. 1098.

**Annotation**.—**Expld.** *Trower v. Chadwick* (1836), 3 Scott, 699.

**1636.** —[—]—In an action on the case for an injury which pltf. had sustained from being thrown down upon iron instruments placed by deft. in the highway, contrary to the common law, & to the provisions of a local Act of Parliament, the defence set up was, negligence on the part of pltf., of which negligence no distinct evidence was given. The judge left it to the jury to say, whether pltf. had been so deficient in reasonable & ordinary care that he had brought the accident upon himself. A verdict having been found for deft., a rule for a new trial was refused on the ground of misdirection; but it was granted, on payment of costs, as upon a verdict against evidence, & was afterwards made absolute.—**MARRIOTT v. STANLEY** (1840), 1 Man. & G. 568; 1 Scott, N. R. 392; 4 Jur. 320; 133 E. R. 458; **subsequent proceedings**, 1 Man. & G. 853.

**1637.** —[—]—The general rule of law respecting negligence is, that although there may have been negligence on the part of pltf., yet unless he might

by the exercise of ordinary care have avoided the consequences of deft.'s negligence, he is entitled to recover. Therefore, where deft. negligently drove his horses & waggon against & killed an ass, which had been left in the highway fettered in the fore feet, & thus unable to get out of the way of deft.'s waggon, which was going at a smartish pace along the road:—**Held**: the jury were properly directed, that although it was an illegal act on the part of pltf. so to put the animal on the highway, pltf. was entitled to recover.—**DAVIES v. MANN** (1842), 10 M. & W. 546; 12 L. J. Ex. 10; 7 J. P. 53; 6 Jur. 954; 152 E. R. 588.

**Annotations**.—**Consd.** *Colchester Corp. v. Brooke* (1845), 7 Q. B. 339; *Dimes v. Petley* (1850), 15 Q. B. 276; *The Vera Cruz* (1881), 53 L. J. P. 33; *The Bernina* (2) (1887), 12 P. D. 58; *The Highland Loch*, [1911] P. 261; *Paul v. G. R. Ry.* (1920), 36 T. L. R. 341. **Refd.** *G. N. Rly. v. Harrison* (1854), 2 C. L. R. 1136; *Dowell v. General Steam Navigation Co.* (1855), 5 E. & R. 195; *Tuff v. Warman* (1858), 5 C. B. N. S. 573; *North v. Smith* (1861), 10 C. B. N. S. 572; *Witherley v. Regent's Canal Co.* (1862), 12 C. B. N. S. 2; *Peck v. North Staffordshire Ry.* (1863), 10 L. L. Cas. 473; *Evison v. Marshall* (1868), 32 J. P. 691; *Armstrong v. L. & N. Rly.* (1873), 1 L. R. 10 Exch. 47; *Radley v. L. & N. W. Rly.* (1876), 1 App. Cas. 751; *Spaight v. Todenastle* (1881), 6 App. Cas. 217; *Loe v. Nixey* (1890), 63 L. T. 285; *The River Derwent* (1891), 61 L. T. 509; *The Altair*, [1897] P. 103; *Barnes U. D. C. v. London General Omnibus Co.* (1908), 7 L. G. R. 359; *Ellerman Lines v. Grayson*, [1919] 2 K. B. 514; *Admiralty Comrs. v. Volute S.S.*, [1922] 1 A. C. 129. **Mentd.** *General Steam Navigation Co. v. Tonkin* (1844), 4 Moo. P. C. C. 314; *Il. v. Waters* (1819), 13 Jur. 130; *The United States* (1865), 12 L. T. 33; *Fordham v. L. B. & S. C. Rly.* (1869), 1 L. R. 4 C. P. 619; *Swanson v. N. E. Ry.* (1877), 37 L. T. 102; *Dublin, Wicklow & Wexford Rly. v. Slattery* (1878), 39 L. T. 365; *The Hornet*, [1892] P. 361; *The Monte Rosa*, [1893] P. 23; *Heath's Garage v. Hodges*, [1916] 2 K. B. 370; *Sales v. British Petroleum Co. & G. W. Rly.* (1920), 90 L. J. K. B. 1289; *The Manorbier Castle* (1922), 129 L. T. 31; *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.*, [1921] A. C. 406.

**1638.** —[—]—Attempt to avoid obstruction — Whether reasonable — Question for jury.—A wooden apparatus, technically called a "slide," & used for lowering casks & other heavy & bulky goods from vans in the street into deft.'s blacklead warehouse, was placed across the pavement or footway of the street from the end of their van to the opening into the cellar of their warehouse, during the hours prohibited by the Metropolitan Police & Metropolitan Streets Acts, for using the same for that purpose, thus blocking the footway so that foot passengers were obliged either to get over the slide or go round by the horses' heads in the roadway, or to wait until the obstruction was removed. The "slide" was very slippery from blacklead, & in his attempt to get over it a foot passenger slipped, lost his footing & fell, receiving serious injuries; & in an action against defts. for negligence **LORD COLERIDGE, C.J.**, directed the jury that defts., being admittedly guilty of an

**1634 iii.** —[—]—Telegraph poles, intended for the construction of their line, had been laid by a telegraph co. upon the highway, encroaching upon the travelled portion. Pltf. was driven along the road in a sulky which, running against a pole upset & injured pltf.:—**Held**: the driver was guilty of contributory negligence, & pltf. could not recover.—**CASTOR v. TOWNSHIP OF UXBIDGE** (1876), 39 U. C. R. 113.—**CAN.**

**1634 iv.** —[—]—**WILLIAMS v. CITY OF PORTLAND** (1891), 19 S. C. R. 159.—**CAN.**

**1634 v.** —[—]—**KEACHIE v. TORONTO CORPN.** (1893), 22 A. R. 371.—**CAN.**

**1634 vi.** —[—]—**ATRIN v. HAMILTON (CITY)** (1897), 24 A. R. 389.—**CAN.**

**1634 vii.** —[—]—**MESSINGER v. BRIDGETOWN TOWN** (1901), 31 S. C. R. 379.—**CAN.**

**1634 viii.** —[—]—**PATTERSON v. ALDBOROUGH TOWNSHIP** (1913), 24 O. W. R. 638; 4 O. W. N. 1316; 11 D. L. R. 437.—**CAN.**

**1634 ix.** —[—]—**FREEDMAN v. CITY OF WINNIPEG**, [1918] 3 W. W. R. 479; 43 D. L. R. 126.—**CAN.**

**1634 x.** —[—]—**MACILL v. TOWNSHIP OF MOORE** (1919), 43 O. L. R. 372; 44 D. L. R. 489.—**CAN.**

**1634 xi.** —[—]—**RYFE v. BERTAWIN MUNICIPALITY**, [1922] 1 W. W. R. 1201; 63 D. L. R. 674; 17 Alta. L. R. 433.—**CAN.**

**1634 xii.** —[—]—Pltf. tripped over a hose that had been placed across the sidewalk by defts.' servants & for their use & injured herself. She was not looking at the sidewalk at the time but looking across the street:—**Held**: the conduct of pltf. in not looking to see if any obstruction was placed across the sidewalk as she walked

along the street did not amount to want of care. **CHANE v. MURRAY** (1902), 8 Nfld. L. R. 549.—**NFLD.**

**1634 xiii.** —[—]—**ADAMS v. ABERDEEN MAGISTRATES** (1884), 11 L. J. (Cl. of Sess.) 852; 21 Sc. L. R. 570. **SCOT.**

**1634 xiv.** —[—]—**SCOTT v. NEW MINERVA SYNDICATE, LTD.** (1911), App. D. 533.—**S. AF.**

**r.** —**Motor car—Use of acetylene headlights.**—Pltf. drove a motor car at night on a suburban road. The car struck the capstone of a gully shaft at the side of the road:—**Held**: the fact that pltf. was using his acetylene headlights did not necessarily amount to contributory negligence.—**MOODY v. WOOLLAHRA MUNICIPALITY**, [1913] 16 C. L. R. 353; 30 N. S. W. W. N. 51.—**AUS.**

**s.** —**Contributory negligence question for jury.**—A portion of a highway

*Sect. 2.—Defences: Sub-sects. 10 & 11. Sect. 3: Sub-sect. 1, A. & B.]*

illegal act, were bound to guard the public against injury ensuing therefrom.

The jury found that pltf. had only acted reasonably & prudently in what he did, & gave him a verdict for £300 damages.

*Held:* the judgment entered for plaintiff was right, as it was for the jury to decide what was the proper course for him to adopt under all the circumstances, & to say whether or not his attempt to get over the "slide" was the act of a reasonable & prudent man.—*LEE v. NIXEY* (1890), 63 L. T. 285; 54 J. P. 807, D. C.

#### SUB-SECT. 11. REMOTENESS OF DAMAGE.

*See, generally, DAMAGES, Vol. XVII., pp. 93 et seq.; NEGLIGENCE; NUISANCE.*

### SECT. 3.—REMEDIES.

#### SUB-SECT. 1. ABATEMENT OF NUISANCE.

##### A. By Private Person.

**1639. Right of member of public to abate—Necessity for special damage.**—The authority of a private individual to abate a nuisance in a public highway, is conditional on the fact that the nuisance does him some special injury, & he can only interfere with such a nuisance so far as may be necessary to the exercise of his right of passing along the highway. A plea justifying damage to the property of a person who has improperly placed a nuisance on a highway, must show either that the abatement of the nuisance was absolutely necessary to enable the person doing the damage to pass, or that the person doing the damage could not, avoiding the nuisance, have passed along the highway with reasonable convenience. To a declaration complaining of an injury done to a wharf abutting on the river Thames by means of a certain vessel navigating the river of which deft. had the care & management, deft. pleaded in substance that the wharf in the declaration mentioned was a woodwork erection below low water mark into the navigable river Thames, which was a certain public Queen's highway; that the wharf was a common nuisance, constructed & wilfully continued by deft. after notice; that deft. had the care & management of a certain vessel & having such care had occasion to pass over the particular part of the bed & course of the river; that in so passing he directed & managed the vessel with all the skill & care that would have been due & proper

had the part of the bed & course of the river not been obstructed as aforesaid; & that he did no unnecessary damage:—*Held:* on motion for judgment, *non obstante verdicto*, bad for not showing that deft. could not with reasonable convenience pass along without causing the damage complained of.—*DIMES v. PETLEY* (1850), 15 Q. B. 276; 19 L. J. Q. B. 449; 16 L. T. O. S. 1; 14 J. P. 653; 14 Jur. 1132; 117 E. R. 462.

*Annotations:* *Fold.* *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 96. *Refd.* *Bateman v. Bluck* (1852), 18 Q. B. 870; *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. N. S. 759; *Wyatt v. G. W. Ry.* (1865), 6 B. & S. 109; *Evison v. Marshall* (1868), 32 J. P. 691; *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518; *Liverpool & North Wales S.S. Co. v. Mersey Trading Co.*, [1908] 2 Ch. 460. *Mentd.* *Abraham v. G. N. Ry.* (1851), 15 Jur. 853; *Dowell v. General Steam Navigation Co.* (1855), 5 E. & B. 195.

**1640.** ——— **Breaking down wall.**—*BATEMAN v. BLUCK*, No. 41, *ante*.

**1641.** ——— **Obstruction must constitute nuisance.**—The use of a public footway includes that of a perambulator as a usual accompaniment of a large class of foot passengers, if of a size & weight not to inconvenience other passengers, & not to injure the soil. Whether under the circumstances the use of such a vehicle be justifiable is a question of fact for the jury. One of the public has no right to remove an encumbrance to the soil of a highway unless it be also a nuisance to the way. The owner of the soil of a highway may remove anything thereon not justified by the easement though not a nuisance to the way. The owner of the soil may remove anything that encumbers his close, except such things as are usual accompaniments of a large class of foot passengers, being so small & light, as neither to be a nuisance to other passengers nor to be injurious to the soil. —*R. v. MATHIAS* (1861), 2 F. & F. 570, N. P.

*Annotation:* —*Refd.* *R. v. Bartholomew*, [1908] 1 K. B. 551.

**1642.** ——— **Cutting down tree.**—*SCRIBTON IMPROVEMENT COMRS. v. METCALF* (1888), *Times*, Nov. 15; *Local Government Chronicle* (1889), p. 216; *Halsbury's Laws of England*, Vol. XVI., pp. 58, n., 258, n.

**1643.** ——— **Lopping trees—Duty to lop on adjoining owner.**—*ANON.* (1492), Y. B. 8 Hen. 7, fo. 5, pl. 2.

*Annotations:* —*Refd.* *Repair of Bridges, Highways, etc.* (Case (1609), 13 Co. Rep. 35. *Mentd.* *Hudson v. Taber* (1877), 2 Q. B. D. 290.

**1644.** ——— **Removal of gate.**—*JAMES v. HAYWARD*, No. 1381, *ante*.

**1645.** ——— **Filling in ditch across road.**—*CHICHESTER v. LETHBRIDGE*, No. 1089, *post*.

**1646.** ——— **Breaking down enclosure.**—*ANON.* (undated), No. 973, *ante*.

which defts. were bound to keep in repair, had a trench running across it, & was allowed so to continue out of repair for a month. Deceased attempted to cross such trench in a wagon, from which he was thrown & killed. In an action for damages, it was alleged by defts. that deceased was well aware of the defect in the road, if any, & at the time of the accident was intoxicated, & thus contributed to the accident: *Held:* the question of contributory negligence was one for the jury. *MAW v. KING & ALBION TOWNSHIPS* (1885), 8 A. R. 248. —*CAN.*

t. ——— *PORTLAND TOWN v. GRIFFITHS* (1885), 11 S. C. R. 333. —*CAN.*

a. ——— *GORDON v. BELLEVILLE (City)* (1888), 15 O. R. 26. —*CAN.*

b. ——— *GILNOR v. ST.*

*JOHN (City) CORPN.* (1889), 28 N. B. R. 325. —*CAN.*

#### PART IX. SECT. 3, SUB-SECT. 1. A.

**1639 I. Right of member of public to abate—Necessity for special damage.**—Deft., proceeding through an artificially constructed canal connecting two lakes, found it wholly obstructed by pltf.'s boom of logs, & in order to make a passage through, after vainly endeavouring to move the boom-sticks, untied the rope or cable by which the boom was moored to the shore, & made a passage for his boat:—*Held:* the canal was a public highway; the logs constituted a nuisance; & deft. was justified in abating a private nuisance or a public nuisance which did pltf. a special injury; deft. having acted in a fair & reasonable manner.—*JOHNSTON & CARSWELL CO. v. DESFORD*

(1912), 19 W. L. R. 802; 1 W. W. R. 722. —*CAN.*

**1639 II.** ——— *A private corp'n. should be careful in interfering with the property of others upon a highway of which it has a limited right of user; in order to justify the removal of the property as being an obstruction amounting to a nuisance, it must show that it could not have constructed its works without such interference.*—*OKANAGAN TELEPHONE CO. v. SUMMERLAND TELEPHONE CO., LTD.*, [1918] 1 W. W. R. 656; 25 B. C. R. 221. —*CAN.*

**1646 I.** ——— **Breaking down enclosure.**—*Pltf.'s fences enclosed part of the highway abutting on his land. Deft. tore down the fences, although his right of passage along the highway was not really interfered with:—Held:* deft., as a private individual, had no right to

1647. — **Unnecessary damage in abatement—Trestles on highway.**—*R. v. RICHMOND, SURREY, JJ.*, No. 1736, *post*.

1648. — **Obstruction adjacent to highway—Trespass in removal.**—*ARNOLD v. HOLBROOK*, No. 515, *ante*.

1649. — **Nuisance arising from non-feasance—Repair of bridge.**—There is a broad difference between removing an obstruction which has been wrongfully placed in the highway, & making good by a permanent structure the result of mere non-feasance on the part of those charged with the duty of repairing; therefore a person who is merely entitled as one of the public to use a bridge carrying the highway over a river is not justified in entering on another person's land, & re-erecting the bridge which has been allowed to fall into a state of decay. An operation of this nature cannot properly fall under the term "abatement," even if the right to "abate" can be said to exist at all in the case of a nuisance arising from mere non-feasance. — *CAMPBELL DAVYS v. LLOYD*, [1901] 2 Ch. 518; 70 L. J. Ch. 714; 85 L. T. 59; 40 W. R. 710; 17 T. L. R. 678; 45 Sol. Jo. 670, C. A.

1650. **Right of owner of soil to abate—Obstruction not nuisance.**—*R. v. MATHIAS*, No. 1611, *ante*.

1651. **Liability of owner of soil to abate—Public Health Act, 1875 (c. 55), ss. 4, 94.**—A person who is the owner of the soil of a public highway is not an "owner" within the definition of that word in sect. 4 of above Act, so as to be liable to be called upon under sect. 91 of above Act to abate a nuisance alleged to exist upon the highway. — *MACEY v. JAMES* (1917), 86 L. J. K. B. 1257; 81 J. P. 213; 15 L. G. R. 479, D. C.

— **At request of local authority.**—*See Public Health Act, 1925 (c. 71), sect. 23.*

#### *B. By Local and Highway Authorities.*

*See, also, Public Health Act, 1925 (c. 71), s. 23.*

1652. **Right to remove obstruction or encroachment—After object adjudicated an obstruction.**—In a suit to restrain surveyors of highways from removing a wall inclosing a piece of ground alleged to form part of a highway, the High Ct. of Justice has jurisdiction to decide whether the land does or does not form part of the highway; & if the Ct. comes to the conclusion that it does form part of the highway, an injunction to prevent the removal of the inclosure cannot be granted. *Semble*: (1) a wall inclosing part of a street is an obstruction to the "safe & convenient passage along" the street within Towns Improvement Clauses Act, 1847 (c. 34), ss. 69, 70, whatever may be the width of the uninclosed portion of the street; (2) after it had been judicially determined that a particular object is an obstruction to a public highway, the surveyors of highways may remove the obstruction. — *BAGSHAW v. BUXTON LOCAL BOARD OF HEALTH* (1875), 1 Ch. D. 220; 45 L. J. Ch. 260; 34 L. T. 112; 40 J. P. 197; 21 W. R. 231.

*Annotations*. — *As to* (2) *Consd. Denny v. Thwaites* (1876), 2 Ex. D. 21. *Reid. Harris v. Northamptonshire County Council* (1897), 61 J. P. 599.

1653. — **After locus in quo adjudicated a highway — Towns Improvement Clauses Act, 1847**

abate the nuisance caused by the obstruction of the highway. — *WADKILL v. RICHARDSON* (1911), 10 W. L. R. 531; 17 B. C. R. 19.—*CAN.*

**PART IX. SECT. 3, SUB-SECT. 1.—B.**  
c. **Right to remove obstruction or**  
J.—**VOL. XXVI.**

*encroachment.*—A municipal corp'n. cannot undertake to abate a public nuisance by tearing down a fence obstructing a highway. — *HOPE v. SURREY CORPN.* (1911), 20 B. C. L. 431.—*CAN.*

d. —.] — When road trustees

(c. 34), ss. 69, 70.]—*BAGSHAW v. BUXTON LOCAL BOARD OF HEALTH*, No. 1652, *ante*.

1654. — **Without previous legal proceedings—Public Health Act, 1875 (c. 55), s. 149.**—An urban district council has power to remove encroachments upon any highway vested in it by above sect. without first taking proceedings, summarily or by indictment, against the person alleged to have encroached. — *REYNOLDS v. PRIESTEIGN URBAN DISTRICT COUNCIL*, [1896] 1 Q. B. 604; 65 L. J. Q. B. 400; 74 L. T. 422; 60 J. P. 296; 44 W. R. 479; 12 T. L. R. 327; 40 Sol. Jo. 438, D. C.

*Annotation*. — *Consd. Murray v. Epsom L. B.*, [1897] 1 Ch. 35.

1655. — **Without previous conviction—Metropolitan Paving Act, 1817, c. xxix, s. 65.**—*BRACKLEY v. ST. MARY, BATTERSEA, VESTRY*, No. 1430, *ante*.

1656. — **Though soil not vested in local authority—Statutory power unnecessary.**—A county council has the right under Local Government Act, 1888 (c. 41), & apart from it to remove an obstruction upon a road, whether or not the soil is vested in them, & their right to remove such obstruction under the Act is not limited to obstructions created after the Act came into force. — *HARRIS v. NORTHAMPTONSHIRE COUNTY COUNCIL* (1897), 61 J. P. 599; 13 T. L. R. 410; 41 Sol. Jo. 608.

*Annotation*. — *Reid. Neeld v. Hendon U. D. C.* (1899), 81 L. T. 105.

1657. — **Before formal dedication—Injunction.**—*KIRBY v. PAIGNTON URBAN COUNCIL*, No. 286, *ante*.

1658. **Removal by surveyor of highways—Liability for trespass After conviction obtained—Highway Act, 1835 (c. 50), s. 69.** Trespass for pulling down a cottage. Plea: Not guilty by statute. Pltf. was convicted by three justices, under above Act, for an encroachment on a highway. Deft., who was surveyor of the highways, pulled down pltf.'s cottage, which was what the conviction referred to, but which was not in fact an encroachment within the meaning of above Act. No warrant issued directing deft. to do the act:—*Held*: sect. 69 of above Act, requires the surveyor to execute a conviction under that Act, by pulling down the encroachment though there is no warrant; & consequently the conviction, though not itself correct, was a defence to this action, as deft. was shown to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction.

When we look at sect. 69, it appears that every conviction under it involves a judgment *quod prosternatur*, which the surveyor is required to execute. The surveyor, if he acts without a conviction, acts at his peril; but when there is one it is a defence, not as conclusive evidence that the alleged encroachment really was one, but on the principle that the surveyor acted in obedience to the judgment of a ct. of competent jurisdiction which he was bound to execute (*LORD CAMPBELL, (C.J.)—KEANE v. REYNOLDS* (1853), 2 E. & B. 748; 2 C. L. R. 245; 18 Jur. 242; 118 E. R. 947; *sub nom. KEEN v. REYNOLDS*, 17 J. P. Jo. 729).

*Annotations*. — *Consd. Mill v. Hawker* (1874), L. R. 9 Exch. 309. *Reid. Denny v. Thwaites* (1876), 2 Ex. D. 21.

have sanctioned the formation of a railway level-crossing over one of their roads they are not entitled arbitrarily to demand its removal or to impose unreasonable conditions upon its continuance. — *LANARKSHIRE (MIDDLE WARD) TRUSTEES v. BELHAVEN'S (LORD)*



*Sec. 3.—Remedies: Sub-sect. 1, B.; sub-sect. 2.]*

**1659. — Disputed highway.**—If a highway board acting as a corp. order the district surveyor to commit a trespass on private property within the district of the board, for the purpose of removing an obstruction from a disputed highway, the surveyor is liable to an action if he obeys the order & commits the trespass.—*MILL v. HAWKER* (1875), L. R. 10 Exch. 92; 44 L. J. Ex. 49; 33 L. T. 177; 39 J. P. 181; 23 W. R. 348, Ex. Ch.  
*Annotation:—* *Reid. Denny v. Thwaites* (1876), 2 Ex. D. 21.

**1660. — Liability under Malicious Damage Act, 1861 (c. 97)—Surveyor acting *bonâ fide*.**—(1) Resp. was the occupier of a residence which communicated with an adjoining highway by means of a gateway; an enclosed drain & brickwork were put down at the gateway for the purpose of convenient access to resp.'s residence, & also for the purpose of allowing the free passage of water running by the side of the highway. The drain & brickwork, with the earth covering the same, formed a nuisance & obstruction to the highway. Applt., being surveyor of highways for the parish within which resp.'s residence was situate, took up & removed the drain & the brickwork, & in so doing damaged them. Applt. having been charged upon an information before justices with committing damage, injury, & spoil upon resp.'s property, against sect. 52 of above Act, they found that applt. acted *bonâ fide*, but that he did not do the act complained of under a fair & reasonable supposition that he had a right to do it, & they convicted him of the offence charged: *Held*: the conviction was wrong, & the information ought to have been dismissed; for applt. was not a private individual, but the surveyor of highways, having a control over, & an interest in, the drains laid for carrying off the water, & in dealing *bonâ fide* with the drains he was not guilty of wilful or malicious damage.

(2) *Semle*: as applt., according to the finding of the justices, acted *bonâ fide*, they ought, upon the facts stated, also to have found that he acted under a fair & reasonable supposition that he had a right to do what was complained of in the information.—*DENNY v. THWAITES* (1876), 2 Ex. D. 21; 46 L. J. M. C. 141; 35 L. T. 628; 41 J. P. 164.

*See, generally, CRIMINAL LAW, Vol. XV., pp. 1020 et seq.*

**1661. — By order of justices—Timber laid in highway—Highway Act, 1835 (c. 50), s. 73.**—A surveyor of highways can obtain an order from a justice under above sect. to clear a highway by removing timber laid thereon so as to be a nuisance, although the word "timber," which is in the introductory words, is omitted from the operative words of above sect.—*DIXON v. CHESTER* (1906), 70 J. P. 380; 22 T. L. R. 501; 4 L. G. R. 1127, D. C.

**1662. Time for cutting timber trees—By order of justices—Highway Act, 1835 (c. 50), ss. 65, 66.**—By sect. 65 of above Act, if any obstruction is caused to any way by a tree the owner may be summoned by the surveyor to show cause why such tree is not lopped, or why the obstruction should not be removed, & the owner shall comply with the order of the magistrates within ten days of the order being left on him. By sect. 66 of above Act

"Provided always . . . that no person shall be obliged to fell any timber trees growing in hedges at any time whatsoever, except where the highways shall be ordered to be widened or enlarged as herein mentioned, or then to cut down . . . any oak . . . except in the months of Apr, May, or June, or any ash, elm, or other trees in any other months than Dec., Jan., Feb., or Mar. Applt. was summoned under sect. 65 of above Act for that a yew tree growing on his lands obstructed a carriageway, & the magistrates made an order for its removal. It was contended on his behalf that, as no order had been made for widening the road, under sect. 66 of above Act he could not be ordered to remove it even if it was an obstruction. But, even if they could order its removal, they could not do so in July, when they made the order:—*Held*: the order was right, & sect. 66 of above Act did not apply to such a case as this at all.—*BULLEN v. WAKELY* (1898), 77 L. T. 689; 62 J. P. 166; 18 Cox, C. C. 692, D. C.

**Powers of county & district councils—To protect roadside wastes & rights of way.**—*See Part VIII., Sect. 1, sub-sects. 9, 10, ante.*

**Powers & duties of highway authorities generally,** *see Part VIII., Sect. 1, ante.*

#### SUB-SECT. 2.—ACTION BY ATTORNEY-GENERAL —INJUNCTION.

**1663. Remedy by injunction—When granted—Breaking up street.**—The disturbance of the pavement in a town by an unincorporated gas co., for the purpose of laying down gas-pipes:—*Held*: not to be such a nuisance as to be a sufficient ground for an injunction, either upon a bill or upon an information.—*A-G. v. SHEFFIELD GAS CONSUMERS CO.* (1853), 3 De G. M. & G. 304; 22 L. J. Ch. 811; 21 L. T. O. S. 49; 17 Jur. 677; 1 W. R. 185; 43 E. R. 119; *sub nom.* *SHEFFIELD UNITED GAS CO. v. SHEFFIELD GAS CONSUMERS CO., A-G. v. SHEFFIELD GAS CONSUMERS CO., Ry. & Can. Cas. 650, L. C. & L. J.J.*

*Annotations:—* *Fold. A-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71. *Reid. Preston Corp. v. Fullwood L. B.* (1885), 53 L. T. 718. *St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31; *A-G. v. Brighton & Hove Co-op. Assocn.*, [1900] 1 Ch. 276; *A-G. v. Scott*, [1905] 2 K. B. 160. *Mentid. Best v. Drake* (1853), 1 W. R. 229; *Drake v. West* (1853), 22 L. J. Ch. 375; *Ellis v. Sheffield Gas Consumers' Co.* (1853), 22 L. T. O. S. 84; *Broadbent v. Imperial Gas Co.* (1857), 7 De G. M. & G. 436; *Freud v. Dennett* (1861), 5 L. T. 73; *Biddulph v. St. George's Vestry* (1863), 3 De G. J. & Sm. 493; *Swaine v. G. N. Ry.* (1864), 4 De G. J. & Sm. 211; *A-G. v. Kingston-on-Thames Corp.* (1865), 34 L. J. Ch. 481; *Pontney v. Lynn Paving Comrs.* (1865), 12 L. T. 818; *Sutton v. S. E. Ry.* (1865), L. R. 1 Exch. 32; *Goldsmid v. Tunbridge Wells Improvement Comrs.* (1866), 1 Ch. App. 349; *Cooke v. Forbes* (1867), L. R. 5 Eq. 166; *Lillywhite v. Trimmer* (1867), 36 L. J. Ch. 525; *Luscombe v. Steer* (1867), 17 L. T. 229; *A-G. v. Lonsdale* (1868), L. R. 7 Eq. 377; *A-G. v. Gee* (1870), L. R. 10 Eq. 131; *Pudsey Coal Gas Co. v. Bradford Corp.* (1873), 21 W. R. 268; *A-G. & Dommes v. Basingstoke Corp.* (1876), 45 L. J. Ch. 726; *Smith v. Mid. Ry. & L. & N. Ry.* (1877), 37 L. T. 224; *Fritz v. Hobson* (1880), 14 Ch. D. 542; *Fanshawe v. London & Provincial Dairy Co.* (1888), 4 T. L. R. 694; *Reinhardt v. Montastri* (1889), 42 Ch. D. 685; *A-G. v. Preston Corp.* (1896), 13 T. L. R. 14; *Garton v. Guildford, Godalming & Woking Joint Hospital Board* (1899), 43 Sol. Jo. 205; *A-G. v. Wimbledon House Estate Co.* (1904) 3 Ch. 34; *A-G. v. Grand Junction Canal Co.*, [1909] 2 Ch. 505.

*TRUSTEES* (1891), 18 R. (Cl. of Sess.) 949; 28 So. L. R. 718.—*SCOT.*

#### PART IX. SECT. 3, SUB-SECT. 2.

*e. Remedy by injunction—When granted—Obstruction under claim of*

*right.*—Where the title to a public road, under the control & management of a local body, is in the Crown, & the road is being obstructed by a person who claims that it is not a road but his land, an action may be brought by the A-G. or the Solicitor-General when

there is no A-G., on the relation of the local body, for an injunction against a continuance of the obstruction.—*SOLICITOR-GENERAL v. BARTLETT* (1899), 18 N. Z. L. R. 142.—*N.Z.*

*f. — Repair of Highway.*—The ct. has no jurisdiction on the

**1664.** ————.]—The Improvement Comrs. of the town of C., in whom the pavement of all thoroughfares were vested, contracted with defts. to light the town with gas. Defts., a co. incorporated under Cos. Act, 1862, & without parliamentary powers, proceeded to break up the pavements in order to lay their pipes, & continued to do so after the rescission of the contract in consequence of their default. A bill & information, in which a rival gas co. which had for many years lighted the town were plffs. & informants, was during the existence of the contract filed to restrain them from doing so:—*Held*: in the absence of all proof of injury to the property of plffs., & of all evidence that injury was sustained by the public, the nuisance was of too temporary & trivial a character to justify the interference of this ct. by injunction.—*A.-G. v. CAMBRIDGE CONSUMERS GAS CO.* (1868), 4 Ch. App. 71; 38 L. J. Ch. 94; 19 L. T. 508; 33 J. P. 147; 17 W. R. 145, C. A.

*Annotations*:—*Reid*, *Preston Corp. v. Fullwood L. R.* (1885), 53 L. T. 718; *St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co.* (1899), 80 L. T. 31. *Mentd.* *Pudsey Coal Gas Co. v. Bradford Corp.* (1873), L. R. 15 Eq. 167; *A.-G. v. Preston Corp.* (1890), 13 T. L. R. 14.

**1665.** ———— **Obstruction under claim of right**—**Abandonment of claim without notice.**—*A.-G. v. BOWEN* (1914), 78 J. P. Jo. 220.

**1666.** ———— **Restoration of subsided road.**—Def. owned & occupied land, being a worked out quarry, immediately adjoining a public highway vested in an urban district council & repairable by the inhabitants at large. A prior owner of the land had, in 1865, made the excavation in order to quarry for limestone & until then the surfaces of the road & the land had been on the same level. The excavation being a source of danger & obstruction to persons using the road, the excavator, to protect them & the road, built alongside the road a wall, the bottom of which rested on a ledge of limestone left ungotten for the purpose & served as a retaining wall for the subsoil of the road & as a fence wall above its surface. In Feb. 1913, part of the wall collapsed & fell into the quarry, & in consequence a considerable part of the subsoil of the road & of its surface fell in also, the road thus becoming impassable, a source of danger to persons attempting to use it, & a nuisance, liable under Quarry (Fencing) Act, 1887 (c. 19), s. 3, to be dealt with summarily under Public Health Act, 1875 (c. 55):—*Held*: in an action by the A.-G. at the relation of the council, a mandatory order must be made on deft. to abate the nuisance by restoring the road to its condition prior to the subsidence & by rebuilding the wall or providing some other reasonable fence between the road & the quarry.—*A.-G. v. ROE*, [1915] 1 Ch. 235; 84 L. J. Ch. 322; 112 L. T. 581; 79 J. P. 263; 13 L. G. R. 335.

*Annotation*:—*Reid*, *Sack v. Jones*, [1925] Ch. 235.

**1667.** ———— **Injury to public—Whether necessary to prove—Breaking up street.**—*A.-G. v. CAMBRIDGE CONSUMERS GAS CO.*, No. 1664, *ante*.

ground of public nuisance to enforce by injunction the ordinary repair of a highway, or to restrain a road co. from suffering a road to continue out of repair. Assuming such jurisdiction, the A.-G. does not seem to be the proper party to sue.—*A.-G. v. WESTON PLANK ROAD CO.* (1853), 4 Gr. 211.—*CAN.*

**International bridge.**—*Held*: the A.-G. for Ontario, as representing only a limited portion of the public, with whom, if at all, a contract existed for the construction of a bridge by a co. incorporated by the

Dominion Parliament, from Canada to the United States, across the Niagara River, had no *locus standi*.—*A.-G. v. INTERNATIONAL BRIDGE CO.* (1881), 6 A. R. 537.—*CAN.*

**Obstruction.**—The A.-G. for the province is the proper informant in a suit to restrain the obstruction of highways. *A.-G. v. WRIGHT* (1886), 3 Man. L. R. 197.—*CAN.*

**HOPE v. SURREY & V. V. & F. RY.** (1914), 29 W. L. R. 525; 7 W. W. R. 175; 20 D. L. R. 540.—*CAN.*

**1668.** ———— **Interference with highway.**—When an illegal act is being committed, which in its nature tends to the injury of the public, such as an interference with a public highway or a navigable stream, the A.-G. can maintain an action on behalf of the public to restrain the commission of the act, without adducing any evidence of actual injury to the public, & in such a case an injunction will be granted with costs, although no evidence of actual injury is given.—*A.-G. v. SHREWSBURY (KINGSLAND) BRIDGE CO.* (1882), 21 Ch. D. 752; 51 L. J. Ch. 746; 46 L. T. 687; 30 W. R. 916.

*Annotations*:—*Reid*, *A.-G. v. Denby*, [1925] Ch. 596. *Mentd.* *London Assn. of Shipowners & Brokers v. London & India Docks Joint Committee* (1892) 3 Ch. 212; *A.-G. v. L. & N. W. Ry.*, [1900] 1 Q. B. 78; *A.-G. v. Birmingham, Tame & Rea Drainage Board*, [1910] 1 Ch. 48.

**1669.** ———— **Encroachment.**—By an inclosure award in 1814 it was awarded that there should be a certain public carriage road & highway of the width of thirty-five feet in the parish of B., the land adjoining the road on the south side thereof being allotted to the predecessors in title of S., who were required under the award to fence the land bounding the road. In or about the year 1883 the predecessor in title of S. erected an iron fence separating his land to the south of the road from the roadway. At some time thereafter the land to the north of the road was fenced, & the width of the roadway before the year 1906 had become reduced to between twenty-five & twenty-seven feet. In 1906 it was alleged that S. removed the fence bounding the land on the south side of the road nearer to the fence on the north side, thus encroaching on the highway. In 1907 the rural district council called on S. to set back his fence so as to restore a width of thirty-five feet to the roadway, & on his refusal, twice took down the fence, which S. on each occasion re-erected in the same position. In an action by the A.-G. & the rural district council for an injunction to restrain deft. S. from inclosing or encroaching upon the highway or from erecting any fence within thirty-five feet of the northern boundary of the road:—*Held*: (1) there had been no encroachment in 1906; (2) in respect of any alleged encroachment in 1883, the lapse of time was sufficient defence to the action by plffs.; & (3) as to the action by the A.-G., no encroachment upon the highway by the fence complained of having been shown, an injunction must be refused, with costs against plffs.—*A.-G. & GODSTONE RURAL DISTRICT COUNCIL v. WARREN SMITH* (1912), 76 J. P. 253.

*See, generally*, INJUNCTION.

**Joinder or sanction of Attorney-General—In action by private person.**—*See* Nos. 1683, 1687, *post*.

**Restraint of obstruction outside theatres, exhibitions, etc.**—*See* Sect. 1, sub-sect. 2, *ante*.

**Delay in applying for injunction.**—*See* INJUNCTION.

**1.** ————.]—The A.-G., as representing the public, is the proper person to prevent by injunction the erection of a permanent structure not authorised by the necessities of the public service, along or upon a county road. *A.-G. v. MAYO COUNTY COUNCIL*, [1902] 1 I. R. 13.—*IR.*

**m.** ————.]—An individual cannot himself complain of a wrong done to the public: the application should be in the name of the A.-G.—*Re BENNETT & CITY OF HAMILTON*, [1923] 3 D. L. R. 1173; 52 O. L. R. 220.—*CAN.*

*Sec. 3.—Remedies: Sub-sect. 3, A. & B.]***SUB-SECT. 3.—ACTION BY PRIVATE PERSON.****A. When Maintainable.**

**1670. Necessity for special damage—Obstruction of road to house.]**—ANON. (1536), Y. B. 27 Hen. 8, fo. 27, pl. 10.

*Annotations:—* **Refd.** Fowler v. Sanders (1617), Cro. Jac. 446; Iveson v. Moore (1697), 1 Ld. Raym. 486.

**1671.** ————.]—ANON. (1583), Moore, K. B. 180; 72 E. R. 517.

**1672.** ————.]—An action for a nuisance will not lie except pltf. has a particular right or suffers a special injury.—**PINEUX v. HIOVENDEN** (1599), Cro. Eliz. 664; 78 B. R. 902.

*Annotations:—* **Refd.** Ricket v. Met. Ry. (1865), 5 B. & S. 156; Harpur v. Hirst (1868), 38 L. J. Ex. 1; Iveson v. Moore (1699), 1 Ld. Raym. 486.

**1673.** ————.]—**FOWLER v. SANDERS**, No. 1580, *ante*.

**1674.** ————.]—**HAAT v. BASSET** (1681), T. Jo. 150; 81 E. R. 1194.

*Annotations:—* **Fold.** Chichester v. Lethbridge (1738), Willes, 71. **Consd.** Winterbottom v. Derby (1867), L. R. 2 Exch. 316. **Refd.** Heblethwait v. Palms (1688), Carth. 81; Iveson v. Moore (1699), 1 Ld. Raym. 486; Wilkes v. Hungerford Market Co. (1835), 1 Rodg. 281; Ricket v. Met. Ry. (1865), 5 B. & S. 156; Boyce v. Paddington B. Co. (1903) 1 Ch. 109.

**1675.** ————.]—A declaration that pltf. was possessed for a term of years of a colliery situate in the parish of A. near to the King's highway leading through the parish of A. & that deft., to hinder the carriage of the coals, obstructed the highway aforesaid, by which pltf. totally lost the benefit of his colliery, etc., is good, although no specific injury be particularly stated; for although deft. was guilty of a public nuisance in obstructing a common highway, & for such offence could only be punished by public prosecution, yet, as a special damage was occasioned thereby, he is liable to a civil action at the suit of the party injured, & the quantum of damage sustained is for the consideration of the jury on the evidence; at least the omission of stating the particular injury is cured by the verdict.—**IVESON v. MOORE** (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K. B. 10; 1 Salk. 15; 91 E. R. 1224; *sub nom.* **JEVESON v. MOOR**, 12 Mod. Rep. 262.

*Annotations:—* **Fold.** Rose v. Groves (1813), 1 Dow. & L. 61. **Consd.** Soltan v. De Held (1851), 2 Sim. N. S. 133. **Apd.** Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 605. **Consd.** Winterbottom v. Derby (1867), L. R. 2 Exch. 316; Filtz v. Hobson (1880), 14 Ch. D. 542. **Refd.** Wilkes v. Hungerford Market Co. (1835), 2 Bing. N. C. 281; Dobson v. Blackmore (1847), 9 Q. B. 991; Cameron v. Charing Cross Ry., Bourhill v. Charing Cross Ry. (1864), 16 C. B. N. S. 430; Beckett v. Mid. Ry. (1867), L. R. 3

C. P. 82; Ricket v. Met. Ry. (1867), L. R. 2 H. L. 175; Buccleugh & Queensberry v. Metropolitan Board of Works (1868), 18 L. T. 906; Benjamin v. Storr (1874), 30 L. T. 362; Metropolitan Board of Works v. McCarthy (1874), L. R. 7 H. L. 243; Lyon v. Fishmongers Co. & Thames Conservators (1875), 44 L. J. Ch. 408; Cale. Ry. v. Walker's Trustees (1882), 7 App. Cas. 259; Boyce v. Paddington B. Co. (1903) 1 Ch. 109; Campbell v. Paddington Corp., [1911] 1 K. B. 869. **Mentd.** Walsley v. Russell (1704), 6 Mod. Rep. 200; Itatcliffe v. Evans, [1892] 2 Q. B. 524.

**1676.** ————.]—**CHICHESTER v. LETHBRIDGE**, No. 1089, *post*.

**1677.** ————.]—(1) Pltf. cannot have this action, because the ground of it is for a common nuisance, for which an action will not lie, unless there is some special damage alleged, or where the party grieved can have no other remedy; but in this case pltf. had not declared upon any particular damage, but generally, that he had lost the liberty of the passage, etc., & therefore this action will not lie (*per* CUR.).

(2) This custom upon which this action is brought, consists only in discharge of payment of toll, & not in any right of passage by the inhabitants; for it appears to be a very ancient passage for all people, & the inhabitants of L. had not the passage *quatenus* inhabitants, but as the King's subjects, for it is a common passage (HOLT, C.J.).—**PAINE v. PARTRICH** (1691), Carth. 191; 3 Mod. Rep. 289; 1 Show. 243; Comb. 180; Holt, K. B. 6; 90 E. R. 715; *sub nom.* **PAYNE v. PARTRIDGE**, 1 Salk. 12; 1 Show. 255.

*Annotations:—* **As to** (1) **Distd.** Greasley v. Codling (1824), 2 Bing. 263. **Refd.** Lyme Regis v. Henley (1834), 2 Cl. & Fin. 331; Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 617; Newton v. Cubitt (1862), 12 C. B. N. S. 32; Cameron v. Charing Cross Ry., Bourhill v. Charing Cross Ry. (1864), 16 C. B. N. S. 430; Ricket v. Met. Ry. (1865), 5 B. & S. 156. **As to** (2) **Refd.** Iveson v. Moore (1697), 1 Ld. Raym. 486; Newton v. Cubitt (1862), 12 C. B. N. S. 32. **Generally, Mentd.** Phillibrown v. Ryland (1725), 8 Mod. Rep. 351; R. v. Ward (1836), 4 Ad. & El. 384; Lockwood v. Wood (1841), 13 L. J. Q. B. 365; Hopkins v. G. N. Ry. (1877), 2 Q. B. D. 224; Mercer v. Henne (1904) 2 Ch. 534; Dibden v. Skirrow, [1907] 1 Ch. 437; Clarke v. West Ham Corp., [1909] 2 K. B. 558; Hammerton v. Dysart, [1916] 1 A. C. 57.

**1678.** ————.]—If there be a public footway with a stile across it of a certain height, no one has a right to remove the stile & put up a gate of greater height; & the fact, that gates had been previously placed across other parts of the way will be no defence. If there be an obstruction of a public way, & any person receives a special injury from it, he may maintain an action.—**BATEMAN v. BURGE** (1834), 6 C. & P. 391; 2 Nev. & M. M. C. 191, N. P.

*Annotation:—* **Refd.** Mercer v. Woodgate (1869), 31 J. P. 261.

**PART IX. SECT. 3, SUB-SECT. 3.—A.**

**1670 I. Necessity for special damage—Obstruction of road to house.]**—**FISHER v. VAUGHAN TOWNSHIP** (1854), 12 U. C. R. 55.—**CAN.**

**1670 II.** ————.]—The corp'n. of C. was constructing a weigh scales on a corner of the principal street in the town, which would have caused a special injury to pltf., who kept a store at such corner. The ct., at the instance of pltf., restrained the construction on the ground of nuisance.—**CLINE v. CORNWALL CORPN.** (1874), 21 Gr. 129.—**CAN.**

**1670 III.** ————.]—**BROWN v. TORONTO & NIPESING RY. CO.** (1876), 26 C. P. 206.—**CAN.**

**1670 IV.** ————.]—**BURTON v. DOUGHERTY** (1879), 19 N. B. R. 51.—**CAN.**

**n.** ————.]—**Construction of rail track—Whether private nuisance—Injury not irreparable.]**—A ry. co. being about to

construct their line along a public street, a bill was filed by the owner of property in front of which it would pass, to restrain the construction of the road: **Held:** the injury did not amount to a private nuisance, & was not irreparable, & complainant was not entitled to an injunction.—**MAGEE v. LONDON & PORT STANLEY RY. CO.** (1857), 6 Gr. 170.—**CAN.**

**o.** ————.]—**Non-repair of road.]**—The principal streets of H. were in such condition from accumulation of ice & snow hardened into irregularities of surface, that pltf., owner of a line of omnibuses, had his vehicles injured & suffered loss of custom:—**Held:** where an individual or corp'n. is liable to indictment for non-repair, an action will lie at the suit of one who suffers special injury.—**HALIFAX (CITY) v. WALKER** (1885), 16 N. S. R. (4 L. & G.) 371.—**CAN.**

**p.** ————.]—**Limitation of action—Miscellaneous by highway authority.]**—Defts.,

for the purpose of repairing their road, placed on the side, heaps of gravel, etc., & took no precautions to prevent accidents therefrom. Pltf., driving at night, ran against one of them & upset, & broke his wagon. Defts. pleaded that an action brought therefor was not brought within three months:—**Held:** plea bad, as the cause of action was not the neglect of defts. to keep in repair, but the positive act of heaping up gravel & neglecting to afford sufficient notice or protection.—**ROWE v. LEBDS & GRENVILLE CORPN.** (1863), 13 C. P. 315.—**CAN.**

**q.** ————.]—**Necessity for compliance with statutory requirements.]**—Vehicles Act, 1912 (Sask.), c. 38, s. 5, which provides that no motor vehicle shall be used or operated upon any public highway which shall not have been registered, or which shall not display thereon the number plate as prescribed by this Act is a bar to the recovery of compensation for damages suffered by an

1679. ———.]—**WINTERBOTTOM v. DERBY** (LORD), No. 251, *ante*.

1680. ———.]—**BENJAMIN v. STORR**, No. 1441, *ante*.

1681. ———.]—**Erection of grand stand—Obstructing view of procession.**]—**CAMPBELL v. PADDINGTON CORPN.**, No. 1483, *ante*.

1682. ———.]—**Claim for injunction—Joinder of Attorney-General—Not necessary.**]—**SPENCER v. LONDON & BIRMINGHAM RY. CO.**, No. 1087, *post*.

1683. ———.]—**Where a pltf. suffers a particular injury from the obstruction of a public way, a bill for an injunction will lie, & the A.-G. need not be a party.**]—**COOK v. BATH CORPN.** (1868), L. R. 6 Eq. 177; 18 L. T. 123; 32 J. P. 741.

*Annotations.*—**Reid.** A.-G. v. Lonsdale (1868), L. R. 7 Eq. 377; **Pudsey Coal Co. v. Bradford Corp.** (1873), 42 L. J. Ch. 293; **Vernon v. St. James, Westminster, Vestry** (1880), 16 Ch. D. 119.

1684. **Limitation of action—Private Act—Effect on damages recoverable.**]—(1) **Pltf., a book-seller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by defts., continuing an authorised obstruction across it for an unreasonable time:—Held:** this was a damage sufficiently of a private nature to form the subject of an action. (2) **The grievance continued from Apr. 2 to July 2: pltf. commenced his action Dec. 30: a statute under which defts. had caused the obstruction having enacted that all actions against them should be commenced within six months after the cause of action arose:—Held:** pltf. could recover only for the damage accruing on July 1 & 2.—**WILKES v. HUNGERFORD MARKET CO.** (1835), 2 Bing. N. C. 281; 2 Scott, 446; 1 Hodg. 281; 5 L. J. C. P. 23; 132 E. R. 110.

*Annotations.*—**As to (1)** **Consd.** R. v. London Dock Co. (1836), 5 Ad. & El. 163. **Dbtd.** Rickett v. Met. Ry. (1867), L. R. 2 H. L. 175. **Consd.** McCarthy v. Metropolitan Board of Works (1872), L. R. 8 C. P. 191. **Appl.** Lyon v. Fishmongers' Co. & Thames Conservators (1875), 41 L. J. Ch. 408. **Consd.** Kutz v. Hobson (1880), 14 Ch. D. 512; **Martin v. L. G. Co.** (1898), 79 L. T. 170. **Reid.** Rose v. Groves (1813), 1 Dow. & G. 61; **East & West India Docks & Birmingham Junction Ry. v. Gattke** (1851), 3 Mac. & G. 155; **Cole. Ry. v. Ogilvy** (1855), 25 L. T. O. S. 106; **Manley v. St. Helen's Canal & Ry. Co.** (1858), 27 L. J. Ex. 159; **Senior v. Met. Ry.** (1863), 2 H. & C. 258; **Beckett v. Mid. Ry.** (1867), L. R. 3 C. P. 82; **Dumey v. London Corp.** (1869), 38 L. J. C. P. 298; **de Wadhwa & N. E. Ry.** (1884), 52 L. T. 894; **Anglo-Algerian S.S. Co. v. Houlder Line** (1908) 1 K. B. 659. **Generally, Mentd.** Cameron v. Charing Cross Ry., Bourhill v. Charing Cross Ry. (1864), 10 L. T. 381; **Eagle v. Charing Cross Ry.** (1867), L. R. 2 C. P. 638.

**Compare COMPULSORY PURCHASE, Vol. XI., p. 140, No. 205.**

**Compensation by statute—For authorised nuisance.**]—**See Sect. 3, sub-sect. 4, post.**

### B. Sufficiency of Damage Sustained.

1685. **Obstruction of road—Premises rendered inaccessible.**]—**ANON.** (1536), Y. B. 27 Hen. 8, fo. 27, pl. 10.

automobile because of the negligence of a municipality in allowing an obstruction to remain on a public street, if the automobile was not carrying a number plate.—**ETTER v. CITY OF SASKATOON**, (1917) 3 W. W. R. 1116; 10 Sask. L. R. 415; 30 D. L. R. 1.—**CAN.**

**r. Necessity for proof of negligence—Repair of road.**]—A motor-car, containing the pltf., skidded into a tramcar, & pltf. was injured. The street, where the accident took place, had previously been cleared of snow & ice by workmen employed by defts. **Held:** an action would not lie against

defts., unless pltf. could prove negligence in repairing the street.—**ANDREWS v. CALGARY (CITY)** (1922), 70 D. L. R. 753.—**CAN.**

### PART IX. SECT. 3, SUB-SECT. 3.—B.

1688 i. **Obstruction of road—Circuitous route necessitated.**]—To maintain an action for obstructing a public way, pltf. must show some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. Pltf. proved no such damage beyond being obliged, in common with every one else who attempted to use the way, to pursue

1686. ———.]—**Crops spoiled.**]—**MAYNELL v. SALT MARSH** (1604), 1 Keb. 847; 83 E. R. 1278.

*Annotations.*—**Distd.** Iveson v. Moore (1699), 1 Ld. Raym. 486. **Reid.** Rickett v. Met. Ry. (1865), 5 B. & S. 156.

1687. ———.]—**Non-compliance with statutory provisions.**]—A railway co. were empowered to cut through public or private roads, provided that if same should be thereby rendered impassable or inconvenient for the persons entitled to the use thereof, the co. should previously cause another sufficient road to be made instead thereof, & equally convenient, or as near thereto as might be. On June 1, the co., as it was alleged, had completely cut through a certain public road without having complied with the provision of the Act, by previously causing such a substituted road to be made, whereby pltf. sustained special damage. On June 25 pltf. filed their bill, praying an injunction to restrain the co. from continuing to cut through or stop up the road, & for other relief:—**Held:** (1) individuals, who suffer a special damage from a public nuisance, may sustain a bill to be relieved therefrom, without the A.-G. being a party to the suit; (2) in the case stated, the ct. will not only restrain the further cutting of the road, but enjoin the co. from continuing to stop up same, & thereby compel them to restore it to its original state.—**SPENCER v. LONDON & BIRMINGHAM RY. CO.** (1836), 8 Sim. 193; 1 Ry. & Can. Cas. 159; 7 L. J. Ch. 281; 59 E. R. 77.

*Annotations.*—**As to (1)** **Fold.** Cook v. Bath Corp. (1868), L. R. 6 Eq. 177. **Reid.** Soltan v. De Held (1851), 2 Sim. N. S. 133; A.-G. v. Lonsdale (1868), L. R. 7 Eq. 377; **London Assn. of Shipowners & Brokers v. London & India Docks, Joint Committee**, [1892] 3 Ch. 242. **Generally, Mentd.** Thorne v. Taw Vale Ry. & Dock Co. (1850), 13 Beav. 10.

1688. ———.]—**Circuitous route necessitated.**]—**HART v. BASSETT** (1681), T. Jo. 150; 81 E. R. 1104.

*Annotations.*—**Consd.** Iveson v. Moore (1699), 1 Ld. Raym. 486. **Fold.** Chichester v. Lethbridge (1738), Willes, 71. **Consd.** Winterbottom v. Derby (1867), 36 L. J. Ex. 104. **Reid.** Wilkes v. Hungerford Market Co. (1835), 1 Hodg. 281; **Rickett v. Met. Ry.** (1865), 5 B. & S. 156. **Mentd.** Heblethwait v. Palms (1688), Carth. 84.

1689. ———.]—**Plaintiff prevented from removing obstruction.**]—An action will not lie by an individual for an obstruction in a public highway unless he sustain a particular damage, which must appear on the record; but if pltf. state that deft. obstructed, etc., by a ditch & gate across the road by which pltf. was obliged to go a longer & a more difficult way, & that deft. opposed him in attempting to remove the nuisance; this is a sufficient damage to support the action.—**CHICHESTER v. LETHBRIDGE** (1738), Willes, 71; 125 E. R. 1061.

*Annotations.*—**Consd.** Dobson v. Blackmore (1847), 9 Q. B. 991. **Reid.** Rose v. Groves (1813), 5 Man. & G. 613; **Pinnington v. Galland** (1853), 9 Exch. 1; **Chundelahn v. West End of London & Crystal Palace Ry.** (1862), 2 B. & S. 695; **Rickett v. Met. Ry.** (1865), 5 B. & S. 156; **Beckett v. Mid. Ry.** (1867), L. R. 3 C. P. 82. **Mentd.** Wheldon v. Burrows (1879), 12 Ch. D. 31; **Anglo-Algerian S.S. Co. v. Houlder Line**, [1908] 1 K. B. 659.

1690. ———.]—**HUBERT v. GROVES** (1794), 1 Esp. 147.

*Annotations.*—**Distd.** Wilkes v. Hungerford Market Co.

his journey by a less direct road:—**Held:** he had no right of action.—**BAIRD v. WILSON** (1872), 22 C. P. 191.—**CAN.**

1688 ii. ———.]—**SMITH v. WILSON**, [1903] 2 I. R. 45.—**IR.**

**s. ———.]—Loss of business.**]—Action by boarding-house keeper for damages caused by defts. obstructing the sidewalk & road in front of pltf.'s residence, so that the boarders not having convenient access to the house left for more convenient & agreeable quarters:—**Held:** there was no evidence that these boarders would

damage to plaintiff arising out of any excess by defendants of their statutory powers, defendants were entitled to the judgment. *Qu.* : whether, assuming a loss of business through such an excess, the injury to plaintiff would have been actionable.—*MARTIN v. LONDON COUNTY COUNCIL* (1899), 80 L. T. 866; 15 T. L. R. 431, C. A.

1701. — Causing delay.]—GREASLY v. COD-  
LING, No. 1691, *ante*.

1702. — — — Swing-bridge.]—WIGGINS v. BODDINGTON, No. 1411, ante.

**1703. Obstruction of view—Erection of stand to view procession—Loss of custom.]—CAMPBELL v. PADDINGTON CORPN., No. 1483, *ante*.**

**1704. Obstruction of light by delivery vans.]—**  
**BENJAMIN V. STORR, No. 1441, ante.**  
**1705. Noise from creaking hoarding—Nuisance to tenants—Action by reversioner.]—**Pltf. was the owner in fee of a cottage, deft. owned some land immediately adjoining. Pltf. alleged that deft. had erected on pltf.'s land a hoarding on poles in order to block out the access of light to a window in the cottage, & had in so doing committed a trespass. Pltf. also alleged that the poles & hoarding produced a rattling & creaking noise which was an intolerable nuisance to pltf. & his tenants. Pltf. claimed an injunction to restrain the trespass & the nuisance. At the trial it was proved that the cottage was in the occupation of a weekly tenant of pltf., who was not a party to the action. There was no evidence that the acts of deft. had caused any diminution of value of, or other injury to, the reversion: *Held*: the poles & hoarding not being of such a permanent character as to injure the reversion pltf. could not maintain an action for trespass; & that the erection of the poles on pltf.'s land was too trifling an injury to entitle pltf. to an injunction. — **COOPER V. CRABTREE (1882),** 20 Ch. D. 589; 51 L. J. Ch. 544; 47 L. T. 5; 46 J. P. 628; 30 W. R. 649, C. A.

**Annotations:—***Refd.* *Meu's Brewery v. City of London Electric Lighting Co., Shelfer v. Same* (1894), 42 W. R. 644. *Mentd.* *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

1708. Claim by reversioner—Damage must be permanent.]—*MOTT v SHOOLBRED*, No. 1415, *ante*.

1707. ———.]—COOPER v. CRABTREE, No.  
1705, ante.

1708. Obstruction resulting in trespass—On another's land—Remoteness of damage.]—BLA-GRAVE v. BRISTOL WATERWORKS CO., No. 1692, *ante*.

*See, generally, DAMAGES, Vol. XVII., pp. 93 et seq.*

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**SUB-SECT. 4.-- STATUTORY COMPENSATION IN LIEU OF ACTION.**

**1709. Nuisance authorised by statute—Provision for compensation—Right of action excluded.]**

—(1) Where the acts of comrs. appointed by a Paving Act, occasion a damage to an individual, without any excess of jurisdiction on their part, the comrs. or paviors acting under them, are not liable to an action.

(2) The question is whether or not this action can be maintained? I am clearly of opinion that it cannot, because a particular remedy [by awarding compensation] is pointed out by the Act

R. 113.—CAN. sidewalk in front of her building, no damage having been suffered by pltf. in consequence of the change.—**BOUDREAU v. SHERBROOKE CORPN.** (1886). M. L. R. 2 S. C. 198.—CAN.

Co. (1909), 7 E. L. R. 113.—CAN.

sidewalk in front of her building, no damage having been suffered by pltf. in consequence of the change.—**BOUDREAU v. SHERBROOKE CORPN.** (1886). M. L. R. 2 S. C. 188.—CAN.

(BULLER, J.).—**BRITISH CAST PLATE MANUFACTURERS' Co. v. MEREDITH** (1792), 4 Term Rep. 794; 100 E. R. 1306.

*Annotations*.—As to (1) *Consd.* *Sutton v. Clarke* (1815), 6 Taunt. 29. *Fold.* *Boulton v. Crowther* (1824), 2 B. & C. 703. *Appld.* *Hall v. Smith* (1821), 2 Bing. 156. *Consd.* *Duncan v. Findlater* (1839), 6 Cl. & Fin. 894; *Pilgrimage v. Southampton & Dorchester Ry.* (1849), 7 C. B. 205. *Distd.* *Whitehouse v. Fellows* (1861), 10 C. B. N. S. 765. *Apprvd.* *East Fremantle Corp'n. v. Annois*, [1902] A. C. 213. *Refd.* *Heysham v. Forster* (1829), 5 Man. & Ry. K. B. 277; *Dawson v. Paver* (1847), 5 Hare, 415; *Scott v. Manchester Corp'n.* (1857), 22 J. P. 70; *Mersey Dock Trustees v. Gibbs, Mersey Dock Trustees v. Poulhallow* (1866), L. R. 1 H. L. 93. As to (2) *Consd.* *Boulton v. Crowther* (1824), 2 B. & C. 703. *Apprvd.* *East Fremantle Corp'n. v. Annois*, [1902] A. C. 213. *Generally*, *Mentd.* *Doswell v. Impey* (1823), 1 B. & C. 163.

**1710. — Obstruction interfering with access to premises—Road narrowed.**—Pltf. was possessed of a house fronting on a public highway. Defts., a railway co., under the powers conferred upon them by their special Act, erected an embankment on a portion of the highway opposite to pltf.'s house, thereby narrowing the road from fifty to thirty-three feet, & thus, according to the evidence, materially diminishing the value of the house for selling or letting, & obstructing the access of light & air to it:—*Held*: that this was such a permanent injury to the estate of the pltf. in the premises as to entitle him to compensation under the Lands Clauses Act, 1845 (c. 18), & Railways Clauses Act, 1845 (c. 20).—*BECKETT v. MIDLAND RY. CO.* (1867), L. R. 3 C. P. 82; 37 L. J. C. P. 11; 17 L. T. 499; 16 W. R. 221.

*Annotations*.—*Apprvd.* *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243. *Consd.* *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259. *Refd.* *Benjamin v. Storr* (1874), 30 L. T. 362; *Montreal Corp'n. v. Drummond* (1876), 1 App. Cas. 384; *Martin v. L. C. C.* (1898), 79 L. T. 170; *Campbell v. Paddington Corp'n.*, [1911] 1 K. B. 869. *Mentd.* *Lyon v. Fishmongers' Co. & Thames Conservators* (1875), 44 L. J. Ch. 408; *Duple v. G. N. Ry.* (1875), 23 W. R. 685; *Rhodes v. Altrude Drainage Commrs.* (1876), 1 C. P. D. 380; *Bell v. Quebec Corp'n.* (1879), 5 App. Cas. 84; *Ellis v. Rogers* (1885), 29 Ch. D. 661; *Belton v. L. C. C.* (1893), 41 W. R. 315.

—See **COMPULSORY PURCHASE**, Vol. XI., pp. 139–142, Nos. 250–272.

**1711. — No provision for compensation—Authority not exceeded.**—Appl't. municipality in the exercise of authority conferred by Western Australia Municipal Institutions Act (59 Vict. No. 10), s. 109, & at the request of the ratepayers in order to improve a street, reduced the gradient opposite resp.'s house so that it was left on the edge of a cutting with a drop of about 6 or 8 feet to the road:—*Held*: resp. was without remedy, since none had been given by statute & appl'ts. had not exceeded the powers conferred.—*RAST FREMANTLE CORPN. v. ANNOIS*, [1902] A. C. 213; 71 L. J. P. C. 39; 85 L. T. 732; 67 J. P. 103; 18 T. L. R. 199, P. C.

*Annotations*.—*Mentd.* *Ash v. G. N. Pice. & Brompton Ry.* (1903), 67 J. P. 417; *Roberts v. Charing Cross, Euston & Hampstead Ry.* (1903), 87 L. T. 732; *A. G. v. Dorchester Corp'n.* (1903), 93 L. T. 290.

**Enforcement of award for compensation.**—See **COMPULSORY PURCHASE**, Vol. XI., pp. 197 et seq.

#### SUB-SECT. 5.—PROCEEDINGS BY LOCAL AND HIGHWAY AUTHORITIES.

**1712. Sanction of Attorney-General—Necessity for—Where no special damage—Public Health Act,**

**1875 (c. 55), s. 107.]**—Above sect. enacts that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any superior ct. of law or equity to enforce the abatement or prohibition of any nuisance under the Act:—*Held*: such proceedings must be ordinary proceedings known to the law, & that in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the sanction of the A.-G. by action in the nature of an information.—*WALLASEY LOCAL BOARD v. GRACEY* (1887), 38 Ch. D. 593; 56 L. J. Ch. 739; 57 L. T. 51; 51 J. P. 740; 35 W. R. 694.

*Annotations*.—*Apprvd.* *Tottenham U. D. C. v. Williamson*, [1896] 2 Q. B. 353. *Appld.* *Stoke Parish Council v. Price*, [1899] 2 Ch. 277. *Distd.* *Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225.

**1713. — — — — —]**—Above sect. enacts that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance:—*Held*: such proceedings must be ordinary proceedings known to the law, & that, in the absence of special damage, a local authority cannot sue in respect of a public nuisance except by action in the nature of an information with the sanction of the A.-G.—*TOTTENHAM URBAN DISTRICT COUNCIL v. WILLIAMSON & SONS*, [1896] 2 Q. B. 353; 65 L. J. Q. B. 591; 75 L. T. 238; 60 J. P. 725; 41 W. R. 670, C. A.

*Annotations*.—*Distd.* *Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225. *Refd.* *Stoke Parish Council v. Price*, [1899] 2 Ch. 277.

**1714. Joinder of Attorney-General Action by parish council—Road vested in district council Local Government Act, 1894 (c. 73), s. 25.]**—A parish council cannot sue for an obstruction to a well situate on a main road, from which the inhabitants claim to take water, as main roads are vested in the district council under above sect. & if the right is a public one, the A.-G. must be joined as pltf. *STOKE PARISH COUNCIL v. PRICE*, [1899] 2 Ch. 277; 68 L. J. Ch. 417; 80 L. T. 643; 63 J. P. 502; 47 W. R. 603.

*Annotations*.—*Distd.* *Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225. *A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480.

**1715. Measure of damages—Subsidence due to mining operations—Cost of repairs.**—A lord of a manor or his lessees or assigns, to whom, in the widest terms, were reserved in a local inclosure Act all rights belonging to the manor, & all mines, etc., under the commons of the manor to be inclosed under the Act, with power to do all necessary acts for draining, winning, & working the said mines, etc., "as fully & freely as he or they could have had, held, used or enjoyed the same in case the Act had not been made, & that without paying any damages or making any satisfaction for so doing," cannot, notwithstanding such reservation, work the mines, underneath the public highways set out in & over the said commons under the Act, & thereby directed to be for ever maintained & kept in repair by the inhabitants & occupiers of the district in which the same are situated, in such a way as to injure the said highways by withdrawing the natural

#### PART IX. SECT. 3, SUB-SECT. 5.

**A. Joinder of Attorney-General—Action by county council—Cost of removal of obstruction.]—A County Council can sue, without joining the**

**A.-G., to recover the cost incurred by it in removing a fence unlawfully erected upon a road under their care & management.**—*HUSHALL v. KAIKOURA COUNTY COUNCIL*, [1923] A. C. 459.—N.Z.

**b. Removal of obstruction—Dangerous fence.]—Road trustees have a good title to sue an action against the proprietor of land bordering a public road who had erected a fence dangerous to users of the road for the purpose of**

support of the surface & causing them to sink below their ordinary level, without rendering themselves liable, at the suit of the persons upon whom by law the duty of keeping such highways in repair is cast, to an action for the recovery of the cost of repairing the injury so done; & such reservation of rights & powers to the lord & his lessees & assigns must be taken to be subject to the paramount right of the public to have the highways in question preserved & maintained in a fit & proper condition for the free use of them by all the Queen's subjects.— *BENFELDSIDE LOCAL BOARD v. CONSETT IRON CO.* (1877), 3 Ex. D. 54; 47 L. J. Q. B. 491; 38 L. T. 530; 26 W. R. 114, D. C.

**Annotations** :— **Apld.** Normanton Gas Co. v. Pope & Pearson (1882), 44 L. T. 656. **Consd.** Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135. **Refd.** L. & N. W. Ry. v. Evans, [1893] 1 Ch. 16; A.-G. v. Conduitt Colliery Co., [1895] 1 Q. B. 301. **Mentd.** Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901), 85 L. T. 53.

**1716.** ----- .] - LODGE HOLES COLLIERY CO., LTD. v. WEDNESBURY CORPN., No. 630, *ante*.

1717. - Removal of obstruction - Cost of removal. | SOUTH DISTRICT COUNCIL v. WEST, No. 1176, *ante*.

*See, now, Indictments Act, 1915 (c. 90), & generally, CRIMINAL LAW, Vol. XIV., pp. 202 et seq.*

**1718. Obstruction of road --Public nuisance**  
**Private loss.** For any obstruction to a public highway which is a public nuisance, though such should obstruct the party's business, an action on the case cannot be maintained by the party so obstructed; the only remedy is by indictment.  
**HUBERT v. GROVES (1794), 1 Esp. 147.**

**Annotations:** - **Rehd.** *Rose* v. Miles (1815), 4 M. & S. 101; (Greasy v. Codling (1821), 9 Moore, C. P. 189; Wilkes v. Hungerford Market Co. (1833), 2 Bing. N. C. 281; *Rose* v. Groves (1813), 6 Scott, N. R. 645; Benjamin v. Stott (1871), L. R. 9 C. P. 400; Anglo-Algerian S.S. Co. v. Houlder Line, [1908] 1 K. B. 659.

1719. - - By railway company.] — R. v. SCOTT,  
No. 1719.

1720. . . . .] --R. v. GREAT NORTH OF ENGL-  
LAND RY. CO., No. 1627, *ante*.

1721. — — —. — The N. E. Ry. Co were indicted for obstruction of a highway. At the trial, the judge directed the jury to acquit them on one of the counts on the ground that they were justified under their special Act in doing what was alleged in such count to be an obstruction. The jury found a verdict for defts. The prosecutor obtained a rule nisi to stay entry of judgment for defts. on the ground that such direction was wrong in law: *Held*: such rule must be discharged, since, whether the direction was wrong or not, the entry of the judgment would not prevent the prosecutors from bringing a second indictment for the continuance of the alleged obstruction, & therefore their rights would not be altered by it. — R. v. NORTH EASTERN RY. CO. (1901), 70

having him ordained to remove the fence.—ELAIN (COUNTY ROAD TRUSTEES v. INNER (1886), 14 R. (Ct. of Sess.) 48.—SCOT.

c. Obstruction of road — Public nuisance.]— Proceedings against the corpora. of a city on a charge of neglecting to repair & keep in repair one of its

**L. J. K. B. 548; 84 L. T. 502; 40 W. R. 524;  
19 Cox, C. C. 682, D. C.**

1722. — By gas company.]—R. v. LONGTON GAS CO., No. 1618, *ante*.

Indictment of corporation generally, *see*  
(CORPORATIONS, Vol. XIII., pp. 409, 410, Nos.  
1294-1303.

**1723. Alternative remedy—Summary proceedings.**—Where a statute makes the erection of a building within certain limits "a common nuisance" & also gives a summary remedy by proceedings before magistrates, the offender may be indicted for the nuisance.—*R. v. GREGORY* (1833), 5 B. & Ad. 555; 2 Nev. & M. K. B. 478; 1 Nev. & M. M. C. 446; 110 E. R. 895.

*Annotations*.—**Reid**. *R. v. Pocock* (1851), 17 L. T. O. S. 91 ;  
*R. v. Lovibond* (1871), 19 W. R. 753 ; *R. v. Hall*, [1891]  
 1 Q. B. 747.

1724. ——— Obstruction by walking abreast  
—Towns Police Clauses Act, 1847 (c. 89), s. 28.]—

Three men walked abreast on the pavement of a street back & forward, causing passengers to go aside on the highway. On a summons under above Act:—*Held*: they could not be convicted, as they had not used any cart, carriage, or animal, & the only remedy seemed to be by indictment.

If these persons had been indicted for a nuisance a stop might have been put to these roughs & rowdies so annoying respectable people. Still, we must keep to the words of the Act. The various ways of causing obstruction are specified, namely, "by carts, carriages, sledges, trunks, or barrows, or any animal," & we can only give to the words "or other means" the meaning that a similar class of means shall be resorted to (FIELD, J.). R. v. LONG, etc., JJ. (1888), 59 L. T. 33; 52 J. P. 630; 4 T. L. R. 581; 16 Cox, C. C. 442, D. C.

**Annotations:**—**Folld.** R. v. Williams (1891), 55 J. P. 406.  
**Consd.** Gill v. Carson & Nield, [1917] 2 K. B. 671.

**1725.** *—* [J.] — Four men walked abreast on the pavement, causing passengers to go into the carriageway in order to pass, & were charged under Town Police Clauses Act, 1847 (c. 80), s. 28, with obstructing the highway: — *Held*: this was not an offence punishable summarily, but might be indictable.—*R. v. WILLIAMS* (1891), 55 J. P. 408, D. C.

**1723. — Civil action pending—Postponement.]**—The trial of an indictment for obstructing a highway, not postponed at the instance of deft. until the trial of an action brought by prosecutor against him for injury by reason of the obstruction of the same highway.

A person ought not to be harassed with two proceedings, & when he is so, the ct. have a right to determine which of the two proceedings shall be pursued, so as to place the parties in a position of equality. Here, however, being an allegation of a public nuisance, & the indictment founded only on that, it is only a public grievance by reason of a private wrong. Therefore, if the prosecutor will undertake not to proceed in the action—so much of it as relates to the right of way—no order shall be made (WIGHTMAN, J.).—*R. v. BOWLES* (1861). 2 F. & F. 371.

1727. Continuing nuisance—Order to abate.]—Where a nuisance is temporary, as the steeping

public streets, thereby committing a common nuisance, should be by indictment.—R. v. CITY OF LONDON CORPN. (1900), 32 O. R. 326.—CAN.

d. ——— Form of indictment.]  
--An indictment for obstructing a highway should state in what way the obstruction interferes with the comfort of the public—whether to those passing along the highway or

residing near it or otherwise. There ought to be some description of the highway, & it must appear that the nuisance has been committed in the county in which the indictment is found.—*R. v. REYNOLDS* (1906), 2 E. L. R. 42.—**CAN.**

1727 i. Continuing nuisance—Order to abate.]—Defts. were indicted for a nuisance in obstructing a highway for



stinking hides, etc., there need not be judgment that it be abated.

Every judgment should be adapted to the nature of the case (REYNOLDS, J.).

The cases cited by [counsel] were of a permanent nuisance. But here erecting the mole is not the nuisance, for it might be lawful to do that, but the nuisance arises from the use he puts it to. If a dye-house or any stinking trade were indicted you shall not pull down the house where the trade was carried on. Here could be no judgment to abate any thing (LORD RAYMOND, C.J.).—*R. v. PAPPINEAU* (1726), 2 Stra. 686; 93 E. R. 781; *sub nom. R. v. PAPINIAN*, Sess. Cas. K. B. 135.

*Annotations*:—*Folld. R. v. Stead* (1799), 8 Term Rep. 112; *Cooper v. Marshall* (1757), 1 Burr. 259; *R. v. White & Ward* (1757), 1 Burr. 333; *R. v. West Riding of Yorkshire JJ.* (1798), 7 Term Rep. 167; *Wednesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

**1728.** ———.]—Upon an indictment for erecting a wall across a highway, not stating the nuisance to be continuing, there need not be judgment to abate it: *secus*, where it is stated in the indictment as an existing nuisance.

When a debt. is indicted for an existing nuisance, it is usual to state the nuisance & its continuance down to the time of taking the inquisition, & in such cases the judgment should be, that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence & it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, debt. may be again indicted for continuing it (LORD KENYON, C.J.).—*R. v. STEAD* (1799), 8 Term Rep. 142; 101 E. R. 1312.

**1729.** ———.]—Further Indictment.] On the trial of an indictment for continuance of a nuisance, found at the quarter sessions, & removed into the Ct. of Q. B. by *certiorari* & tried at the assizes, a plea of *autrefois convict* on a former indictment for same nuisance was not allowed to be added, even by consent, the judge having no jurisdiction to receive it. But the nuisance being a wall, proved to be still standing:—*Held*: the judgment on the former indictment was conclusive. *R. v. MAYBURY* (1864), 4 F. & F. 90.

**1730.** ———.]—*R. v. NORTH EASTERN RY. Co.*, No. 1721, *ante*.

*Compare* No. 1728, *ante*.

**1731. Abatement before judgment—Discretion of court to make order.**—If the ct. be satisfied that a nuisance indicted is already effectually abated before judgment is prayed upon the indictment, they will not, in their discretion, give judgment to abate it. They refused to give such judgment upon an indictment for an obstruction in a public highway; which highway after the conviction of debt., was regularly turned by an order of magistrates, & a certificate obtained that the new way was fit for the passage of the public, & on affidavits that so much of the old way indicted as was still retained was freed from all

obstruction.—*R. v. INCLEDON* (1810), 13 East, 164; 104 E. R. 331.

*Annotations*:—*Held. Windhill L. B. of Health v. Vint* (1890), 45 Ch. D. 351; *Wednesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

**1732.** ———.]—On an indictment for obstructing a highway, where it appears that the obstruction has been removed, that is substantially an end of the proceeding, its object having been attained.—*R. v. PAGET* (1802), 3 F. & F. 29.

**1733.** ———.]—Nominal fine.]—The ct. will discharge an indictment for a nuisance by erecting a building on part of a highway, on a merely nominal fine, when the nuisance has been removed, if it appears that the public has not suffered any real inconvenience.—*R. v. DUNRAVEN (EARL)* (1837), Will. Woll. & Dav. 577.

**1734.** ———.]—Where a local authority has been indicted for a nuisance which has subsequently been removed, & has not caused any real inconvenience to the public, only a nominal fine will be inflicted.—*R. v. LEWES CORPN.* (1886), 2 T. L. R. 399.

**1735. Removal by certiorari—To enable jury to view—Difficult points of law involved.**—*R. v. TRENCIARD* (1816), 10 J. P. Jo. 70.

*See, further, CROWN PRACTICE*, Vol. XVI., pp. 409 *et seq.*

—*Procedure.*] *See, generally, CROWN PRACTICE*, Vol. XVI., pp. 451 *et seq.*

#### SUB-SECT. 7. —SUMMARY PROCEEDINGS UNDER HIGHWAY ACTS.

##### A. Jurisdiction of Justices.

*See, generally, MAGISTRATES.*

#### 1736. Disqualification—Pecuniary interest Time for objection—Knowledge of defendant.

—The surveyor of the roads directed trestles to be put at intervals on either side of a road, on which fresh granite had been laid, to confine the traffic to a particular part of it. A. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he deeming the surveyor to have no power so to put the trestles for this object. One of the trestles was injured, & on a summons against A., under 7 & 8 Geo. 4, c. 30, the justices convicted & fined A. 1s. By a local Act, the justices were made vestrymen, & became interested in the property in the trestles, & also in the fine:—*Held*: (1) the justices had jurisdiction to convict: & (2) in order to obtain a *certiorari* to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he nor his advocate before the justices, knew of the objection at the time of the hearing.—*R. v. RICHMOND, SURREY JJ.* (1860), 2 L. T. 373; 24 J. P. 422; 8 Cox, C. C. 314.

**1737.** ———.]—As ratepayer.]—At a vestry meeting summoned by a district surveyor to consider (*inter alia*) the obstruction of a highway by debt., who had deposited & left a heap of earth &

improper construction of their road in crossing it, & were convicted. Nothing having been done to abate the nuisance, the prosecutors moved for judgment on the conviction. Judgment was given sentencing debt. to pay a fine & to abate the nuisance.—*R. v. GRAND TRUNK RY. Co.* (1858), 17 U. C. R. 165.—CAN.

**e. Removal by certiorari—To enable jury to view.**—The ct. will grant a *certiorari* to remove an indictment for obstructing a public highway, from the assizes, it appearing to be necessary to the ends of justice that there should be a view of the locus in

*quo.*—*R. v. MAGILL* (1859), 8 L. C. L. R. App. 121; 11 Ir. Jur. 182.—IR.

**f. Necessity for bye-law adopting new road.**—Deft. felled a tree & blocked a road where it passed through a corner of his land. The county council had made the road, but had not passed a bye-law to make clear the precise course of the road. Deft. was convicted upon an indictment for a nuisance:—*Held*: the conviction must be quashed.—*R. v. RANKIN* (1888), 16 U. C. R. 304.—CAN.

**g. Whether necessary to determine title to highway.**—It is not necessary

that the title to the road should be first determined on an indictment for nuisance.—*SOLICITOR-GENERAL v. BARTLETT* (1899), 18 N. Z. L. R. 142.—N.Z.

#### PART IX. SECT. 3, SUB-SECT. 7.—A.

**b. Disqualification—Pecuniary interest**—*R. v. DUBLIN COUNTY JJ.*, [1894] 2 I. R. 527.—IR.

**c. Claim of right—Effect on jurisdiction—Encroachment of fencing.**—*R. v. TAYLOR* (1859), 8 U. C. R. 237.—CAN.

**1. Municipal Act, 1888—Construction**

**Sect. 3.—Remedies: Sub-sect. 7, A., B., C., D., E. & F.]**

manure by the side of the highway, a justice of the peace moved a resolution calling upon deft. to remove the heap. Deft. having failed to remove the heap, a summons was taken out against him by the district surveyor for depositing the heap to the obstruction & annoyance of the highway, & for failing to remove it after notice. The justice who had moved the resolution, & who was a ratepayer of the parish, sat & adjudicated with another justice upon the summons, & made an order directing the heap to be removed & sold, & the proceeds of the sale to be applied to the repair of the highway:—*Held*: the justice was disqualified from adjudicating upon the summons, for the part taken by him in moving the resolution afforded ground for a reasonable suspicion of bias on his part, though there might not have been bias in fact, & upon the further ground that as a ratepayer he was pecuniarily interested in the result of the summons. *R. v. GAISFORD*, [1892] 1 Q. B. 381; 61 L. J. M. C. 50; 66 L. T. 24; 56 J. P. 247, D. C.

**1738. — Member of authority ordering prosecution—Bias.**—*R. v. GAISFORD*, No. 1737, *ante*. Compare No. 1736, *ante*.

**1739. Encroachment not on via trita—Within fifteen feet of centre of road—Highway Act, 1835 (c. 50), s. 69.**—*CHAPMAN v. ROBINSON*, No. 1530, *ante*.

**1740. Claim of right—Effect on jurisdiction—Erection of stall in street.**—*SIMPSON v. WELLS*, No. 1578, *ante*.

**1741. — — — Goods exposed for sale in street.**—*LEICESTER URBAN SANITARY AUTHORITY v. HOLLAND*, No. 308, *ante*.

**1742. — — — Deposit of rubbish on highway.**—On the hearing of a complaint, under Highway Act, 1835 (c. 50), s. 73, for leaving rubbish on a highway after notice to remove it, deft., who was the owner of the land on both sides of the alleged highway, denied it to be a highway; & as he claimed the soil subject to a private right of way only, he contended that the justices ought not to adjudicate in the matter, on the ground that title to land came in question:—*Held*: the objection was untenable, for that the justices had jurisdiction under the statute to determine whether the road was a highway or not.—*WILLIAMS v. ADAMS* (1862), 2 B. & S. 312; 31 L. J. M. C. 109; 5 L. T. 790; 26 J. P. 180; 8 Jur. N. S. 816; 121 E. R. 1080.

**Annotations:—***Fold. R. v. Young & White* (1883), 52 L. J. M. C. 55. *Apld. R. v. Phillimore, etc. JJ. & Pilling* (1884), 51 L. J. P. 205. *Refd. Cornwall v. Sanders* (1862), 32 L. J. M. C. 6. *R. v. Farrer* (1866), L. R. 1 Q. B. 658; *White v. Fox* (1880), 49 L. J. M. C. 60; *R. v. Sheffield Recorder* (1884), 31 W. R. 701; *R. v. Bradley* (1894), 63 L. J. M. C. 183.

**1743. — — — Deposit of materials on highway.**—A local Act gave jurisdiction to justices over the offence of "throwing or laying down stones, iron, etc., or other materials in a street." A person charged with the offence maintained that the spot on which iron had been laid down was his private property, free from any right of way, & the justices declined to adjudicate:—*Held*: their jurisdiction was not ousted, as the statute gave them power to determine what was a street.—*R. v. YOUNG & WHITE* (1883), 52 L. J. M. C. 55; 47 J. P. 510, D. C.

**Annotations:—***Apld. R. v. Smith & Pritchard* (1883), 52

L. J. M. C. 56, n. *Refd. R. v. Sheffield Recorder* (1883), 52 L. J. M. C. 78; *Openshaw v. Pickering* (1912), 11 L. G. R. 112.

**1744. — — — Encroachment.**—An information having been laid against P. under Highway Act, 1864 (c. 101), s. 51, for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was *bona fide*, & thereupon refused to hear the case on the ground of want of jurisdiction. Complainant having applied under Justices Protection Act, 1848 (c. 44), s. 5, for a rule for the justices to show cause why they should not hear & determine the case:—*Held*: the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties.—*R. v. PHILLIMORE* (1884), 14 Q. B. D. 474, n.; 51 L. T. 205; 48 J. P. 774; *sub nom. R. v. PILLING*, 32 W. R. 593.

**Annotation:—***Fold. R. v. Bron* (1884), 14 Q. B. D. 474.

**1745. — — — — —**—*R. v. BRADLEY*, No. 1532, *ante*.

**1746. — — — Playing games on heath.**—*R. v. SMITH & PRITCHARD* (1883), 52 L. J. M. C. 56, n.

**1747. — — — Erection of showcase on footway.**—*OPENSHAW v. PICKERING*, No. 278, *ante*.

**1748. Effect of adjudication—As to fact of highway—Action against magistrate.**—Under Highway Act, 1835 (c. 50), s. 73, which enacts that if any timber, etc., is laid upon any highway so as to be a nuisance, & shall not after notice be removed, it shall be lawful for the surveyor, by order in writing from a justice to remove the timber, etc., an order of a justice, reciting that pltf.'s timber was laid on the highway & directing its removal, is conclusive to show that the *locus in quo* was a highway, so that pltf. in an action of trespass against the justice who made the order cannot dispute his jurisdiction on the ground that the *locus in quo* was not a highway.—*MOULD v. WILLIAMS* (1844), 5 Q. B. 469; 1 Dav. & Mer. 631; 2 L. T. O. S. 369; 114 E. R. 1326.

**Annotations:—***Refd. R. v. Hickling* (1845), 7 Q. B. 880; *Lindsay v. Leigh* (1818), 12 Jur. 286; *Newbold v. Colman* (1850), 16 L. T. O. S. 488; *R. v. Baker* (1857), 2 H. & N. 219; *Dixon v. Chester* (1906), 70 J. P. 380. *Mentd. Revell v. Blake* (1872), L. R. 7 C. P. 300.

**1749. Jurisdiction to convict surveyor—Failure to obey order for removing obstruction—Highway Act, 1835 (c. 50), s. 73.**—Defts., who were magistrates, directed pltf. a surveyor of highways, to remove a certain nuisance from the highway, & to fence a pit that was dangerous, & on his neglecting to do so, convicted him in a penalty for having "wilfully neglected his duty in not removing, or causing to be removed, certain nuisances in & upon a certain highway in the said parish, etc., & not duly guarding a dangerous pit lying on the highway":—*Held*: the conviction was not warranted by sect. 20 of above Act or by above sect. & it could not be supported.—*MORGAN v. LEACH* (1842), 10 M. & W. 558; 12 L. J. M. C. 4; 7 J. P. 242; 152 E. R. 593.

**1750. Jurisdiction to dismiss summons—Under Probation of Offenders Act, 1907 (c. 17), s. 1 (1)—One stallholder only proceeded against.**—Where a person is charged with obstructing the footway by means of a stall, the fact that other persons against whom no proceedings have been taken are committing the same offence in a worse form is an extenuating circumstance within above sub-sect.

*of.*—On a complaint by the chairman of St. John's Municipal Council against deft. for not laying a side-

walk:—*Held*: under Con. Stat. c. 80, s. 28, the magistrate has jurisdiction to try complaints for the non-

feasances under s. 15.—*POWER v. HUNT* (1892), 7 Nfld. L. R. 584.—*NFLD.*

entitling the justices to dismiss the summons.—*DUNNING v. TRAINER* (1909), 101 L. T. 421; 73 J. P. 400; 25 T. L. R. 658; 22 Cox, C. C. 170; 7 L. G. R. 919.

**Jurisdiction to order removal of obstruction.]—**See Sub-sect. 1, B., *ante*.

**Jurisdiction to state special case.]—**See *MAGISTRATES*.

### B. Who may Institute Proceedings.

**1751. Under Highway Act, 1835 (c. 50), s. 72—Any person.]—***BACK v. HOLMES*, No. 1348, *ante*.

**1752. Under Metropolitan Police Act, 1839 (c. 47), s. 60—Any person.]—***ALLMAN v. HARDCASTLE*, No. 1435, *ante*.

**1753. Under Metropolitan Paving Act, 1817 (c. xxix), ss. 65, 123—Necessity for authority in writing.]—**Sect. 123 of above Act, which empowers justices to proceed on the complaint of the persons having the control of the pavements or of any person appointed in writing for the purpose does not apply to proceedings under sect. 65, which enables justices to entertain proceedings for street obstruction on the complaint of one or more credible witnesses, & therefore in proceedings under sect. 65 complainant need not be authorised in writing to make the complaint.—*KEEF v. ALEXANDER* (1909), 101 L. T. 430; 73 J. P. 423; 7 L. G. R. 894, D. C.

### C. Form of Order.

See, now, Highway Act, 1835 (c. 50), s. 118, & Schedule of Forms; as to Schedule, Forms 20–25, see, now, Summary Jurisdiction Act, 1884 (c. 43), s. 4.

**1754. Highway Act, 1739 (c. 78)—How far forms obligatory.]—**(1) An order made by justices of peace under above Act, for stopping up an old footway & setting out a new one, must follow the form prescribed in the schedule annexed to the Act, & set forth the length & breadth of the new footway; otherwise it is no answer to a justification of a right of way pleaded to an action of trespass *quare clausum fregit* brought by the owner of the soil over which the old way led. The Act requires, that the form set forth in the schedule "shall be used on all occasions, with such additions & variations only as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, & may be taken advantage of in a collateral proceeding.

(2) The soil was not vested in trustees of turnpike road, but remained in the persons who were entitled to it before the Act passed by which they were appointed. The trustees have only the control of the highway (*KENYON, C.J.*).—*DAVISON v. GILL* (1800), 1 East, 64; 102 E. R. 25.

**Annotations:—***As to (1)* *Reid. Goss v. Jackson* (1800), 3 Esp. 198; *R. v. Milverton* (1836), 5 Ad. & El. 841; *Catterall v. Sweetman* (1845), 4 Notes of Cases, 222. *As to (2)* *Apprvd. Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374. *Reid. Badger v. South Yorkshire Ry. & River Dun Co.* (1858), 1 E. & El. 359; *Salisbury v. G. N. Ry.* (1858), 5 C. B. N. S. 174.

**1755. ———.]—**13 Geo. 3, c. 78, s. 80, prohibits the removal by *certiorari* into this ct., of any proceedings had in pursuance of that Act.

Where an order was made by two justices, & confirmed by the sessions, for diverting a road, professedly under the authority of, but, as was alleged, without pursuing all the formalities required by the Act:—*Held*: the *certiorari* was still taken away; & after the proceedings had been in fact removed, the ct. quashed the *certiorari*, *quia improvide emanavit*, & refused to discuss the sufficiency or insufficiency of the order. *Qu.*: whether an order for diverting & turning an old road, need set out the names of owners of the land through which the new road is proposed to be carried.—*R. v. CASSON* (1823), 3 Dow. & Ry. K. B. 36; 1 Dow. & Ry. M. C. 480.

**Annotations:—***Distd. R. v. Somersetshire JJ.* (1825), 6 Dow. & Ry. K. B. 469. *Reid. R. v. Cambridgeshire JJ.* (1835), 4 Ad. & El. 111; *R. v. Cook* (1841), 5 Jur. 1181.

**Quashing proceedings for want of form.]—**See Highway Act, 1835 (c. 50), s. 107; Public Health Act, 1875 (c. 55), s. 262.

### D. Removal of Obstruction.

See Highway Act, 1835 (c. 50), ss. 65, 66, 73; & compare Public Health Act, 1925 (c. 71), s. 23. See, also, Nos. 1601, 1602, *ante*.

### E. Time for Commencement of Proceedings.

**1756. Recovery of penalty—Six months after date of encroachment.—**Under Highway Act, 1864 (c. 101), s. 51.—If an encroachment be made upon a highway by erecting a fence within fifteen feet from the centre thereof, the penalty must be proceeded for under the above sect., within six months after the erection of the fence, & it is not a continuing offence.—*RANKING v. FORBES* (1860), 34 J. P. 480.

**Annotation:—***Apprvd. Coggins v. Bennett* (1877), 2 C. P. D. 508.

**1757. ——— How reckoned Highway Act, 1864 (c. 101), s. 51.]—**Under the above sect., the encroachment is not a continuing offence, & the six months' limitation created by Summary Jurisdiction Act, 1848 (c. 43), s. 11, commences from the completion of such building or fence.—*COGGINS v. BENNETT* (1877), 2 C. P. D. 508.

**Annotations:—***Consd. Hyde v. Entwistle* (1884), 52 L. T. 760. *Mentd. Rumball v. Schmidt* (1882), 8 Q. B. D. 603.

**1758. ——— Turnpike Roads Act, 1822 (c. 126), s. 118.]—**By 9 Geo. 4, c. 77, s. 18, no person may be convicted of an offence against Turnpike Roads Act, 1822 (c. 120), s. 118, which enacts that any person causing an encroachment within a certain distance of the centre of a turnpike road shall be subject to a penalty, after the expiration of six months from the time when such offence shall have been committed. The period of six months mentioned in the sect. begins to run from the time that a substantial encroachment of the highway has been caused, & not from the final completion of the encroaching building or other encroachment.—*HYDE v. ENTWISTLE* (1884), 52 L. T. 760; 49 J. P. 517.

### F. Appeals.

See Highway Act, 1835 (c. 50), s. 105, & now, Summary Jurisdiction Act, 1884 (c. 43), s. 4, sched.

### PART IX. SECT. 3, SUB-SECT. 7.—C.

**m. Obstruction of highway.]—**A conviction for obstructing a highway is bad, unless it appears on the face of it that the place where the alleged obstruction took place was a highway.—*R. v. BRITTAIN* (1845), 2 Kerr, 614.—*CAN.*

**n. Continuing fine.]—**Conviction by

a magistrate for obstructing a highway, & order to pay a continuing fine until the removal of such obstruction:—*Held*: bad.—*R. v. HUBER* (1858), 15 U. C. R. 569.—*CAN.*

### PART IX. SECT. 3, SUB-SECT. 7.—D.

**o. Commissioner's duty.]—**If a road is laid out over land on which a

fence is standing it is the duty of the comr. of highways to remove the fence.—*Ex p. MORRISON* (1848), 1 All. 203.—*CAN.*

### PART IX. SECT. 3, SUB-SECT. 7.—F.

**p. On question of evidence—General rule.]—**Def't. was convicted at a recorder's ct. upon an indictment for

**Sect. 3.—Remedies: Sub-sect. 7, F. Parts X. & XI. Sect. 1.]**

**1759. Notice of appeal—Service on all convicting justices—Service on surveyors insufficient.]—**A party convicted by two justices in special sessions under Highway Act, 1835 (c. 50), ss. 47, 103, on information by one of the surveyors, cannot be heard on appeal to the quarter sessions under sect. 105, unless he has served notice on both the convicting justices. It is not sufficient that he has served notice on the surveyors, & has also served a notice on one of the justices, addressed to both, which that justice has transmitted to the clerk of the special sessions, with an observation to him that he will know how to act upon it.—*R. v. BEDFORDSHIRE JJ., Re FOSTER* (1839), 11 Ad. & El. 134; 3 Per. & Dav. 21; 9 L. J. M. C. 8; 3 J. P. 730; 4 Jur. 85; 113 E. R. 365.

**Annotations.**—*Consd. R. v. Cheshire JJ.* (1840), 11 Ad. & El. 139; *R. v. North Riding of Yorkshire JJ., Re Lunn* (1845), 14 L. J. M. C. 91. *Refd. R. v. Glamorganshire JJ., Ex p. Applegate, R. v. Glamorganshire JJ., Ex p. Evans* (1892), 36 Sol. Jo. 232. *Mentd. South Staffordshire Waterworks Co. v. Stone* (1887), 56 L. J. M. C. 122.

**1760. Appeal against acquittal—Offence under**

**Highway Act, 1835 (c. 50), s. 72.]—**A summons under above sect. against a person for wilfully obstructing a highway was dismissed by a justice:—*Held*: informant had no right of appeal under sect. 105 of above Act against the acquittal of accused.—*R. v. LONDON COUNTY KEEPERS OF THE PEACE & JJ.* (1890), 25 Q. B. D. 357; *sub nom. R. v. LONDON JJ., Ex p. FULHAM VESTRY*, 59 L. J. M. C. 146; 63 L. T. 243; 55 J. P. 50; 39 W. R. 11; 6 T. L. R. 389, D. C.

**Annotations.**—*Apld. R. v. Wright, Ex p. Bradford Corpn.* (1907), 72 J. P. 23. *Refd. Foss v. Best*, [1906] 2 K. B. 105. *Mentd. Stokes v. Checkland* (1893), 9 T. L. R. 235; *Stokes v. Mitcheson*, [1902] 1 K. B. 857.

**Removal of proceedings by certiorari.]—***See* Highway Act, 1835 (c. 50), s. 107; Public Health Act, 1875 (c. 55), s. 262, & generally, CROWN PRACTICE, Vol. XVI., pp. 398 *et seq.*

**Effect of statutory restriction.]—***See* CROWN PRACTICE, Vol. XVI., pp. 438, 441, Nos. 3029, 3062–3065.

**Difficult points of law involved.]—***Compare* CROWN PRACTICE, Vol. XVI., p. 410, Nos. 2632–2636.

## Part X.—Interference with Highways under Statutory Powers.

**1761. Liability to maintain reinstated road.]—**Deft., under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; some months after the work was finished, damage ensued to pltf. from his horse stumbling in a hole in the road. The filling in of the road had been properly done by deft., & the hole was owing to the natural subsidence of the materials, which sometimes takes place, to a greater or less degree, six months or longer after such an excavation has been filled in: *Held*: deft. was not liable to pltf. for the damage; for there was no obligation on deft. by common law or statute to do more than properly

reinstate the road.—*HYAMS v. WEBSTER* (1868), L. R. 4 Q. B. 138; 9 B. & S. 1016; 38 L. J. Q. B. 21; 17 W. R. 232, Ex. Ch.

**Annotation.**—*Refd. Cox v. Paddington Vestry* (1891), 61 L. T. 566.

**Rights of electricity undertakings.]—***See* ELECTRIC LIGHTING, Vol. XX., p. 201.

**Rights of gas companies.]—***See* GAS, Vol. XXV., pp. 471 *et seq.*

**Rights of sanitary authorities.]—***See* SEWERS & DRAINS.

**Rights of tramway undertakings.]—***See* TRAMWAYS & LIGHT RAILWAYS.

**Rights of water undertakings.]—***See* WATER SUPPLY.

## Part XI.—Excessive Weight and Extraordinary Traffic.

### SECT. 1.—EXCESSIVE WEIGHT.

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 20), s. 12.

**1762. What amounts to excessive weight—Abnormal weight on particular road.]—***PICKERING LYTHE EAST HIGHWAY BOARD v. BARRY*, No. 1780, *post*.

**1763. ——— Traction-engine—Within limits of Highways & Locomotives Amendment Act, 1878 (c. 77), s. 28.]—**Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, enacts that where by a certificate of their surveyor it appears

to the authority which is liable to repair any highway that, "having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon," the authority may recover in a summary manner the amount of such expenses from the person by whose order the weight of traffic has been conducted. Applt. used on a highway a locomotive engine & waggons in order to carry goods & materials for the ordinary purposes of his estate.

a nuisance in obstructing a highway. The evidence was contradictory. The ct., on appeal, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be entertained upon questions of evidence.—*R. v. McLEAN* (1863), 22 U. C. R. 443.—*CAN.*

*q. Cases heard without jury—Duty*

*of Appellate Court.]—*In cases heard without a jury, the appeal is not governed by the rules applicable to new trials after a trial & verdict, but the duty of the ct. is to rehear the case upon the materials before the trial judge, with such other materials as it may have decided to admit. The ct. must then decide the case, not dis-

regarding the judgment appealed from, but carefully weighing & considering it, & not shrinking from overruling it if on full consideration the ct. comes to the conclusion that the judgment is wrong.—*TURNBULL v. CORBETT, O'BRIEN v. CORBETT* (1912), 11 E. L. R. 67; 41 N. B. R. 284.—*CAN.*

The engine was constructed & used in accordance with Locomotives Acts, 1861 (c. 70), & 1865 (c. 83), & the weight of the engine & the width of its wheels were in compliance with Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 28. Justices having made an order for the payment by applt. of a sum to cover extraordinary expenses incurred by the highway authority by reason of the damage caused to the road by the use of the engine & waggons. On a case stated by the justices:—*Held*: the question of what was "excessive weight" & "extraordinary traffic" within sect. 23 of the latter Act must be determined with reference to the ordinary traffic of the road, & its capacity for bearing weights, & not with reference to abnormal traffic merely, or to weight in excess of that authorised by statute, & therefore the order of the justices was rightly made.

The words in sect. 23, "the average expense of repairing highways in the neighbourhood" are not the absolute test of ascertaining the damage to the particular road caused by "excessive weight" or "extraordinary traffic" thereon, but merely an element in the calculation.—*AVELAND (LORD) v. LUCAS* (1880), 5 C. P. D. 351; 49 L. J. Q. B. 643; 42 L. T. 788; 44 J. P. 360; 28 W. R. 571, C. A.

*Annotations*:—*Appld.* Wallington v. Hoskins (1880), 6 Q. B. D. 206. *Consd.* Gas Light & Coke Co. v. St. Mary Abbots, Kensington Vestry (1884), Cab. & El. 368; Etherley Grange Coal Co. v. Auckland District Highway Board (1893), 69 L. T. 286; Hill v. Thomas, [1893] 2 Q. B. 333; Shepton Mallet R. D. v. C. v. Wainwright (1908), 72 J. P. 459; Weston-super-Mare U. C. v. Bullt, [1919] 2 Ch. 1. *Refd.* Pickering Lythe East Highway Board v. Barry (1881), 8 Q. B. D. 59; Tonbridge Highway Board v. Sevenoaks Highway Board (1884), 49 J. P. 340; R. v. East & West India Dock Co. (1888), 60 L. T. 232; Wycombe R. D. v. Smith (1903), 67 J. P. 75; Hemsworth R. D. v. C. v. Micklethwaite (1901), 68 J. P. 345; High Wycombe R. D. v. Palmer (1905), 69 J. P. 167.

1764. — — — — — & trucks.] — Justices having made an order charging the expenses of repairing a highway upon applts. as being extraordinary expenses within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, it appeared that the highway communicated at either end with main roads, & was principally used by farmers & occupiers of land adjoining it for ordinary farm traffic. Applts. having been employed to convey a quantity of manure to a farm adjoining the road, carried it there by means of a traction engine & trucks, the engine weighing 8 & the truck 5 tons. The road, which had not been prepared for, & was not adapted to, the weight of traction engines, was, in consequence of such traffic, rendered unfit for use. The carriage of farm materials & produce by traction engines was usual in the neighbourhood, though not upon this particular road:—*Held*: the order was right, the passage of traction engines & trucks being "extraordinary traffic" upon the particular road.—*R. v. ELLIS* (1882), 8 Q. B. D. 406; 30 W. R. 613; *sub nom.* ELLIS v. MAIDSTONE RURAL SANITARY AUTHORITY, 46 J. P. 295, D. C.

*Annotations*:—*Follgd.* Whitebread v. Sevenoaks Highway Board, [1892] 1 Q. B. 8. *Appld.* Etherley Grange Coal Co. v. Auckland District Highway Board (1893), 69 L. T. 286. *Consd.* Gerard v. Kent County Council, [1897] 1 Q. B. 351. *Refd.* Hill v. Thomas, [1893] 2 Q. B. 333; Wycombe R. D. v. Smith (1903), 67 J. P. 75; High Wycombe R. D. v. Palmer (1905), 69 J. P. 167.

1765. — — — — —.]—Pltfs., who were the road authority within their district, were also the owners of the water mains beneath the roads. A duly licensed traction engine belonging to deft., weighing upwards of 10 tons, & drawing three trucks, broke the water main under one of the

streets for which pltfs. were the road authority. The main had been laid at least thirty years, but was found as a fact to be sufficiently strong & well laid to withstand the pressure of the ordinary traffic of the district. Pltfs., had been guilty of no neglect or default in the execution of their duty as the road authority, & neither deft. nor his servants had been guilty of any neglect or want of skill or care in the construction or user of the traction engine. A county ct. judge found that the injury was caused by the excessive weight of deft.'s traction engine, & that deft. was liable for the cost of repairing the broken water main:—*Held*: in using an exceptionally heavy locomotive deft. was exercising his right to use the highway in a way that was not necessary in order to enable him to enjoy it, & the decision was right.—*CHICHESTER CORPN. v. POSTER*, [1906] 1 K. B. 167; 75 L. J. K. B. 33; 93 L. T. 750; 70 J. P. 73; 54 W. R. 199; 22 T. L. R. 18; 4 L. G. R. 205, D. C.

*Annotations*:—*Apprvd.* Bromley R. D. v. C. v. Croydon Corp., (1907), 24 T. L. R. 132. *Refd.* Worsborough U. D. v. Barnsley British Co-op. Soc. (1914), 111 L. T. 129; Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654.

1766. How estimated Not aggregate weight Conditions under which weight carried.] (1) Upon the hearing of a complaint made by a highway board under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, for the purpose of recovering from applt. extraordinary expenses incurred by the board by reason of traffic conducted by him, it appeared that he was owner or occupier of stone quarries in the district, & that the stone was conveyed in heavy loads over the highways, so as to make the cost of repairing them much larger than if they had been subject to ordinary agricultural traffic; but that the stone traffic was a recognised business in the neighbourhood, & the wagon-loads of the usual weight in such traffic. The justices having upon these facts found, first, that the traffic was not extraordinary, secondly, that the weights were excessive, & thirdly, that the expenses were extraordinary:—*Held*: the first finding, which was warranted by the evidence, showed that the expenses were not "extraordinary" within the sect. & they could not be recovered from applt.

(2) In determining whether "excessive weight" has been carried along a road, the justices are to consider not what is the aggregate weight, but what are the conditions under which such weight has been carried. WALLINGTON v. HOSKINS (1880), 6 Q. B. D. 206; 43 L. T. 597; 45 J. P. 173; 20 W. R. 152; *sub nom.* WALLINGTON v. HOSKINS, STONE v. HOSKINS, PICTOR v. HOSKINS, 50 L. J. M. C. 19, D. C.

*Annotations*:—*As to* (1) *Apprvd.* Raglan Highway Board v. Monmouth Steam Co. (1881), 46 J. P. 598. *Consd.* R. v. East & West India Dock Co. (1888), 60 L. T. 232; Gelronydd R. D. v. C. v. Green (1908), 72 J. P. 321; Ledbury R. C. v. Somerset (1915), 84 L. J. K. B. 1297. *Refd.* Tonbridge Highway Board v. Sevenoaks Highway Board (1884), 49 J. P. 340; Etherley Grange Coal Co. v. Auckland District Highway Board (1893), 69 L. T. 286. *As to* (2) *Refd.* Etherley Grange Coal Co. v. Auckland District Highway Board (1893), 69 L. T. 286. *Generally, Refd.* Hill v. Thomas, [1893] 2 Q. B. 333; Wirral Highway Board v. Newell, [1895] 1 Q. B. 827; A.-G. v. Scott, [1905] 2 K. B. 100.

1767. — — — — — Pressure per square inch of wheels.]—HEMSWORTH RURAL DISTRICT COUNCIL v. MICKLETHWAITE, No. 1790, *post*.

1768. — — — — — Period to be considered—More than one year.]—HEMSWORTH RURAL DISTRICT COUNCIL v. MICKLETHWAITE, No. 1790, *post*.

Distinguished from extraordinary traffic.]—See No. 1771, *post*.

*Sect. 1.—Excessive weight. Sect. 2: Sub-sects. 1, 2 & 3.]*

**Excessive weight on bridges—Provision of bridges of sufficient strength.]—See No. 2715, post.**

**Recovery of expenses.]—See Sect. 4, post.**

**Excessive weight as public nuisance—Indictment.]—See Part IX., Sect. 3, sub-sect. 6, ante.**

**1769. Damage to pipes laid in subsoil.]—GAS LIGHT & COKE CO. v. ST. MARY ABBOTTS, KENSINGTON, VESTRY, No. 1508, ante.**

**1770. —.]—CHICHESTER CORPN. v. FOSTER, No. 1500, ante.**

## SECT. 2.—EXTRAORDINARY TRAFFIC.

### SUB-SECT. 1.—IN GENERAL.

*See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12.*

**1771. What constitutes extraordinary traffic—General rule.]—**Under the above sect. [Highways & Locomotives Amendment Act, 1878 (c. 77), s. 23], "extraordinary traffic" as distinguished from "excessive weight" includes all such continuous & repeated user of a road by a person's vehicles as is out of the common order of traffic, & as may be calculated to damage the highway & increase the expenditure on its repair. "Extraordinary traffic" is the carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of the articles carried, or in the mode or time of user of the road, as substantially to alter or increase the burden imposed by ordinary traffic on the road, & thereby to cause damage & expense beyond what is common. The mere user of the road, however, by one person more than others does not constitute "extraordinary traffic" even though it be that user which produces damage to the road; the traffic must be extraordinary as regards the ordinary user of the road by all who use it, & not merely large as compared with the traffic put on it by other persons.—*HILL v. THOMAS*, [1893] 2 Q. B. 333; 62 L. J. M. C. 161; 69 L. T. 553; 57 J. P. 628; 42 W. R. 85; 9 T. L. R. 617; 4 R. 505, C. A.

*Annotations: Follid. Etherley Grange Coal Co. v. Auckland Highway Board*, [1894] 1 Q. B. 37. *Consd. Wolverhampton Corp'n. v. Salop County Council* (1895), 64 L. J. M. C. 179; *Norfolk County Council v. Green* (1904), 90 L. T. 451; *Kent County Council v. Kent Coal Concessions* (1908), 72 J. P. 507. *Appld. Ledbury R. C. v. Somerset* (1915), 84 L. J. K. B. 1297. *Apprvd. Butt v. Weston-super-Mare U. C.*, [1922] 1 A. C. 340. *Refd. Wycombe R. C. v. Smith* (1903), 67 J. P. 75; *High Wycombe R. D. C. v. Palmer* (1905), 69 J. P. 167; *Geirionydd R. D. C. v. Green* (1908), 72 J. P. 321; *Shampton Mallet R. D. C. v. Wainwright* (1908), 72 J. P. 459; *Cambridgeshire County Council v. Pepper & Hollis* (1912), 78 J. P. 393; *Worsborough U. D. C. v. Barnsley British Coop. Soc.* (1914), 111 L. T. 429; *Abingdon R. C. v. City of Oxford Electric Tramways*, [1917] 2 K. B. 318.

**1772. —.]—**Applts., who were quarry owners in the neighbourhood of a residential

town, had for many years conveyed lime & coal to & from the town by a country road. In 1913 they substituted a steam waggon & trailer, which, when loaded, weighed in the aggregate 20 tons, for horse-drawn waggons of a maximum weight of 3 tons, & in 1916 they introduced on to the road, a second steam waggon & trailer. There had been no abnormal increase in the volume of applts.' traffic. In recent years the substitution of mechanical for horse traction by quarry owners had become general in the district. In Feb. 1917, resps., the urban authority, brought an action against applts. to recover extraordinary expenses alleged to have been incurred by them during the previous twelve months in repairing damage caused to the road in question by excessive weight & extraordinary traffic by reason of applts.' user of the road. This road was not a main thoroughfare & was not made up so as to bear the excessive concentrated weight of applts.' steam waggon & trailer, & apart from applts.' traffic, heavy motor traffic had not become part of the ordinary user of the road:—*Held*: having regard to the character of the particular road, the use by applts. of the steam waggon & trailer constituted extraordinary traffic thereon in 1913, & the continuance by applts. of that mode of traction since 1913 had not altered the character of the traffic.

(2) The question whether traffic put upon a road is extraordinary . . . is a question of fact (*LORD CAVE*).—*BUTT (HENRY) & CO. v. WESTON-SUPER-MARE URBAN DISTRICT COUNCIL*, [1922] 1 A. C. 340; 91 L. J. Ch. 305; 86 J. P. 113; 38 T. L. R. 406; 66 Sol. Jo. 332; *sub nom. WESTON-SUPER-MARE URBAN DISTRICT COUNCIL v. BUTT (HENRY) & CO., LTD.*, 127 L. T. 34; 20 L. G. R. 397, H. L. **1773. Question of fact.]—**It is a question of fact in each case whether particular traffic upon a road is "extraordinary" or not. The haulage of timber along a road may constitute extraordinary traffic within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, although timber-growing, timber-felling, & timber-hauling is a recognised industry in the district in which the road is situate.—*GEIRIONYDD RURAL COUNCIL v. GREEN*, [1909] 2 K. B. 845; 78 L. J. K. B. 1039; 100 L. T. 418; 73 J. P. 137; 25 T. L. R. 282; 7 L. G. R. 308, C. A.

*Annotations:—Apprvd. Butt v. Weston-super-Mare U. D. C.* [1922] 1 A. C. 340. *Refd. Ledbury R. C. v. Somerset* (1915), 84 L. J. K. B. 1297.

**1774. —.]—**BARNSELY BRITISH CO-OPERATIVE SOCIETY, LTD. v. WORSBOROUGH URBAN COUNCIL, No. 1849, post.

**1775. —.]—**BUTT (HENRY) & CO. v. WESTON-SUPER-MARE URBAN DISTRICT COUNCIL, No. 1772, ante.

**1776. Whether condition of road considered.]—**A.-G. v. SCOTT, No. 1499, ante.

**1777. Distinguished from excessive weight—Highways & Locomotives Amendment Act, 1878 (c. 77), s. 23.]—***HILL v. THOMAS*, No. 1771, ante.

### PART XI. SECT. 2, SUB-SECT. 1.

*P. What constitutes extraordinary traffic.]—*Traffic necessitated a complete, although not an immediate, renewal of many of the granite setts in the streets. In an action by the local authority to cover the cost of repairing the damage:—*Held*: as defenders' traffic had not destroyed the streets or rendered them dangerous or inconvenient for the public use, it was not illegal, & as there was no evidence of negligence, they were not liable at common law for the cost of making

good the damage.—*GLASGOW CORPN. v. BARCLAY, CURLE & CO., LTD.*, [1922] S. C. 413.—SCOT.

*s. —.]—*An action was brought by a road authority in Scotland to recover damages in respect of injury caused to roads by the carriage over them of very heavy traffic, in a district to which Roads & Bridges (Scotland) Act, 1878, did not extend; such traffic had been carried over the roads for a considerable number of years, & precautions had been taken to do as little damage to the roads as possible, consistent with the passage

of such traffic, but the effect of the traffic was that the roads required repair more often than would have been the case if such traffic had not passed over them:—*Held*: the road authority could not recover damages.—*GLASGOW CORPN. v. BARCLAY, CURLE & CO., LTD.* (1923), 93 L. J. P. C. 1.—SCOT.

**1778. Question of fact.]—**The question of extraordinary traffic or excessive weight is a question of fact.—*KEMAY COUNTY COUNCIL v. FLETCHER* (1916), 50 L. L. T. 86.—IR.

**Extraordinary traffic as a nuisance.]—***See* Part IX., Sect. 1, sub-sect. 5, *ante*.

**1778. Diversion of traffic.—Necessity for diversion immaterial.]—**BARNSELY BRITISH CO-OPERATIVE SOCIETY, LTD. *v.* WORSBOROUGH URBAN COUNCIL, No. 1849, *post*.

#### SUB-SECT. 2.—HOW CHARACTER DETERMINED.

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12.

**1779. Comparison with normal traffic in particular road.]—**AVELAND (LORD) *v.* LUCAS, No. 1763, *ante*.

**1780. — No substantial difference in character.]—**Materials for building a house were carried by resp. over a highway, & he was summoned under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, by applts. to recover the amount of expenses incurred by them by reason of the damage to the highway. The justices dismissed the summons, subject to a special case in which they found that the traffic conducted by resp. was in aggregate weight & in quantity excessive & extraordinary as compared with the ordinary traffic along the highway, which was light agricultural traffic, that the highway had been damaged thereby, that the amount expended on the highway by reason thereof was in excess of the average expense of repairing highways in the neighbourhood, & was an extraordinary expense incurred by reason of such damage, but that the traffic did not materially differ in character from that to be expected on the highway:—*Held*: resp. was not liable for the damage to the highway.—PICKERING LYTTIE EAST HIGHWAY BOARD *v.* BARRY (1881), 8 Q. B. D. 59; 51 L. J. M. C. 17; 45 L. T. 655; 46 J. P. 215; 30 W. R. 246, D. C.

*Annotations:—***Dbtd.** R. *v.* Ellis (1882), 8 Q. B. D. 466; Whitebread *v.* Sevenoaks Highway Board, [1892] 1 Q. B. 8. **Overd.** Hill *v.* Thomas, [1893] 2 Q. B. 333. **Refd.** Etherley Grange Coal Co. *v.* Auckland District Highway Board (1893), 69 L. T. 286.

**1781. —.]—**HILL *v.* THOMAS, No. 1771, *ante*.

**1782. — Not neighbouring roads generally.]—**The standard of comparison by which to determine whether traffic is "extraordinary" within Highways & Locomotives Amendment Act, 1878 (c. 77), s. 23, is the ordinary traffic on the road in question, not that on other roads in the district.

Where a colliery co., in carrying on their business, which was the staple trade of the district, caused to be conducted on a road traffic which was extraordinary as compared with the ordinary traffic of that road:—*Held*: such traffic was rightly determined by magistrates to be "extraordinary traffic" within the sect., although other coal owners ordinarily used other roads in the district for similar purposes.—ETHERLEY GRANGE COAL CO. *v.* AUCKLAND DISTRICT HIGHWAY BOARD, [1894] 1 Q. B. 37; 69 L. T. 702; 58 J. P. 102; 42 W. R. 198; 10 T. L. R. 62; 38 Sol. Jo. 38; 9 H. 88, C. A.

*Annotations:—***Folld.** Geirionydd R. D. *v.* Green (1908), 73 J. P. 321. **Refd.** Hemsworth R. D. *v.* Micklethwait (1903), 68 J. P. 16; Wycombe R. C. *v.* Smith (1903), 67 J. P. 75; High Wycombe R. D. *v.* Palmer (1905), 69 J. P. 167; Ledbury R. C. *v.* Somerset (1915), 84 L. J. K. B. 1297; Abingdon R. C. *v.* Oxford Electric Tramways (1917), 117 L. T. 133.

#### PART XI. SECT. 2, SUB-SECT. 3.

**1790. General rule.]—**Road authorities should have regard to modern requirements, & must make reasonable

provision for motor traffic; & a natural increase of volume in this mode of carriage, where its character is normal, does not amount to "extraordinary"

**1783. — Over period of more than one year.]—**HEMSWORTH RURAL DISTRICT COUNCIL *v.* MICKLETHWAITE, No. 1790, *post*.

**1784. — Introduction of mechanical transport.]—**BUTT (HENRY) & CO. *v.* WESTON-SUPER-MARE URBAN DISTRICT COUNCIL, No. 1772, *ante*.

**— Increase of normal traffic.]—***See* Sub-sect. 3, *post*.

**1785. Unusual character of article carried — Effect of carriage of such article.]—**HILL *v.* THOMAS, No. 1771, *ante*.

**1786. Excessive user of road by one individual.]** W., owner of ironstone mines, sent his traffic to the railway station along a highway in carts of the ordinary size & weight, but they made about seventy journeys per day. The other traffic was agricultural & very small, & W.'s carts caused the chief traffic there. Other owners of mines sent their traffic by a private railway, & not over the highway in carts:—*Held*: the justices were wrong in holding that W. caused extraordinary traffic merely because he had many carts to send.

*Seemle*: the surveyor was wrong in merely comparing the traffic of W. with the traffic on part of the highway he was bound to repair.—R. *v.* WILLIAMSON (1881), 45 J. P. 505, D. C.

*Annotations:—***Consd.** Etherley Grange Coal Co. *v.* Auckland District Highway Board (1893), 69 L. T. 286; Hill *v.* Thomas, [1893] 2 Q. B. 333. **Refd.** Whitebread *v.* Sevenoaks Highway Board (1891), 56 J. P. 214; Ledbury R. C. *v.* Somerset (1915), 84 L. J. K. B. 1297.

**1787. —.]—**HILL *v.* THOMAS, No. 1771, *ante*.

**1788. —.]—**LEDGBURY RURAL COUNCIL *v.* SOMERSET, No. 1801, *post*.

**1789. Burden substantially increased Close succession of carts No increase of weight carried.]—**For sixteen years prior to 1893 applts. carted coal, every weekday, over a main road between a railway siding & the pumping station at their water-works, a distance of about a mile & a quarter. In 1893-4 they adopted a plan of sending a string of four or five carts at a time in charge of two or three drivers; the average number of journeys every weekday being five each way. These carts followed each other in the same track. They were drawn by one horse apiece, & the individual loads were not excessive. About 7,855 tons of coal were carted during the year:—*Held*: this was extraordinary traffic within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as the mode of user of the road tended substantially to alter & increase the burden imposed by ordinary traffic.—WOLVERHAMPTON CORPN. *v.* SALOP COUNTY COUNCIL (1895), 64 L. J. M. C. 179; 43 W. R. 494; 11 T. L. R. 386; 39 Sol. Jo. 469; 59 J. P. Jo. 309, D. C.

#### SUB-SECT. 3.—RELATION TO NORMAL INCREASE OF TRAFFIC.

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12.

**1790. General rule.]—**(1) The question whether particular traffic is extraordinary is to be determined by comparison not merely with the other traffic on the road during the particular year, but with the traffic which by the time in question has become the ordinary traffic of the road. The

traffic.—LONDONDERY COUNTY COUNCIL *v.* MACARTHUR, LONDONDERY COUNTY COUNCIL *v.* CORNICK, [1917] 2 L. R. 49.—*IR.*



*Sect. 2.—Extraordinary traffic: Sub-sects. 3 & 4, A. & B.]*

standard of what is ordinary traffic for this purpose may vary from time to time.

(2) The principle of contributory negligence has no application in an action under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12, to recover extraordinary expenses of repairing a highway from a person by or in consequence of whose orders extraordinary traffic or excessive weight has been conducted thereon; but in considering the amount of the damage caused by extraordinary traffic or excessive weight the state of the highway as maintained by the highway authority is material. The fact that the pressure per square inch of the wheels of the vehicles alleged to be excessive in weight is less than that of the pressure per square inch of the ordinary traffic or weight on the road in question, although it is material, does not prove that the vehicles are not of excessive weight. Accordingly, in an action under the said sects., where it appeared that the county ct. judge had been influenced by the principle of contributory negligence, & by the said argument as to relative pressures, the action was sent down to the county ct. for a new trial: *Semble*: in estimating ordinary traffic or weight for the purpose of ascertaining what is extraordinary traffic or excessive weight on a highway, more than one year's traffic should be taken into consideration, as that year's traffic may be extraordinary. — *HEMSWORTH RURAL DISTRICT COUNCIL v. MICKLETHWAITE* (1901), 68 J. P. 345; 2 L. G. R. 1084, D. C.

*Annotations*—*As to* (1) *Reid*. *Worsborough U. D. C. v. Barnsley British Co-op. Soc.* (1911), 111 L. T. 429; *Ledbury R. C. v. Somerset* (1915), 84 L. J. K. B. 1297; *Abingdon R. C. v. Oxford Electric Tramways* (1917), 117 L. T. 133. *As to* (2) *Reid*. *A.-G. v. Scott*, (1905) 2 K. B. 160; *High Wycombe R. D. C. v. Palmer* (1905), 69 J. P. 167; *Bromley R. D. C. v. Croydon Corpn.* (1907), 24 T. L. R. 132.

**1791.** --- *J.* — *BARNSELY BRITISH CO-OPERATIVE SOCIETY, LTD. v. WORSBOROUGH URBAN COUNCIL*, No. 1810, *post*.

**1792. Increase through public requirements—Increased facilities for transport.**—[In the summer of 1914 defts. began to run a service of motor omnibuses between two places a few miles apart for the carriage of passengers. The service was an hourly service from each terminus from 9 a.m. to 9 p.m. & the omnibuses were well filled & served the needs of the district. The road along which the omnibuses ran was in the nature of a country lane, the traffic on which before the advent of the motor omnibuses consisted mainly of light country & agricultural carts. For the year after the service commenced the cost of repairing the road was nearly twice as much as it was before the service commenced. In an action by the local authority under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, to recover the extra cost so incurred as being extraordinary expenses incurred by them by reason of the damage caused by the extraordinary traffic of the motor omnibuses:—*Held*: (1) on the facts, this new traffic on the road was not the slow & normal increase of traffic owing to the development of the district, but was extraordinary traffic within the sect., & the fact that the motor omnibuses served the requirements of the district did not prevent the traffic from being extraordinary traffic; (2) in determining whether traffic is or is not extraordinary traffic no distinction in principle can be drawn between the conveyance of persons &

the conveyance of goods.—*ABINGDON RURAL COUNCIL v. CITY OF OXFORD ELECTRIC TRAMWAYS, LTD.*, [1917] 2 K. B. 318; 86 L. J. K. B. 1247; 117 L. T. 133; 81 J. P. 189; 33 T. L. R. 319; 15 L. G. R. 446, C. A.

*Annotation*:—*As to* (1) *Reid*. *Weston-super-Mare U. C. v. Butt*, [1919] 2 Ch. 1.

**1793. Reasonable anticipation of increase.]—**

In determining whether traffic is extraordinary traffic within Highways & Locomotives (Amendment) Act, 1878 (c. 77), it is material to consider whether the traffic is such as having regard to the character of the road was reasonably to be anticipated. — *WESTON-SUPER-MARE URBAN DISTRICT COUNCIL v. BUTT (HENRY) & CO., LTD.* (1921), 127 L. T. 34; 65 Sol. Jo. 680; 85 J. P. Jo. 297; *subsequent proceedings, sub nom. BUTT (HENRY) & CO. v. WESTON-SUPER-MARE URBAN DISTRICT COUNCIL*, [1922] 1 A. C. 340, H. J.

**SUB-SECT. 4.—TRAFFIC ARISING FROM LOCAL INDUSTRY.**

*A. In General.*

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12.

**1794. Peat moss—Use of drays lighter than ordinary traffic.]—**The H. co. manufactured peat moss from a moor of three thousand acres, & having works near a railway station, were charged under Highways & Locomotive (Amendment) Act, 1878 (c. 77), s. 23, with causing £44 extraordinary expense by their traffic. Their five drays were lighter than those used in other traffic, which was ordinary agricultural traffic, & passed each day over the highway. The justices found that this was a recognised industry, & that the traffic was not extraordinary:—*Held*: the justices' decision in dismissing the case could not be interfered with.—*LOWER STRAFFORTH HIGHWAY BOARD v. HATFIELD CHASE CO.* (1893), 57 J. P. 567, D. C.

**1795. Coal Traffic extraordinary as to particular road.]—***ETHERLEY GRANGE COAL CO. v. AUCKLAND DISTRICT HIGHWAY BOARD*, No. 1782, *ante*.

**1796. Brick-work Previous payment in respect of repairing expense.]** The High Wycombe Rural District Council brought an action to recover expenses incurred in repairing damage to certain highways caused by the excessive weight & extraordinary traffic of defts. The highways had been used for agricultural traffic, butchers' & bakers' carts, & other light vehicles. Defts. carried bricks over the highways from his brickyards by means of traction engines, & had been using a traction engine for this purpose for some years past. During the years 1900, 1901, & 1902, defts. had made payments in respect of the extra expense incurred in repairing the highways in consequence of his extraordinary traffic during those years. Latterly, the state of the highways required a large amount of flints & material for their repair. The pltf. council claimed in this action for extraordinary expenses incurred during the years 1903, 1904:—*Held*: defts. was liable.—*HIGH WYCOMBE RURAL DISTRICT COUNCIL v. PALMER* (1905), 69 J. P. 167.

*B. Stone Quarrying.*

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12.

**1797. Commencement of new work—New traffic on particular road—Other quarries in district.]—**Justices having made an order upon appts. to pay the expenses of repairing a highway as extraordinary expenses within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, it appeared that the road, called Carter's Hill, was used solely for agricultural traffic & was in a the parish of S., which, with some other parishes in resps.' district, was situate upon a range of hills. There were several stone quarries upon this range of hills within resps.' district, from which for many years the surrounding country, including appts., had drawn stones for the repair of highways, the stone traffic being a recognised business there, but until 1882 there had been no stone taken from the parish of S. In 1882 a stone quarry was opened in S. at the top of Carter's Hill, & the stone was conveyed by appts. for the repair of their highways down Carter's Hill in the manner customary in the stone traffic, that is. in heavy waggons with the wheels chained, & damage was, in consequence done to the road:—*Held:* the evidence warranted the justices in coming to the conclusion that the traffic was extraordinary on this particular road, & the order was right.—**TUNBRIDGE HIGHWAY BOARD v. SEVENOAKS HIGHWAY BOARD** (1884), 40 J. P. 340; *sub nom.* **TUNBRIDGE HIGHWAY DISTRICT BOARD v. SEVENOAKS HIGHWAY DISTRICT BOARD**, 33 W. R. 300, D. C.

*Annotation:—***Reid.** Ledbury R. D. C. v. Colwall Park Granite Quarries Co. (1913), 108 L. T. 1002.

**1798. — — —.]—**The expressions "extraordinary traffic" & "extraordinary expenses" in Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, mean expenses & traffic which are extraordinary to a particular road.

Applt. was summoned by a highway board to recover expenses incurred by the highway board in repairing a road in their district during a period of seven years. The expenses were incurred in consequence of stone having been carted by applt. from a quarry along the road, which was an ordinary country road, used for ordinary light country traffic, & had never been adapted for, or made to bear, heavier traffic. The ordinary use of the road did not include the carting of stone, but from the year 1883 to 1890 applt. carried stone over the road, & the highway authority was put to what the justices held to be "extraordinary expenses." The public did not carry stone along the road in question:—*Held:* the magistrates were right, the traffic along the road in question was "extraordinary" within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, the purpose for which the road was used by applt. in the first instance was "extraordinary" & the order for the payment of extraordinary expenses by appts. was rightly made by the justices.—**WHITEBREAD v. SEVENOAKS HIGHWAY BOARD**, [1892] 1 Q. B. 8; 61 L. J. M. C. 59; 65 L. T. 855; 56 J. P. 214, D. C.

*Annotations:—***Apld.** Etherley Grange Coal Co. v. Auckland District Highway Board (1893), 69 L. T. 286. **Consd.** Hill v. Thomas, [1893] 2 Q. B. 333; Worsborough U. D. C. v. Barnsley British Co-op. Soc. (1914), 111 L. T. 429. **Reid.** Wycombe R. D. C. v. Smith (1903), 67 J. P. 75; High Wycombe R. D. C. v. Palmer (1905), 69 J. P. 167; Bromley R. D. C. v. Croydon Corp'n. (1907), 6 L. G. R. 185; Ledbury R. D. C. v. Colwall Park Granite Quarries Co. (1913), 108 L. T. 1002; Ledbury R. C. v. Somerset (1915), 84 L. J. K. R. 1297; Butt v. Weston-super-Mare U. C., [1922] 1 A. C. 340.

**1799. — — —.]—**Where a claim is made for extraordinary expenses incurred in making good damage occasioned to highways by extraordinary

traffic, the facts that the road in question was initially weak in some places; that some part of the traffic may be fairly looked upon as ordinary; that, in consequence of the repairs & reparations carried out in order to make good the damage, the road is a better road than it would have been had there been no extraordinary traffic & no consequent repairs may all be taken into account to reduce the amount payable to the highway authority.

Prior to 1909 gravel from an old gravel pit had been carted in farm carts, holding from 1½ to 2 tons each, in sufficient quantity to supply the immediate wants of a district in which gravel hauling was not a recognised industry. Defts. subsequently became the proprietors of the gravel pit & set up business as traders in gravel, & in the eight months between Aug. 1, 1910, & Mar. 31, 1911, hauled, by means of two traction engines, to each of which two or three trucks were attached, a weight of 21,950 tons, including the weight of the engines & trucks going & returning, over six & a half miles of a main road repairable by the county council, between the gravel pit & the county town. The comparable highways of the district carried traffic consisting of (1) ordinary agricultural traffic; (2) light carts & carriages of residents in a thinly populated district, but within a few miles from a county town; (3) some motor traffic; & (4) occasional thrashing & steam ploughing machines, etc. This traffic, however, fell very much short of the traffic conducted by defts., both in volume & weight, & was not equal to half the strain on the road caused by defts.' traffic. In an action by the county council against defts. to recover extraordinary expenses incurred in repairing the main road in question:—*Held:* as the traffic conducted by defts. was such as substantially to alter & increase the burden imposed by ordinary traffic on the road, & cause damage & expense beyond what was common, it was extraordinary traffic & the county council were entitled to recover extraordinary expenses incurred; but since the road would have carried ordinary traffic with little, if any, damage, a small allowance must be made for damage that would have been done to the road by so much traffic as was ordinary. **CAMBRIDGESHIRE COUNTY COUNCIL v. PEPPER & HOLLIS** (1912), 76 J. P. 393; 10 L. G. R. 759.

*Annotation:—***Consd.** Ledbury R. C. v. Somerset (1915), 84 L. J. K. B. 1297.

**1800. Increase of existing work Change of mode of haulage Traction engines.]** A road in a district in which for many years stone had been quarried & hauled was damaged by the haulage thereon by defts. of stone in trucks drawn by a traction engine. Haulage by traction engines had been carried on over other roads, but this mode of haulage, although it had been adopted for a period by defts., was not the accustomed mode over the road in question, haulage having previously been done in carts or waggons drawn by horses:—*Held:* the traffic was extraordinary traffic. **SHEPTON MAILLET RURAL DISTRICT COUNCIL v. WAINWRIGHT (JOHN) & CO.** (1908), 72 J. P. 459; 24 T. L. R. 894; 6 L. G. R. 1121.

*Annotation:—***Reid.** Ledbury R. D. C. v. Colwall Park Granite Quarries Co. (1913), 108 L. T. 1002.

**1801. — — — Road adapted to heavy traffic.]** Deft. owned a stone quarry abutting on the main road. From June, 1912, to May, 1913, stone from the quarry was carried along the road in trucks drawn by a traction engine by the order of deft. Pltf. local authority & others conveyed stone over the

*Sect. 2.—Extraordinary traffic: Sub-sect. 4, B. & C.  
Sect. 3: Sub-sect. 1.]*

road in a similar manner, the quantity being conveyed by deft. being a little more than half the total traffic over the road. The road was fully adapted to traffic by traction engines & had been so used for a number of years. The output from the quarry had gradually increased from 7,284 tons in 1909 to 17,378 tons in 1912. The judge held that traffic led along a road adapted to it, being such traffic as was to be expected in the ordinary course, could not be "extraordinary" within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 20). On appeal:—*Held*: the traffic did not come within the expressions as to extraordinary traffic used by BOWEN, L.J., in *Hill v. Thomas*, No. 1771, *ante*, & was not extraordinary.—LEDDBURY RURAL COUNCIL v. SOMERSET (1915), 84 L. J. K. B. 1297; 113 L. T. 71; 79 J. P. 327; 31 T. L. R. 205; 59 Sol. Jo. 476; 13 L. G. R. 701, C. A.

*Annotations*:—*Consd.* Weston super-Mare U. C. v. Butt, [1919] 2 Ch. 1. *Reid*. Worsborough U. D. C. v. Barnsley British Co-op. Soc. (1911), 111 L. T. 429.

**1802. Inconsistent findings of justices—Traffic not extraordinary—Expenses extraordinary.]**—WALLINGTON v. HOSKINS, No. 1766, *ante*.

*C. Timber Haulage.*

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 20), s. 12.

**1803. Timber the natural produce of district.]**—W. bought timber near a railway station, & contracted with a person to convey part of it, he himself sending the rest. The timber was conveyed in waggons in sixty-seven loads, between Christmas & March, each load from three to five tons weight, & on broad wheels. The surveyor estimated that this caused £21 extra expense in repairs, & summoned W. under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, & the justices held it was extraordinary traffic, & that whether W. or the contractor conveyed it made no difference, & made an order on W. for £21:—*Held*: the justices were right.—WILLIAMS v. DAVIES (1880), 44 J. P. 347, D. C.

*Annotations*:—*Consd.* Laphorn v. Harvey (1885), 49 J. P. 709; *Hill v. Thomas*, [1893] 2 Q. B. 333; *Gerard v. Kent County Council*, [1897] 1 Q. B. 351; *Pathe v. Dorset County Council* (1898), 77 L. T. 683; *Wycombe R. C. v. Smith* (1903), 67 J. P. 75; *Norfolk County Council v. Green* (1904), 90 L. T. 451; *High Wycombe R. D. C. v. Palmer* (1905), 69 J. P. 167. *Reid*. Kent County Council v. Gerard, [1897] A. C. 633; *Geirionydd R. D. C. v. Green* (1908), 72 J. P. 321; *Ledbury R. D. C. v. Colwall Park Granite Quarries Co.* (1913), 108 L. T. 1002.

**1804.** —.] In a group of twenty parishes there were large woods which came to maturity after ten to seventeen years' growth, & one or other wood was cut every year, & the timber hauled over one or other highway each winter. Before the haulage the roads were in fair repair, & the other traffic was chiefly caused by donkey carts & passengers. The haulage over one & a half miles caused extra expense of £12 10s. for which resps. were summoned, under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 20. The justices found that the weights were not excessive, & held that there was not extraordinary traffic, this being the ordinary trade of the district:—*Held*: the justices were justified by the evidence in coming to their decision.—RAGLAN HIGHWAY BOARD v. MONMOUTH STEAM CO. (1881), 46 J. P. 598, D. C.

*Annotations*:—*Consd.* Geirionydd R. D. C. v. Green (1908), 72 J. P. 321; *Cambridgeshire County Council v. Pepper*

& Hollis (1912), 76 J. P. 393. *Reid*. Tonbridge Highway Board v. Sevenoaks Highway Board (1884), 49 J. P. 340; *Whitebread v. Sevenoaks Highway Board* (1891), 56 J. P. 214; *Hill v. Thomas*, [1893] 2 Q. B. 333; *Norfolk County Council v. Green* (1904), 90 L. T. 451; *Worsborough U. D. C. v. Barnsley British Co-op. Soc.* (1914), 78 J. P. 425; *Ledbury R. C. v. Somerset* (1915), 84 L. J. K. B. 1297.

**1805.** — *Haulage to supply local furniture industry—Mode of haulage not otherwise in use—On particular road.]*—The principal industry in W. & neighbourhood is chair manufacture, & deft. carried over certain highways, by means of a traction engine & carriages, timber grown in the neighbourhood for this industry. He carried about sixteen engine truck loads, each load weighing about three tons. Traction engines were in common use in the district for farm purposes & for purposes of trade, especially on main roads, but it was not proved that any traction engine had been on the highways in question, which were not main roads, previous to deft.'s carriages & engines passing along them. Damage was done to the highways by the traction engine & carriages, for which extraordinary expenses were incurred by the pltf. council in repairing:—*Held*: deft. was liable for the extraordinary expenses.—WYCOMBE RURAL COUNCIL v. SMITH (1903), 67 J. P. 75.

*Annotation*:—*Reid*. High Wycombe R. D. C. v. Palmer (1905), 69 J. P. 167.

**1806.** — *No systematic cultivation.]*—Haulage by timber merchants of timber over roads adapted for ordinary agricultural traffic in a district where there is no systematic cultivation of timber, under such circumstances that, having regard to the total weight carried within a given period, & to the means whereby the haulage is done, the traffic is unusual & does unusual damage to the roads, thereby occasioning unusual expense to the road authority, constitutes "extraordinary traffic" within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, for the expenses occasioned by which the timber merchants are accordingly responsible.

Large quantities of timber had been felled on the B. estate, & between the early part of 1900 & Mar. 31, 1902, the timber felled had been sold to defts. by separate & successive contracts. Defts. had carried the timber so purchased to a railway station over two roads, which pltf. council were liable to repair, & which were ordinary country roads intended to bear ordinary country traffic; the haulage of the timber was for the most part done by means of a traction engine. Pltfs., on Aug. 4, 1902, brought this action under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, & Locomotives Act, 1898 (c. 20), s. 12, to recover the extraordinary expenses incurred by them on the two roads by reason of the damage caused by the above traffic:—*Held*: (1) the traffic was extraordinary traffic within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23; (2) the felling of timber on the B. estate & its haulage thence by defts. did not constitute a "particular work" within Locomotives Act, 1898 (c. 20), s. 12 (1) (b), & pltfs. were debarred by that sub-sect. from recovering expenses incurred by reason of any damage done to the roads by defts.' traffic before Aug. 4, 1901.—NORFOLK COUNTY COUNCIL v. GREEN (1904), 90 L. T. 451; 68 J. P. 223; 2 L. G. R. 652, N. P.

*Annotations*:—*As to* (1) *Reid*. High Wycombe R. D. C. v. Palmer (1905), 69 J. P. 167; *Ledbury R. C. v. Somerset* (1915), 84 L. J. K. B. 1297.

**1807.** —.]—GEIRIONYDD RURAL COUNCIL v. GREEN, No. 1773, *ante*.

## SECT. 3.—WHO ARE LIABLE.

## SUB-SECT. 1.—BEFORE LOCOMOTIVES ACT, 1898.

See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23.

**1808.** Person "by whose order"—Traffic conducted by agent or sub-contractor—Liability of principal.]—WILLIAMS v. DAVIES, No. 1803, *ante*.

**1809.** ———.]—L. was a contractor with the Govt. to erect a rifle range, & employed D., a sub-contractor, to cart the stone. Nothing in the contract between L. & D. specified the mode of conveying the stone. D. used traction engines, & caused excessive injury to the highway:—*Held*: L. was not the person liable under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, but D. was liable, being the only person by whose order the excessive weights were carried.—LAPTHORN v. HARVEY (1885), 49 J. P. 709; 1 T. L. R. 533, D. C.

**1810.** ———.]—Resps. contracted to deliver ballast for the construction of a railway, & arranged with several owners of traction engines the terms on which they would convey the ballast from resps.' wharf to the place of delivery. From time to time when ballast was required resps. arranged with one or other of the owners of the traction engines to haul it to the place of delivery. They exercised no control over the user of the engines, the weights carried, or the route followed. The carriage of the ballast caused extraordinary traffic whereby the road was damaged. A complaint by the authority liable to repair the road against resps. to recover the expense of the repairs was dismissed by the justices. On a case stated:—*Held*: resps. were liable under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as the persons by whose order such traffic, the aggregate amount of which had caused the damage, had been conducted.—KENT COUNTY COUNCIL v. VIDLER, [1895] 1 Q. B. 418; 61 L. J. M. C. 77; 72 L. T. 77; 59 J. P. 518; 13 W. R. 273; 14 R. 240; *sub nom.* VIDLER v. KENT COUNTY COUNCIL, 11 T. L. R. 155, C. A.

*Annotations*:—*Refd.* Bishop Auckland U. C. v. Murphy & Hadley (1896), 60 J. P. 153; Pethick v. Dorset County Council (1898), 62 J. P. 579; Ledbury R. C. v. Somerset (1915), 84 L. J. K. B. 1297.

**1811.** ———.]—Resp. contracted with several persons for the delivery to him of materials required for his residence, the prices including carriage to be payable & the property in the materials to pass on delivery & acceptance at his residence. The materials were conveyed by a certain highway. Resp. knew that the contractors intended to send the materials by that highway by traction engines & trucks, but he did not employ or pay the carriers or give directions as to the route or the mode of conveyance. Extraordinary expenses having been incurred by the highway authority by reason of the damage caused by excessive weight passing along the highway or extraordinary traffic thereon, within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23:—*Held*: resp. was not a "person by whose order such weight or traffic had been conducted" within that sect., & he was not liable for the expenses.—KENT COUNTY COUNCIL v. GERARD (LORD), [1897] A. C. 633; 66 L. J. Q. B. 677; 77 L. T. 109; 61 J. P. 804; 46 W. R. 111; 13 T. L. R. 536, H. L.; *affg.* S. C. *sub nom.* GERARD (LORD) v. KENT COUNTY COUNCIL, [1897] 1 Q. B. 351, C. A.

*Annotations*:—*Apprvd.* Pethick v. Dorset County Council (1898), 62 J. P. 579. *Expld.* Epsom U. D. C. v. L. C. C. [1900] 2 Q. B. 751. *Consd.* Heigate R. D. C. v. Sutton

District Water Co. (1908), 99 L. T. 168; Windlesham U. D. C. v. Seward (1912), 77 J. P. 161. *Expld.* Colchester Corp'n. v. Gepp (1912), 76 J. P. 337. *Refd.* Macclesfield R. D. C. v. Jackson (1898), 62 J. P. 280. *Mentd.* Bourne v. Keane, [1919] A. C. 815.

**1812.** ———.]—P., a contractor, undertook to build a lunatic asylum for the visiting committee of the county council of Dorset, & entered into a sub-contract with T. to haul the materials necessary for the work from two railway stations. T. was to supply the horses, carts, & men to load & unload the materials, & T. also was only to use such roads as were pointed out by P. T. was not to use any traction engines or carts which P.'s foreman did not certify to be suitable for the work. In the contract between P. & the visiting committee, there was a clause by which P. undertook to indemnify the visiting committee against all claims for damage done by extraordinary traffic. T. also indemnified P. by a similar clause. Extraordinary expenses having been incurred by the highway authority by reason of damage caused by extraordinary traffic in the haulage of the materials:—*Held*: P. was not liable to pay the damage for "extraordinary traffic" as being the "person by whose order such weight or traffic had been conducted."—PETHICK BROTHERS v. DORSET COUNTY COUNCIL (1898), 62 J. P. 579; 11 T. L. R. 548, C. A.; *affg.* 77 L. T. 683, D. C.

*Annotation*:—*Consd.* Macclesfield R. D. C. v. Jackson (1898), 62 J. P. 280.

**1813.** ———.] Deft. had entered into a contract to construct certain sewage works for the Macclesfield Corp'n., & for this purpose it was necessary to convey to the site of the proposed works upwards of 11,000 tons of materials. These materials were carried over the highways, known as A. & E. & H. to E., leading to the site, & damage was, in consequence, done to such highways, necessitating the incurring of extraordinary expenses within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23. Part of the materials was carried by deft. over A. to E., & the remaining & greater part was carried by sub-contractors, partly over A. to E. & H. to E. In proceedings against deft. for extraordinary expenses incurred in repairing from A. to E. & from H. to E.:—*Held*: deft. was liable to pay a proportion of the expenses incurred in respect of A. to E., but he was not liable for any of the expenses in respect of H. to E.—MACCLESFIELD RURAL DISTRICT COUNCIL v. JACKSON (1898), 62 J. P. 280.

**1814.** ———.]—**Railway Clauses Act, 1845 (c. 20), s. 58.**—B. was employed by a contractor, C., to build a bridge over the H. railway for the railway co., & in doing so about 40 tons of bricks per day were carried in carts with broad wheels over the highway & did no damage; but he afterwards used a traction engine of 9 tons to draw two trucks loaded with bricks, each truck 8 tons, & caused damage for several days, & the damage amounted to £137. On a proceeding under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, for causing extraordinary traffic: *Held*: (1) B. was liable, though employed by C.; (2) the remedy was applicable, though under Railway Clauses Act, 1845 (c. 20), s. 58, the co. might be proceeded against to make good all such damage.—BARNETT v. HOO HIGHWAY BOARD (1882), 46 J. P. 805, D. C.

**1815.** ———.]—**Liability of sub-contractor.**—BARNETT v. HOO HIGHWAY BOARD, No. 1814, *ante*.

**1816.** ———.]—W., a farmer, near a country road two miles long, having bought

Sect. 3.—Who are liable: Sub-sects. 1 & 2.]

60 tons of manure lying four miles off, went to E., who kept traction engines & waggons, & agreed to pay E. a sum per ton to remove the manure to a spot pointed out on this road. No mode of conveyance was specified. E. used a traction engine & two trucks, each truck weighing 5 tons. The road had not been made for engines, & none were used there before, though they were used on other roads near. The engine & trucks huled the road into the ditch on each side, & caused extra expenditure for repairs:—*Held*: there was evidence that E. ordered the traffic to be conducted, & this was extraordinary traffic within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23.—*ELLIS v. MAIDSTONE RURAL SANITARY AUTHORITY* (1882), 46 J. P. 295, D. C.

1817. ————]—Where contractors have the direction & regulation of traffic upon a highway which they carry out by using traction engines, regulating the number of waggons attached to each engine & the weight of each waggon, & giving orders as to the time the vehicles shall start, they are persons “by whose order such weight or traffic has been conducted,” within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, notwithstanding that their employers indicate the time during which they will be ready to receive the goods which the contractors have undertaken to deliver.—*COLCHESTER, WEMYSS & CO. v. GLOUCESTERSHIRE COUNTY COUNCIL* (1897), 66 L. J. Q. B. 290, D. C.

*Annotations*: *Fold*. Macelsfield R. D. C. v. Jackson (1898), 62 J. P. 250. *Refd*. Egham R. D. C. v. Gordon (1902), 87 L. T. 31.

*See, now*, Locomotives Act, 1898 (c. 29), s. 12 (1) (c).

## SUB-SECT. 2.—SINCE LOCOMOTIVES ACT, 1898.

*See* Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12 (1) (c).

1818. When liability arises—When damage done—Damage done after Act—Contract entered into before Act.]—Defts. owned land in pltf's. district, on which they intended to erect a lunatic asylum & entered into contracts with certain firms for the alteration & extension of a house standing thereon. The materials for the work were carted over certain highways in pltf's. district, but did not become the property of defts. until worked into the structure. Defts. never gave any orders as to the particular route the carting was to follow. The traffic amounted to extraordinary traffic, & damage was done to pltf's. highways. The bulk of this traffic took place under two large contracts, both of which were entered into before the date of the commencement of Locomotives Act, 1898 (c. 29), but neither was completed till after this date. One contract was completed more than six months before the writ in this action was issued:—*Held*: (1) defts. were the persons by or in consequence of whose order the traffic was conducted & therefore they were liable to make good the damage to the highways caused thereby under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12; (2) inasmuch as it was not the giving of the order which created the liability, but the doing of the damage, defts. were liable if & to the extent that damage was done after the commencement of the Act although the contract which caused it was entered into before that date; (3) where there were several contracts

under which traffic was being conducted, proceedings to recover extraordinary traffic expenses must be commenced within six months of the date of the completion of the particular contract under which the damage sued for was done; (4) a surveyor's certificate was sufficient if it made it clear that extraordinary expenses had been incurred, although it did not show on its face that in making it regard had been had “to the average expense of repairing highways in the neighbourhood.”—*EPSOM URBAN COUNCIL v. LONDON COUNTY COUNCIL*, [1900] 2 Q. B. 751; 69 L. J. Q. B. 933; 83 L. T. 284; 64 J. P. 726; 49 W. R. 302; 16 T. L. R. 571, N. P.

*Annotations*:—As to (1) *Refd*. Egham R. D. C. v. Gordon, [1902] 2 K. B. 120. As to (3) *Consd*. Bromley R. D. C. v. Croydon Corp'n., [1907] 2 K. B. 39. As to (4) *Refd*. Worsborough U. D. C. v. Barnsley British Co-op. Soc. (1914), 78 J. P. 425.

1819. Person “by or in consequence of whose order”—Traffic conducted by agent or sub-contractor—Liability of principal.]—*EPSOM URBAN COUNCIL v. LONDON COUNTY COUNCIL*, No. 1818, ante.

1820. ————]—No instructions given by him.]—Deft., being about to build a house, entered into a contract with a brick co. to supply him with a quantity of bricks to be delivered at the place where he proposed to build. He had no instructions as to the manner, time, or amount in which the bricks were to be delivered, & the co. without his knowledge delivered them by means of a traction engine & trucks, the excessive weight of which damaged pltf's. roads to an extraordinary extent. In an action to recover the amount of the expenses to which pltf's. had been put in repairing the roads, the county ct. judge held that deft. was not, within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12, the person “by or in consequence of whose order” such weight had been conducted over pltf's. roads:—*Held*: the facts justified him in coming to that conclusion.—*EGHAM RURAL DISTRICT COUNCIL v. GORDON*, [1902] 2 K. B. 120; 71 L. J. K. B. 523; 87 L. T. 31; 60 J. P. 759; 50 W. R. 703; 18 T. L. R. 515; 46 Sol. Jo. 151, D. C.

*Annotations*:—*Refd*. Reigate R. D. C. v. Sutton District Water Co. (1907), 5 L. G. R. 917; Bromley R. D. C. v. Croydon Corp'n., [1908] 1 K. B. 353; Windlesham U. D. C. v. Seward (1912), 77 J. P. 161; Colchester Corp'n. v. Gepp (1913), 77 J. P. 181.

1821. ————]—*ST. THOMAS RURAL DISTRICT COUNCIL v. SIEMENS BROTHERS* (1910), 74 J. P. Jo. 292, N. P.

1822. ————]—By the order of two cos. subsidiary to the deft. co. extraordinary traffic had been conducted over a road in respect of which pltf's. were the highway authority:—*Held*: upon the facts & the construction of certain agreements between the subsidiary cos. & the deft. co., the orders given by the subsidiary cos. were given by them as agents for the deft. co., & therefore the deft. co. was liable for the extraordinary expenses incurred by pltf's. in repairing the road.—*KENT COUNTY COUNCIL v. KENT COAL CONCESSIONS, LTD.* (1909), 73 J. P. 305; 25 T. L. R. 479; 7 L. G. R. 899, C. A.

*Annotation*:—*Refd*. Ledbury R. C. v. Somerset (1915), 84 L. J. K. B. 1297.

1823. ————]—S., a building owner, contracted with L. to deliver bricks at the R. estate by traction haulage. L. sub-contracted with E. to carry the bricks in this way. E. carried them over X. road. L. knew the size & weight of the engines to be employed, but he did

not determine the particular road over which they were to be carried except in so far as an order to go to a particular destination involved the necessity of going by a particular road:—*Held*: L. was a person "by or in consequence of whose order" the traffic was conducted over this road within Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12 (1) (c).

I should like to say, although it is not necessary to decide the point in this case, that in my view as the sect. now stands, there is no reason why two or three persons should not be held liable in respect of the damage done to a particular road. The words "by whose order" bring in the contractor & the words "in consequence of whose order" bring in the building owner, & I do not see why either or both should not be liable (SCRUTTON, J.).

*Semle*: the sub-contractor would also be liable. **WINDLESHAM URBAN DISTRICT COUNCIL v. SEWARD** (1912), 77 J. P. 161; 11 L. G. R. 324, D. C.

**1824.** — *Liability of agent.*—**WINDLESHAM URBAN DISTRICT COUNCIL v. SEWARD**, No. 1823, *ante*.

**1825.** — *Person "by whose order" damage done—Person "in consequence of whose order" damage done—Alternative right to sue.*—**KENT COUNTY COUNCIL v. FOLKESTONE CORPN.**, No. 1850, *post*.

**1826.** — *Traffic must be consequence of order—Alternative modes of haulage employable.*—*Defts.* entered into a contract with A. that he should construct a reservoir for them in four months. The contract did not specify the method or route of haulage to be employed in bringing the requisite materials to the site. A. for the space of eight months employed traction engines & trucks over second & third class district roads to bring the materials from the railway station to the reservoir, a distance of about a mile & a quarter. In an action for the extraordinary expenses of repairing the roads alleged to have been damaged by extraordinary traffic or excessive weight, the traction engines & trucks, conducted thereon by or in consequence of the order of *defts.*, a surveyor called as a witness by *plffs.* said that "the same weight of stuff taken in carts during the same period would not have done injury," & *defts.*' engineer, called by *plffs.*, said: "I thought the contractor would lay a light railway across the fields from the goods station without going on the roads at all. That would be feasible as also cart haulage." At the close of *plffs.*' case the county ct. judge gave judgment for *defts.*, holding that there was no evidence that the traffic had been conducted on these roads in consequence of the order of *defts.*:—*Held*: there was such evidence.—**REIGATE RURAL DISTRICT COUNCIL v. SUTTON DISTRICT WATER CO.** (1907), 71 J. P. 405; 5 L. G. R. 917, D. C.; *subsequent proceedings* (1908), 99 L. T. 103, D. C.; (1909), 78 L. J. K. B. 315, C. A.

*Annotation*:—**Mentl.** Carlisle R. D. C. v. Carlisle Corpn., (1909) 1 K. B. 471.

**1827.** — *Necessary consequence not essential.*—A municipal corpn., requiring road material for the general purposes of the maintenance & construction of roads within their district, entered into contracts with two contractors, whereby the contractors agreed to supply & deliver to the corpn., during the twelve months from Mar. 31, 1904, to Mar. 31, 1905, flints & ragstone, in such quantities & numbers, at such times, & in such manner as the corpn. should from time to time by order in writing direct.

*Plffs.*, as the authority liable for the repair of highways in their district, incurred extraordinary expenses in repairing a highway in consequence of damage done to it by extraordinary traffic conducted over it in the haulage of stones by the contractors for the fulfilment of their contracts with the corpn. The last load of stones was carried on Mar. 31, 1905, & on Aug. 22, 1905, the *plffs.* commenced an action against the corpn. for the recovery of the extraordinary expenses:—*Held*: (1) the traffic was conducted in consequence of the orders of the corporation; (2) the damage was not the consequence of "any particular building contract or work extending over a long period" within Locomotives Act, 1898 (c. 29), s. 12 (1) (b), & therefore, under the first part of that sub-sect., *plffs.* could recover only the expenses incurred within twelve months before the commencement of the action.—**BROMLEY RURAL DISTRICT COUNCIL v. CROYDON CORPN.**, [1908] 1 K. B. 353; 77 L. J. K. B. 335; 98 L. T. 105; 72 J. P. 17; 24 T. L. R. 132; 52 Sol. Jo. 77; 6 L. G. R. 165, C. A.

*Annotations*: As to (2) **Reid.** Carlisle R. D. C. v. Carlisle Corpn., (1909) 1 K. B. 471; **Reigate R. D. C. v. Sutton District Water Co.** (1909), 100 L. T. 354; **Ledbury R. C. v. Somerset** (1915), 81 L. J. K. B. 1297.

**1828.** — *Natural consequence.*—For the purpose of erecting a new lunatic asylum for the joint use of a county council & a county borough council large quantities of materials were conveyed in waggons drawn by traction engines, & otherwise, over two roads in the borough by the contractor employed by the visiting committee of the asylum. The roads had not been adapted to such traffic, though they were fit for the traffic that might have been expected on them. The visiting committee were elected partly by the county council, & partly by the county borough council, & had purchased the site for the asylum from the latter council. Their contract with the contractor contained provisions by which he undertook to indemnify them against claims in respect of damage caused by excessive weight or extraordinary traffic over any highway in carrying out the works & against all costs & expenses in respect thereof.

The surveyor of the council certified in pursuance of section 23 of the Highways & Locomotives (Amendment) Act, 1878 (c. 77), as regards each road, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses had been incurred in repairs by reason of the damage caused by excessive weight & extraordinary traffic, etc.; but he had not taken out the actual figures of the expense of repairing such neighbouring highways:—*Held*: (1) as the surveyor must in the circumstances have been aware that the cost of repairing the most expensive of the comparable roads in the neighbourhood did not approach the actual cost of repairing the roads in question, & however he might make out the average cost for the highways in the neighbourhood, "extraordinary expenses" had been incurred on those roads, it was not necessary for him to go into details with regard to highways in the neighbourhood; (2) the traffic was in the circumstances the natural, though not the direct or inevitable, consequence of the building contract, & was therefore conducted "in consequence of the order" of the visiting committee, (3) the fact that the council elected some members of the visiting committee did not in any sense make them *defts.* to the action so as to prevent them from suing the committee in the name of their clerk; (4) the

**Sect. 3.—Who are liable: Sub-sect. 2. Sect. 4: Sub-sects. 1 & 2.]**

conveyance by the council of the site for the asylum did not, & could not, imply a grant of the right to damage public roads, so as to estop the council from recovering the expenses claimed; (5) so much of the expenses claimed as had been incurred in "betterment," namely, improving the roads by converting them from rag & flint roads, into granite macadam roads, or by widening or strengthening them, could not be recovered; (6) the amount recoverable could be ascertained by deducting from the actual expenses incurred on the roads respectively, the cost of the betterment & the ordinary expenses which would have been incurred if there had been no extraordinary traffic; such ordinary traffic being estimated having regard to the average cost for some years of repairing the comparable highways in the neighbourhood including the road in question; (7) deft. was entitled to be indemnified by the third party for damages recovered by plffs. & for all costs that he had been put to in defending the action, & for such costs as deft. had to pay to plffs.; & the costs of the proceedings between plffs. & the third party, to which deft. was not in fact a party should be included in the bill by plffs. against deft., in order that the latter might recover them from the third party; but deft. should not pay these costs to plffs. unless he got them from the third party. —*COLCHESTER CORPN. v. GEPP* (1912), 76 J. P. 337; 10 L. G. R. 930; *on appeal* (1913), 77 J. P. 181, C. A.

*Annotation:—As to (1) & (6) Refd. Morpeth R. D. C. v. Bullocks Hall Colliery Co. (No. 2) (1913), 57 Sol. Jo. 373.*

**SECT. 4.—RECOVERY OF EXPENSES.**

**SUB-SECT. 1.—IN GENERAL.**

*See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12.*

**1829. Nature of remedy—Action for tort—Actio personalis moritur cum persona—Liability of executor.]—**Proceedings under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, for the recovery of extraordinary expenses incurred by reason of the damage caused by excessive traffic & weight on the highway, can only be taken against the person by whose order the traffic causing the damage was conducted, & cannot be taken against the personal representatives of such person after the death, as such proceeding is in substance an action of tort, & therefore dies with the person.

Extraordinary expenses were incurred on certain main roads, caused by extraordinary weight & traffic conducted over them by the order of A., whose traction engines & trucks had caused the damage. A. had, during his lifetime, offered to pay a certain sum in respect of such damage, but this sum was refused, & during A.'s lifetime the surveyor had not given a certificate of the amount of such damage. After A.'s death, & after the amount had been fixed by the certificate of the surveyor, proceedings were taken to recover the amount against the extrix. of A.:—*Held*: the extrix. of A. was not liable to pay these expenses, as the claim for such expenses, being

in the nature of a tort, was a purely personal one against A., & died with him.—*STORY v. SHEARD*, [1892] 2 Q. B. 515; 61 L. J. M. C. 178; 87 L. T. 423; 58 J. P. 760; 41 W. R. 31; 36 Sol. Jo. 559, D. C.

*Annotations:—Refd. Hemsworth R. D. C. v. Micklethwait* (1903), 68 J. P. 16. *Mentid. Harvey v. North Eastern Marine Engineering Co. (1902), 5 W. C. C. 30; Darlington v. Roscoe, [1907] 1 K. B. 219.*

**1830. Highways & Locomotives Amendment Act, 1878 (c. 77), s. 23—Scope of section.]—***HILL v. THOMAS*, No. 1771, *ante*.

**1831. Condition precedent to action—Actual expenditure in repair.]—**An action by a highway authority under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12, to recover extraordinary expenses incurred in repairing a highway by reason of damage caused by excessive weight or extraordinary traffic will not lie until extraordinary expenses for such repairs have been in fact expended.—*LITTLE HULTON URBAN DISTRICT COUNCIL v. JACKSON* (1904), 68 J. P. 451; 2 L. G. R. 986, D. C.

**—Surveyor's certificate.]—***See Sub-sect. 2, post.*

**1832. Inspection of books—Of highway authority—Right to inspection—By whom made.]—**(1) In an action by a highway authority to recover expenses incurred in consequence of extraordinary traffic on a highway, the average expense of repairing other highways in the neighbourhood is not a question in issue, & therefore deft. is not entitled to inspection of the books of the highway authority relating to such other highways.

(2) Deft. is entitled to inspection by his solr. of books relating to the highway in respect of which the action is brought, but the ct. will not make an order for inspection by an engineer.

(3) The certificate of the surveyor is not evidence of the measure of damages but a condition precedent to the right to bring an action (*COZENS-HARDY, L.J.*).—*BROMLEY RURAL DISTRICT COUNCIL v. CHITTENDEN* (1906), 70 J. P. 409; 4 L. G. R. 907, C. A.

*Annotations:—As to (1) N.F. Colchester Corpn. v. Gepp, [1912] 1 K. B. 477. Generally, Refd. Worsborough U.D.C. v. Bainsley British Co-op. Soc. (1914), 78 J. P. 425.*

**—.]—***See, generally, DISCOVERY, Vol. XVIII., pp. 95-178.*

**1833. Particulars of expenses—Right of defendants to—Average cost of repair of neighbouring highway.]—**In an action by a highway authority to recover extraordinary expenses incurred in repairing a highway by reason of damage caused by excessive weight & extraordinary traffic thereon, it was alleged in the statement of claim that the extraordinary expenses amounted to £1,577 11s. 9d., & that that sum was arrived at by deducting £217 8s. 4d., the average expense of repairing similar highways in the neighbourhood, from £1795 0s. 1d., the actual expense of repairing the highway in question:—*Held*: plff. must give particulars of the names of the similar highways, & of the average expense of repairing each of them.

The ct. which is adjudicating upon the matter is to have regard to the average expense of repairing similar highways in the neighbourhood (*BUCKLEY, L.J.*).—*COLCHESTER CORPN. v. GEPP*, [1912] 1 K. B. 477; 81 L. J. K. B. 356; 106

**PART XI. SECT. 4, SUB-SECT. 1.**

**1. Repair of damage caused by traction engine—Liability of owner.]**  
The duty cast upon a county council

to repair damage caused by the use of a traction-engine which, by reason of its excessive weight, does substantial & abnormal damage to a public road, adequate for ordinary traffic & the

liability of a district council to provide the funds for such repair, amount to special damage, so as to make the owner of the traction engine civilly liable at the suit of both bodies, suing



L. T. 54; 76 J. P. 97; 56 Sol. Jo. 160; 10 L. G. R. 109, C. A.

*Annotation*.—*Conad. Morpeth R. D. C. v. Bullocks Hall Colliery Co. (No. 2) (1913), 57 Sol. Jo. 373.*

**1834.** ————]—In an action brought by a highway authority to recover expense incurred by them in repairing a highway in their district which they alleged to have been damaged by extraordinary traffic conducted thereon by order of defts., which expense was alleged to be extraordinary, having regard to the average expense of similar highways in the neighbourhood, the ct. ordered plffs. to deliver to defts. the best particulars that they could of the average expense for the past five years of the similar highways in the neighbourhood, stating the cost of labour, the establishment charges, & the nature & amount & cost of materials, but refused to order plffs. to deliver to defts. particulars of the average expense for the past five years of the highway damaged, stating cost of labour, establishment charges, & the nature & amount & cost of materials.—*MORPETH RURAL COUNCIL v. BULLOCKS HALL COLLIERY CO., LTD.*, [1913] 2 K. B. 7; 82 L. J. K. B. 547; 108 L. T. 479; 77 J. P. 188; 29 T. L. R. 297; 57 Sol. Jo. 373; 11 L. G. R. 475, C. A.

**1835.** ————]—Average cost of repairing particular highway.]—*MORPETH RURAL COUNCIL v. BULLOCKS HALL COLLIERY CO., LTD.*, No. 1834, *ante*.

**1836.** Matters in bar of action.—Interest of highway authority.—In election of defendant committee.]—*COLCHESTER CORPN. v. GEPP*, No. 1828, *ante*.

**1837.** ————]—Conveyance of land by highway authority.—For building purposes by defendants.—Damage in consequence of building operations.]—*COLCHESTER CORPN. v. GEPP*, No. 1828, *ante*.

— Limitation of time.]—*See* Sect. 4, sub-sect. 3, *post*.

**1838.** Indemnity.—Between defendant & contractor.—Right of defendant to recover.]—In a contract for the construction of a reservoir, which included the supply of all materials, labour & scaffolding, made between a water co. & a contractor, there was an indemnity clause, making the contractor responsible for "injury or damage to person & property of any description whatever which may be caused by or result from the execution of the works":—*Held*: the co. could recover from the contractor, under this clause, the expenses incurred by a rural district council in repairing highways by reason of the damage caused by extraordinary traffic, which the contractor had conducted on the highways in bringing materials to the site of the reservoir, expenses which the council had recovered from the co. under *Highways & Locomotives Amendment Act, 1878 (c. 77)*, s. 23, as amended by *Locomotives Act, 1898 (c. 29)*, s. 12, as this was damage to property, & also damage caused by or resulting from the execution of the works within the indemnity clause.—*CROYDON RURAL DISTRICT COUNCIL v. SUTTON DISTRICT WATER CO. (1908)*, 72 J. P. 217; 6 L. G. R. 574, C. A.

**1839.** ————]—Damages & costs.]—*COLCHESTER CORPN. v. GEPP*, No. 1828, *ante*.

—.]—*See, generally, GUARANTEE*, pp. 221 *et seq.*

jointly, for the cost of repairing the road.—*CAYAN COUNCIL & BAILINGBOROUGH RURAL DISTRICT COUNCIL v. KANE*, [1910] 2 I. R. 644.—*IR.*

#### PART XI. SECT. 4, SUB-SECT. 2.

**1846 i.** Form of certificate.—Average

expenses of repairing.—Details in respect of neighbouring roads.]—It is not essential that the surveyor's certificate should bear to have been framed, or should in fact have been framed, with regard to the average expense of repairing highways in the neighbourhood.—*HIGHLAND DISTRICT*

#### SUB-SECT. 2.—CERTIFICATE OF SURVEYOR.

*See* *Highways & Locomotives Amendment Act, 1878 (c. 77)*, s. 23, as amended by *Locomotives Act, 1898 (c. 29)*, s. 12.

**1840.** Validity of surveyor's appointment.—Surveyor acting only on facts.—Effect on certificate.]—J. was not appointed under seal district surveyor, but only by minute of the rural sanitary committee signed by the chairman, but not countersigned by the clerk of the board. L. being summoned for damage caused by extraordinary traffic, set up the defence that the appointment of J. & his certificate & the proceedings were void:—*Held*: as J. had acted *de facto* as surveyor the objection to J.'s appointment was rightly overruled, & the order on L. was valid.—*LANCASTER R. HARLECH HIGHWAY BOARD (1888)*, 52 J. P. 805, D. C.

**1841.** Condition precedent to right of action.]—Under *Highways & Locomotives Act, 1878 (c. 77)*, the limitation of time for proceeding to recover expenses caused by extraordinary weights on the highway dates from the surveyor's certificate, & not from the time of demand.

The legislature has interposed the certificate of the surveyor as a condition precedent to his right of the highway authority to recover these expenses (*FIELD, J.*).—*POOL HIGHWAY BOARD v. GUNNING (1882)*, 51 L. J. M. C. 49; 46 L. T. 163; 46 J. P. 708; 31 W. R. 30, D. C.

*Annotations*.—*Reid, Wirral Highway Board v. Newell, [1895] 1 Q. B. 827. Mentd. Corbett v. Badger, [1901] 2 K. B. 278.*

**1842.** ————]—*CHESTERFIELD RURAL COUNCIL v. NEWTON*, No. 1867, *post*.

**1843.** ————]—*BROMLEY RURAL DISTRICT COUNCIL v. CHITTENDEN*, No. 1832, *ante*.

**1844.** Form of certificate.—Several highways included in one certificate.]—A certificate of the surveyor to a highway board, under *Highways & Locomotives Amendment Act, 1878 (c. 77)*, s. 23, as to extraordinary expenses incurred upon highways in their district, is not bad by reason of the fact that it includes more than one highway, & does not particularise or describe the highways included; a separate certificate need not be given in respect of each highway.—*WIRRAL HIGHWAY BOARD v. NEWELL, [1895] 1 Q. B. 827*; 64 L. J. M. C. 181; 72 L. T. 535; 59 J. P. 183; 43 W. R. 328; 11 T. L. R. 275; 39 Sol. Jo. 317; 15 R. 309, D. C.

*Annotation*.—*Reid, Kendal v. Lewisham Borough (1903)*, 1 L. G. R. 416.

**1845.** ————]—Average expenses of repairing.—What highways included in average.]—*EPSOM URBAN COUNCIL v. LONDON COUNTY COUNCIL*, No. 1818, *ante*.

**1846.** ————]—Details in respect of neighbouring roads.]—*COLCHESTER CORPN. v. GEPP*, No. 1833, *ante*.

**1847.** ————]—Certification of specific part damaged.—Unnecessary.]—A highway led by a zigzag route with some steep gradients from the M. Hills down to the village & railway station of C., a distance of more than a mile, & continued thence for nearly four miles, being known as main road No. 6. In 1907 the highway was an ordinary agricultural road, with some metalling in the centre, resting on a clay bottom, & owing to its gradients it was

*COMMITTEE OF PERTH COUNTY COUNCIL v. RATTRAY, [1913] S. C. 794; 60 Sc. L. R. 531; 1 S. L. T. 320.—SCOT.*

*a. Validity of certificate.*—*MILNE & CO. v. ABERDEEN DISTRICT COMMITTEE (1899)*, 2 F. (Cl. of Sess.) 220.—*SCOT.*

**Sect. 4.—Recovery of expenses: Sub-sects. 2 & 3.]**

expensive to maintain. In 1907 the predecessors of defts. opened a stone quarry on the M. Hills & conveyed quantities of stone by light motors along the road to the C. station. In 1910, defts. became the owners of the quarry, & in addition to the tractors already used, put on the road a heavy traction engine with trucks, more than doubling their traffic on the road from the quarry to the station, & thereby causing extraordinary expenses to be incurred by plffs. in maintaining the road. Plffs.' surveyor gave a certificate under Highways & Locomotives Amendment Act, 1878 (c. 77), s. 23, that extraordinary expenses had been incurred to the extent of £770 in repairing "the highway known as main road No. 6" by reason of the extraordinary traffic conducted thereon by defts. In an action to recover this sum as "extraordinary expenses":—*Held*: (1) the traffic was extraordinary traffic," but it was not proper to take the ordinary expenditure on the other roads in the district, which were cheaper to maintain, as the basis of estimating the amount of the expenses; & the proper principle was to hold defts. liable for the excess of the amount actually spent in repairing the road over the amount which would have been spent in repairing the damage done to the same section of the road by the other traffic which used the road during the period; & as the road was not merely repaired but was improved & brought up to a higher standard, defts. ought not to pay for such improvement as distinct from repairs, & on this principle the amount recoverable should be £440; (2) an objection taken to the surveyor's certificate on the ground that while the certificate was as to the repair of main road No. 6, the statement of claim was only in respect of a part of such highway, was not a valid objection, as the certificate need not specify the exact parts of the highway where the damage was done. —LEDBURY RURAL DISTRICT COUNCIL v. COLWALL PARK GRANITE QUARRIES (CO., LTD. (1913), 108 L. T. 1002; 77 J. P. 198; 11 L. G. R. 811.

*Annotation*—As to (1) *Reid*, *Weston-super-Mare U. C. v. Butt*, [1919] 2 Ch. 1.

**1848. Not evidence of measure of damage.]**—BROMLEY RURAL DISTRICT COUNCIL v. CHITTENDEN, No. 1832, *ante*.

**1849. At whose instance given—Request of road authority.]**—(1) Where traffic is diverted from one road to another the question of the necessity for the diversion is not relevant to the question whether the particular traffic is extraordinary on the latter road within Highways & Locomotives Amendment Act, 1878 (c. 77), s. 23.

(2) It is immaterial whether the certificate of the surveyor to the road authority required to be given under sect. 23 as a condition precedent to the recovery of expenses of extraordinary traffic is given at the sole instance of the surveyor or at the request of the road authority.

A co-operative society having several branch shops, in the ordinary course of its business, conveyed goods to its branch shops by means of wagons drawn by traction engines. The society diverted this traffic from a main road to an alternative road, which was a country road not adapted for heavy traffic, on the ground that the urban district council had, by completely paving the main road with granite setts, rendered it dangerous for traction engine traffic. The council appointed a special committee to consider the damage done to the road in question by the society's traffic. The committee resolved that, subject to a formal

written certificate of the council's surveyor, a claim for extraordinary traffic should be made against the society. After the surveyor had signed the certificate the matter was reported to the council, who approved the decision of the committee, & an action was brought against the society to recover extraordinary expenses incurred by the council in repairing the road by reason of the damage caused by extraordinary traffic passing along it by order of the society. The society had constantly used the road in question for nearly two years before the commencement of the period covered by the claim:—*Held*: (3) the requirements of the statute as to the surveyor's certificate had been complied with; (4) there was ample evidence to support the finding of the judge that the traffic of the society was extraordinary traffic at the commencement of the period of the claim.

(5) The question of ordinary & extraordinary traffic, above all questions, is a question of fact (LORD BUCKMASTER, C.).—BARNSELY BRITISH CO-OPERATIVE SOCIETY, LTD. v. WORSBOROUGH URBAN COUNCIL, [1916] 1 A. C. 291; 85 L. J. K. B. 103; 113 L. T. 1121; 80 J. P. 114; 32 T. L. R. 41; 60 Sol. Jo. 25; 14 L. G. R. 122, H. L., *affg.* S. C. *sub nom.* WORSBOROUGH URBAN DISTRICT COUNCIL v. BARNSELY BRITISH CO-OPERATIVE SOCIETY, LTD. (1914), 111 L. T. 429, C. A.

*Annotations*:—As to (1) *Consd.* Butt v. Weston-super-Mare U. C., [1922] 1 A. C. 340. As to (5) *Reid*, Abingdon R. C. v. City of Oxford Electric Tramways, [1917] 2 K. B. 318; Butt v. Weston-super-Mare U. C., [1922] 1 A. C. 340. *Generally*, *Reid*, Ledbury R. D. C. v. Somerset (1915), 84 L. J. K. B. 1297.

**SUB-SECT. 3.—PERIOD OF LIMITATION.**

See Locomotives Act, 1898 (c. 29), s. 12 (1) (b); Public Authorities Protection Act, 1893 (c. 61), s. 1.

**1850. General rule—Damage committed within twelve months of action brought.]**—(1) Locomotives Act, 1898 (c. 29), s. 12 (1) (b), provides that proceedings by a highway authority for the recovery of the extraordinary expenses incurred by them in repairing a highway by reason of extraordinary traffic thereon "shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or works":—*Held*: notwithstanding this limitation of twelve months, an action against a public authority, in respect of damage to a highway caused by them "in pursuance or execution of any Act of Parliament, or of any public duty or authority," must be brought within the six months limited by Public Authorities Protection Act, 1893 (c. 61), s. 1.

(2) But, if the act which causes the damage to the highway is done by an independent contractor employed by a public authority in pursuance of his contract with them, he not being their servant or agent, the limit of six months fixed by sect. 1 of the latter Act, has no application. In such a case an action in respect of the damage can be brought against the public authority under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12, as persons "in consequence of whose order" the damage has been done, & the time within which the action must be brought is that which is fixed by sect. 12, sub-sect. 1 (b). The

effect of the latter part of the sub-sect. is, "where the damage is the consequence of any particular building contract or work extending over a long period," to give a period of "six months after the completion of the contract or work," in addition to the twelve months fixed by the prior part of the sub-sect., within which the action may be brought.

A corp., in carrying out a scheme for the widening of one of the roads, entered into a contract with a contractor for the hauling of stone. The contractor used traction engines to haul the stone, & in so doing caused damage to some other roads which were repairable by the county council as the highway authority. The contract was for a year, commencing on Apr. 1, 1902, & terminating on Mar. 31, 1903. The damage to the roads took place between Jan. 19, & Mar. 24, 1903. The work of widening the road was completed in Sept. 1903. On Feb. 11, 1904, the county council commenced an action against the corp. to recover the additional expenses of repairing pths. roads in consequence of the use of the traction engine:—*Held*: (3) the action could be maintained against the corp. as the persons "in consequence of whose order" the damage had been done; (4) the limit of six months for bringing the action fixed by Public Authorities Protection Act, 1893 (c. 61), s. 1, did not apply, because, the contractor not being the servant or agent of the corp., the act was not done by them, & it was done by him in performance of his private obligations under his contract, & not in pursuance or execution of any public duty or authority; (5) the time within which the action must be brought was that fixed by Locomotives Act, 1898 (c. 29), s. 12 (1) (b); (6) the hauling of the stone was a distinct work from the widening of the road, & pths. could only recover in respect of the damage done since Feb. 11, 1903, i.e., within twelve months from the issue of the writ in the action.

(7) An alternative right is given to sue either the person by whose order the damage is done, or the person in consequence of whose order it was done (VAUGHAN-WILLIAMS, L.J.).—KENT COUNTY COUNCIL v. FOLKESTONE CORPN., [1905] 1 K. B. 620; 74 L. J. K. B. 352; 92 L. T. 309; 69 J. P. 125; 53 W. R. 371; 21 T. L. R. 269; 49 Sol. Jo. 281; 3 L. G. R. 438, C. A.

*Annotations*:—As to (1) *Apld.* Reigate R. C. v. Sutton District Water Co. (1909), 78 L. J. K. B. 315. *Refd.* Bromley R. C. v. Croydon Corp., [1908] 1 K. B. 353. As to (2) *Apld.* Tilling v. Dick Kerr, [1905] 1 K. B. 562. As to (6) *Consd.* Bromley R. C. v. Croydon Corp., [1908] 1 K. B. 353. *Refd.* Reigate R. C. v. Sutton District Water Co. (1909), 78 L. J. K. B. 315.

1851. — — — — —]—BROMLEY RURAL DISTRICT COUNCIL v. CROYDON CORPN., No. 1827, *ante*.

1852. When time begins to run—Whether date of repairs—Or surveyor's certificate.]—(Certain extraordinary traffic took place in the year ending Mar. 1880. The expense of £21 thereby incurred was demanded from C. in Nov. 1880, & in Mar. 1881, the surveyor's certificate being signed in Feb. 1881. The summons for non-payment was in Apr. 1881:—*Held*: the six months' limitation dated from the certificate & demand of payment, & not from the time when the repairs were made, & therefore was in time in this case.—WHITE v. COLSON (1881), 46 J. P. 565.

1853. In respect of "particular building contract"—Completion of contract—Action within eighteen months therefrom.]—KENT COUNTY COUNCIL v. FOLKESTONE CORPN., No. 1850, *ante*.

1854. — — — — —]—What amounts to—Contract containing maintenance clause.]—(1) By Locomotives Act, 1898 (c. 29), s. 12 (1) (a), extra-

ordinary expenses incurred by a highway authority in repairing a highway by reason of damage caused by extraordinary traffic thereon are recoverable by an action in the High Ct. or county ct., & by (1) (b) proceedings for the recovery of such expenses "shall be commenced within twelve months of the time at which the damage has been done or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." It being conceded, having regard to *Kent County Council v. Folkestone Corporation*, No. 1850, *ante*, that where the damage was caused by work done under a building contract, or work extending over a long period, an action for recovery of expenses was in time if brought either within twelve months of the doing of the damage, or within six months after the completion of the contract or work:—*Held*: "the completion of the contract" meant the completion of the contract so far as it related to the work causing the damage which gave rise to the action.

(2) Therefore where the damage was caused by work done under a contract which the ct. assumed to be a building contract, & the contract contained a maintenance clause which provided that the entire work should be at the risk of the contractor for a certain period after completion:—*Held*: the contract was completed, within Locomotives Act, 1898 (c. 29), s. 12 (1) (b), at the date of the completion of the work, & the six months began to run from that date.—LANCASTER RURAL COUNCIL v. FISHER & LE FANU, [1907] 2 K. B. 516; 76 L. J. K. B. 1070; 97 L. T. 500; 71 J. P. 401; 23 T. L. R. 614; 5 L. G. R. 1223, C. A.

*Annotations*:—As to (1) *Expld.* Carlisle R. C. v. Carlisle Corp., [1909] 1 K. B. 371. *Apld.* Reigate R. C. v. Sutton District Water Co. (1909), 78 L. J. K. B. 315. As to (2) *Consd.* Bromley R. C. v. Croydon Corp., [1908] 1 K. B. 353. *Refd.* Reigate R. C. v. Sutton District Water Co., *Ewart Third Party* (1909), 78 L. J. K. B. 316.

1855. — — — — —]—Question of fact.]—REIGATE RURAL DISTRICT COUNCIL v. SUTTON DISTRICT WATER CO., No. 1861, *post*.

1856. — — — — —]—Work comprising inter-related component parts.] In Locomotives Act, 1898 (c. 29), s. 12 (1) (b), which provides that proceedings for the recovery of expenses of extraordinary traffic, "where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work," the term "building contract" means a contract for the building of any physical construction & the term "completion of the contract" means completion so far as concerns the constructional work comprised therein; & where the constructional work consists of several component parts so closely connected that each would be useless without the others, the period of six months begins to run from the completion of the whole work, notwithstanding that the damage to the roads may have been caused exclusively by the haulage of materials in connection with some or one only of the component parts of the work.

*Qu.*: whether different considerations may not apply to contracts comprising several independent works; also to contracts comprising work in several different districts where it is shown that all the work within the district of the pth. authority has been completed more than six months before the commencement of the action. Accordingly, where the work comprised in a contract included the construction of a reservoir & the laying of a line of pipes therefrom within pths.'

**Sect. 4. - Recovery of expenses: Sub-sects. 3, 4 & 5.**  
**Sect. 5.]**

district, & damage was caused to the roads of the district by haulage in connection with the laying of the pipes, but not in connection with the construction of the reservoir:—*Held*: the contract was a building contract for one compound work, which was a work extending over a long period within Locomotives Act, 1898 (c. 29), s. 12 (1) (b), & an action for recovery of expenses commenced more than six months after the completion of the line of pipes but before the completion of the reservoir was in time.—*CARLISLE RURAL COUNCIL v. CARLISLE CORPN.*, [1900] 1 K. B. 471; 78 L. J. K. B. 307; 100 L. T. 216; 73 J. P. 121; 25 T. L. R. 237; 53 Sol. Jo. 228; 7 L. G. R. 268, C. A.

*Annotation*:—*Folld. Relgate R. C. v. Sutton District Water Co.* (1909), 78 L. J. K. B. 315.

**1857. — — — — — Contracts comprising independent works in several districts.]**—*CARLISLE RURAL COUNCIL v. CARLISLE CORPN.*, No. 1856, *ante*.

**1858. — — — — — What amounts to building contract—Any physical construction.]**—*CARLISLE RURAL COUNCIL v. CARLISLE CORPN.*, No. 1856, *ante*.

**1859. In respect of "work extending over long period"—Completion of work—Action within eighteen months therefrom.]**—*KENT COUNTY COUNCIL v. FOLKESTONE CORPN.*, No. 1850, *ante*.

**1860. — — — — — Causing damage.]**—*LANCASTER RURAL COUNCIL v. FISHER & LE FANU*, No. 1854, *ante*.

**1861. — — — — — What amounts to—Question of fact.]**—In Locomotives Act, 1898 (c. 29), s. 12 (1) (b), which provides that proceedings for the recovery of expenses of extraordinary traffic "where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work," the expression "the completion of the contract or work" means the constructional completion of the contract or work, & it is a question of fact when the contract or work is completed in that sense. Accordingly where a contract provided for the construction of a watertight reservoir & the reservoir was so far completed that the water was let into it more than six months before the commencement of an action in the county ct. for the recovery of expenses of extraordinary traffic in relation thereto, but was not made watertight until within six months of the commencement of the action:—*Held*: the county ct. judge was justified in finding that the reservoir was not completed within Locomotives Act, 1898 (c. 29), s. 12 (1) (b), until it was made watertight, & the action was in time.—*REIGATE RURAL DISTRICT COUNCIL v. SUTTON DISTRICT WATER CO.* (1909), 78 L. J. K. B. 315; 100 L. T. 354; 73 J. P. 161; 25 T. L. R. 260; 53 Sol. Jo. 243; 7 L. G. R. 280, C. A.

*Annotation*:—*Consid. Carlisle R. C. v. Carlisle Corpn.*, [1909] 1 K. B. 471.

**1862. — — — — — What amounts to "work"—Removal of timber—Work spread over two years.]**—*NORFOLK COUNTY COUNCIL v. GREEN*, No. 1806, *ante*.

**1863. — — — — — Material supplied for road repairs.]**—*KENT COUNTY COUNCIL v. FOLKESTONE CORPN.*, No. 1850, *ante*.

**1864. — — — — — ]**—*BROMLEY RURAL DISTRICT COUNCIL v. CROYDON CORPN.*, No. 1827, *ante*.

**1865. Damage done by public authority—Action to be brought within six months—Effect of employment of independent contractor—Public Authorities**

**Protection Act, 1893 (c. 61), s. 1.]**—*KENT COUNTY COUNCIL v. FOLKESTONE CORPN.*, No. 1850, *ante*.

**SUB-SECT. 4.—IN WHAT COURT RECOVERABLE.**

*See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12 (1) (a).*

**1866. High Court—Removal from county court—Certiorari—Grounds for removal.]**—*GODMAN-CHESTER RURAL DISTRICT COUNCIL v. HOOLEY* (1901), *Times*, Aug. 5.

— — — — —.]—*See, generally, COUNTY COURTS*, Vol. XIII., pp. 543–546, Nos. 988–1010.

**1867. County court—Expenses not exceeding £250—Whether High Court jurisdiction excluded.]**

By Locomotives Act, 1898 (c. 29), s. 12 (1) (a), "Expenses under" Highways & Locomotives (Amendment) Act, 1878 (c. 77), "shall cease to be recoverable in a summary manner, but may be recovered if not exceeding £250 in the county ct.," & if exceeding that sum in the High Ct. In an action brought in the High Ct. by a local authority to recover a sum exceeding £250 from debt, in respect of expenses incurred by such authority in repairing certain roads over which locomotives belonging to debt. & others had travelled, the jury found that the weight was excessive & the traffic extraordinary, & assessed the damages at £120. Judgment was entered for the authority for £80, the amount of damage agreed by the parties to be attributable to debt., with costs, the judge stating that if necessary, & if he had the power to do so, he would certify for costs on the High Ct. scale:—*Held*: (1) under Locomotives Act, 1898 (c. 29), s. 12 (1) (a), the action might be brought either in the High Ct. or in the county ct., & apart from special legislation, the mere fact that it might have been brought in the county ct. did not affect the right of the local authority to costs, & the action having been tried by a jury, the costs would, under R. S. C., 1883, Ord. 65, r. 1, follow the event unless otherwise ordered for good cause shown; (2) assuming the action to be founded on tort within county cts. Act, 1888 (c. 43), s. 116, then the only special legislation was that sect., & the judge, having a discretion under that sect. to certify for costs on the High Ct. scale, had exercised that discretion by granting a certificate in favour of the local authority.

It has been pointed out that a condition precedent to the right to bring an action to recover expenses is that there shall be a certificate of the surveyor that extraordinary expenses have been incurred by reason of damage caused by excessive weight or extraordinary traffic (*COLLINS, M.R.*).—*CHESTERFIELD RURAL COUNCIL v. NEWTON*, [1904] 1 K. B. 62; 73 L. J. K. B. 24; 80 L. T. 406; 68 J. P. 33; 52 W. R. 129; 20 T. L. R. 6; 48 Sol. Jo. 13; 2 L. G. R. 45, C. A.  
*Annotation*:—*As to* (1) *Dist. Ripon R. C. v. Armitage & Hodgson*, [1919] 1 K. B. 559.

**1868. — — — — —.]**—An action cannot be brought in the High Ct. under Locomotives Act, 1898 (c. 29), s. 12, where the expenses sought to be recovered do not exceed £250.—*RIPON RURAL COUNCIL v. ARMITAGE & HODGSON*, [1919] 1 K. B. 559; 88 L. J. K. B. 728; 120 L. T. 611; 83 J. P. 112; 17 L. G. R. 264.

**1869. — — — — — Locomotives on Highways Act, 1896 (c. 36), ss. 1, 6—Heavy Motor Car Order, 1904.]**—An action lies in the county ct. to recover expenses of extraordinary traffic not exceeding £250 caused by light locomotives within above sects. as extended by above Order, inasmuch as

expenses of extraordinary traffic not exceeding £250 ceased by virtue of Locomotives Act, 1898 (c. 29), to be recoverable summarily under Highways & Locomotives (Amendment) Act, 1878 (c. 77), & became recoverable in the county ct.; & Locomotives Act, 1898 (c. 29), s. 17 (2), means that nothing in that Act is to affect light locomotives as distinguished from other vehicles, but it does not mean that light locomotives, as far as they have characteristics in common with other vehicles, one of which is that they may cause extraordinary traffic, are not to be dealt with by the new procedure established by Locomotives Act, 1898 (c. 29), s. 12 (1).—*R. v. JAMES (JUDGE) & MIDLAND RY. CO., Ex p. BATH RURAL COUNCIL*, [1908] 1 K. B. 958; 6 L. G. R. 160; *sub nom. R. v. BATH COUNTY COURT JUDGE & MIDLAND RY. CO., Ex p. BATH RURAL COUNCIL*, 77 L. J. K. B. 402; 98 L. T. 505; 72 J. P. 67, D. C.

**1870. — Duty of judge to take notes.**—If the jurisdiction in these cases [actions under Locomotives Act, 1898 (c. 29), s. 12] extending to an amount of £250, & exceeding very largely the amount sought to be recovered in many actions in the High Ct., is conferred upon the county ct., it is the duty of the judge who is trying such cases to see that a proper note is taken of the evidence, & that whether an application to do so is made or not. The difficulties arising in these cases are known to be substantial; what are the highways, proper certificates, what is extraordinary traffic, who are the persons responsible for it, & so on. This case is itself an illustration. . . . If this case came before any judge of the High Ct. he would deem it his duty to see that a proper note was taken (LORD ALVERSTONE, (C.J.)).—*CHELTSEY URBAN DISTRICT COUNCIL v. BINNS* (1905), 60 J. P. Jo. 28; *sub nom. Re CHELTSEY RURAL DISTRICT COUNCIL & BINNS*, 49 Sol. Jo. 223.

*Annotations*:—*Reid*, *Hilton R. C. v. Arncliffe & Hodgson*, [1919] 1 K. B. 559. *Mentid*, *Simmons v. Crossley*, [1922] 2 K. B. 95.

—*See, generally, COUNTY COURTS*, Vol. XIII., p. 538, Nos. 897–900.

**1871. Scale of costs—Action in High Court—Damages received less than two hundred & fifty pounds—Certificate of court.**—*CHESTERFIELD RURAL COUNCIL v. NEWTON*, No. 1867, *ante*.

#### SUB-SECT. 5.—MEASURE OF DAMAGES.

*See Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12; & generally, DAMAGES*, Vol. XVII., pp. 120–136.

**1872. General rule.**—The measure of damages under Locomotives Act, 1898 (c. 29), s. 12, is the difference between the sum expended in repairs during the year & the average sum expended on the road in previous years, allowance being made for other traffic & causes contributing to the increased expenditure.—*WESTON-SUPER-MARE URBAN DISTRICT COUNCIL v. BUTT (HENRY) & CO.*, [1919] 1 Ch. 11; 87 L. J. Ch. 612; 119 L. T. 669; 82 J. P. 262; 34 T. L. R. 624; 62 Sol. Jo. 730; 10 L. G. R. 754; *on appeal*, [1919] 2 Ch. 1, C. A.; *sub nom. BUTT (HENRY) & CO. v. WESTON-SUPER-MARE URBAN DISTRICT COUNCIL*, [1922] 1 A. C. 340, H. L.

**1873. Reconstruction of road necessary—Repairs ineffective.**—S. was the owner of locomotive engines, which were used on a highway which was originally sufficient for ordinary light traffic, but was greatly damaged by the heavy traffic of the engines. The highway board were obliged not

merely to repair but re-construct the road, & an expenditure of £500 was thereby incurred. The repairs & re-construction items could not be severed:—*Held*: S. was rightly ordered to pay the sum of £500, & it was immaterial that his engines were made & used in accordance with the statute.—*SAVIN v. OSWESTRY HIGHWAY BOARD* (1880), 44 J. P. 766.

*Annotations*:—*Reid*, *Kent County Council v. Kent Coal Concessions* (1908), 72 J. P. 507; *Cambridgeshire County Council v. Pepper & Hollis* (1912), 76 J. P. 393.

**1874. Average expenses of repairing neighbouring roads—Not conclusive.**—*AVELAND (LORD) v. LUCAS*, No. 1763, *ante*.

**1875. — Whether material.**—*BROMLEY RURAL DISTRICT COUNCIL v. CHITTENDEN*, No. 1832, *ante*.

**1876. — — —**—In an action by a local authority under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12, to recover expenses as having been incurred by them in the repair of a highway by reason of damage arising from extraordinary traffic, the local authority must, in order to succeed, prove that those expenses were “extraordinary,” & for the purpose of determining whether they were so, regard must be had to the average expense of repairing similar highways in the neighbourhood.—*BILLEMEY RURAL COUNCIL v. POPLAR UNION & KEELING*, [1911] 2 K. B. 801; 80 L. J. K. B. 1211; 105 L. T. 476; 75 J. P. 497; 55 Sol. Jo. 617; 9 L. G. R. 796, C. A.

*Annotations*:—*Apld*, *Colchester Corp. v. Gepp*, [1912] 1 K. B. 177; *Ledbury R. D. C. v. Colwall Park Granite Quarries Co.* (1913), 108 L. T. 1002. *Reid*, *Cambridgeshire County Council v. Pepper & Hollis* (1912), 76 J. P. 393; *Windsorham U. D. C. v. Seward* (1912), 11 L. G. R. 321; *Morpeth R. C. v. Bullocks Hall Colliery Co.*, [1913] 2 K. B. 7; *Worsborough U. D. C. v. Barnsley British Co-op. Soc.* (1914), 111 L. T. 429; *Ledbury R. C. v. Somerset* (1915), 84 L. J. K. B. 1297.

**1877. — — —**—*COLCHESTER CORPN. v. GEPP*, No. 1828, *ante*.

**1878. — Neighbouring roads cheaper to maintain.**—*LEDDBURY RURAL DISTRICT COUNCIL v. COLWALL PARK GRANITE QUARRIES CO., LTD.*, No. 1817, *ante*.

**1879. State of repair of highway.**—*HEMSWORTH RURAL DISTRICT COUNCIL v. MICKLETHWAITE*, No. 1790, *ante*.

**1880. Excess of cost of repairing particular highway—Over cost of repair due to ordinary traffic.**—*LEDDBURY RURAL DISTRICT COUNCIL v. COLWALL PARK GRANITE QUARRIES CO., LTD.*, No. 1847, *ante*.

**1881. Deductions & allowances—Improvement of road due to repair.**—*COLCHESTER CORPN. v. GEPP*, No. 1833, *ante*.

**1882. — — —**—*CAMBRIDGESHIRE COUNTY COUNCIL v. PEPPER & HOLLIS*, No. 1799, *ante*.

**1883. — — —**—*LEDDBURY RURAL DISTRICT COUNCIL v. COLWALL PARK GRANITE QUARRIES CO. LTD.*, No. 1847, *ante*.

**1884. — Bad state of repair.**—*CAMBRIDGESHIRE COUNTY COUNCIL v. PEPPER & HOLLIS*, No. 1799, *ante*.

**1885. — Alleged extraordinary traffic not wholly so.**—*CAMBRIDGESHIRE COUNTY COUNCIL v. PEPPER & HOLLIS*, No. 1799, *ante*.

**— Average expenses of repairing neighbouring highways.**—*See Nos. 1763, 1771, 1772, 1780, 1782, 1786, 1790, ante.*

#### SECT. 5.—INJUNCTION TO RESTRAIN.

*See Part IX., Sect. 3, sub-sect. 2, ante.*

## Part XII.—Stopping-up or Diversion of Highways.

### SECT. 1.—AT COMMON LAW.

#### SUB-SECT. 1.—IN GENERAL.

**Common law rule**—Once a highway always a highway.]—*See* Nos. 4, 14, 45, 46, *ante*.

**1886. Exceptions to rule—Destruction of road by natural means.**]—*LEE v. PATRICK* (1864), 28 J. P. Jo. 276.

**Access to road destroyed—By stopping up communicating roads under statute.**]—Where a highway is stopped or diverted by order of quarter sessions, a road which branches from & rejoins the highway so stopped or diverted, & to which the public had no other means of access, ceases to be a highway, although not mentioned in the order.—*BAILEY v. JAMIESON* (1876), 1 C. P. D. 329; 34 L. T. 62; 40 J. P. 486; 24 W. R. 456.

*Annotations* :—*Consd. G. C. Ry. v. Balby-with-Hexthorpe* U. C., A.-G. v. G. C. Ry., [1912] 2 Ch. 110. *Reid. Tyne Improvement Comrs. v. Imrie, A.-G. v. Tyne Improvement Comrs.* (1899), 81 L. T. 174.

— **Statutory provisions.**]—*See* Sect. 2, *post*.

#### SUB-SECT. 2.—FORMER PROCEDURE.

**1888. Writ ad quod damnum.**]—*R. v. WARDE & LYME* (1832), Cro. Car. 266; *Ex p. VENNOR* (1754), 3 Ark. 706; *Ex p. ARMITAGE* (1756), Amb. 294; *R. v. RUSSELL* (1827), 6 B. & C. 560; *EMER & DITTONS URBAN COUNCIL v. MARKS* (1902), 71 L. J. K. B. 309.

### SECT. 2.—STATUTORY PROVISIONS.

#### SUB-SECT. 1.—IN GENERAL.

**1889. Necessity for order.**]—*R. v. PLATTS*, No. 2206, *post*.

**1890. Proceedings to obtain order—By surveyor—Highway Act, 1835 (c. 55), s. 85.**]—The charges of a solr. employed by an urban authority to conduct proceedings at the instance of an individual for the stopping-up or diverting a highway under above Act are not "expenses" within sect. 84 of the Act, so as to be recoverable in the manner pointed out by sect. 101 :—*Seemle* : all the steps required by sect. 85 to be taken for the purpose of obtaining the order of sessions, are ministerial

acts which ought to be done by the surveyor of the local authority.—*UNITED LAND CO. v. TOTTENHAM LOCAL BOARD* (1884), 13 Q. B. D. 640; 53 L. J. M. C. 136; 51 L. T. 364; 48 J. P. 726; 32 W. R. 798, D. C.

**1891. More than one highway—Necessity for separate orders.**]—*R. v. MILVERTON (INHABITANTS)*, No. 1936, *post*.

**1892. Partial stopping up.**]—*R. v. MILVERTON (INHABITANTS)*, No. 1936, *post*.

**1893. Condition imposed must be complied with.**]—The L. Ry. Co. were empowered to make obstructions in public or private roads, for the purposes of their undertaking, doing as little damage as might be, & wherever it was found necessary to use that power, they should, before any such road should be cut through, etc., make a good & sufficient road instead thereof, as convenient for passengers as the road to be cut through, or as near thereto as may be. The co. having obstructed a public road without making a new one equally convenient or as nearly so as might be :—*Held* : they were indictable for a nuisance on the old highway.—*R. v. SCOTT* (1842), 3 Q. B. 543; 3 Ry. & Can. Cas. 187; 2 Gal. & Dav. 729; 11 L. J. Q. B. 254; 6 Jur. 1084; 114 E. R. 615.

*Annotations* :—*Reid. R. v. Great North of England Ry.* (1846), 7 L. T. O. S. 468; *Watkins v. G. N. Ry.* (1851), 16 Q. B. 961; *Wyatt v. G. W. Ry.* (1865), 13 W. R. 837. *Mentd. Re Royal British Bank* (1857), 29 L. T. O. S. 148; *R. v. Lee* (1875), 24 W. R. 550; *R. v. L. & N. W. Ry.* (1888), 58 L. T. 771.

**1894. —**]—Applt. was convicted of unlawfully trespassing upon a railway in such a manner as to expose himself to danger; & of being upon the railway after having received warning not to go thereon. Prior to the making of the railway, & prior to the passing of the Acts authorising the same, there existed a public footpath over the land now occupied by the railway at the place where applt. crossed, & applt., with others, went upon & crossed the railway at the place in question in the *bona fide* assertion of the right of way which existed before the railway was made. The railway co. had not complied with Railways Clauses Consolidation Act, 1845 (c. 20), s. 40, by making a proper provision for the public to pass over or under the railway :—*Held* : the conviction was wrong, & must be quashed on two grounds, because the jurisdiction of the magistrates was ousted by the claim of right or title which was set up, & they had no jurisdiction to adjudicate upon the case; & because, as the public right of way

#### PART XII. SECT. 2, SUB-SECT. 1.

**b. Proceedings to obtain order—Diversion of highway.**]—A proceeding under 50 (Geo. III. c. 6, to obtain an alteration of a road, must be a continuous proceeding; therefore, if a proceeding on one application fails, there must be a new application of freshhold for a warrant to summon another jury.—*R. v. WHITE, WATERBOROUGH COMR.* (1831), N. B. Dig. 101.—*CAN.*

**c. — Form of application—By whom made.**]—On an application under Highway Act, Consol. Stat. c. 88, for the alteration of a road running through two parishes :—*Held* : the application should have been made by a majority of the comrs. in each parish & the county council had no authority to vary the amounts awarded by the jury.—*Ex p. PARLES* (1885), 35 N. B. II.

#### 51.—*CAN.*

**d. Jurisdiction of municipality.**]—The roads mentioned in Municipal Clauses Act, s. 50 (127) which may be closed by bye-law, are not only such roads as are wholly situate within the limits of the municipality, but include also highways or trunk roads leading into the districts beyond the boundaries.—*STYLES v. VICTORIA (CITY) CORPN.* (1899), 8 B. C. II. 406.—*CAN.*

**e. —**]—The word "wholly" in Consolidated Municipal Act, 1903, s. 637, is used with reference not to the locality of the road, but to the jurisdiction of the council over it; & the council of a municipality has jurisdiction to pass a bye-law closing part of a continuous highway passing through that municipality & extending into other municipalities.—*Re TAYLOR*

*& BELLE RIVER VILLAGE* (1909), 18 O. L. R. 330; 13 O. W. R. 778.—*CAN.*

**f. —**]—*RAMSEY v. WEST VANCOUVER* (1915), 31 W. L. R. 415; 8 W. W. R. 835.—*CAN.*

**1893 i. Condition imposed must be complied with.**]—The power of a municipal council to close up a road, under Municipal Act, s. 504, is a conditional one only, & if another convenient road is not already in existence, or is not opened by another bye-law passed before the time fixed for closing the road, the bye-law closing the road may be quashed.—*Re ADAMS & EAST WHITBY TOWNSHIP CORPN.* (1882), 2 O. R. 473.—*CAN.*

**g. Powers of statutory company.**]—A statute conferring upon a co. powers of expropriation in general terms does not authorise it to take or close an existing highway.—*THOMSON*

existed before the making of the railway, such right of way was not extinguished by the making of the railway over it, as the railway co. had not complied with the provisions of the Act in making proper provision for the public to pass over or under the railway.—*COLE v. MILES* (1888), 57 L. J. M. C. 132; 60 L. T. 145; 53 J. P. 228; 36 W. R. 784, D. C.

*Annotations*.—*Folld. Arnold v. Morgan*, [1911] 2 K. B. 314. *Refd. R. v. Bexley Heath Ry.* (1896), 74 L. T. 540.

**1895. Extinguishment by implication—Works authorised inconsistent with existence of road.]—**

A public right of way may be extinguished by statute by necessary implication as well as by express words. A saving clause in a general Act has no operation if it is inconsistent with the express provisions of a subsequent special Act. The saving clauses of General Pier & Harbour Act, 1861 (c. 45), do not apply to a public right of way. A corp. were empowered by a provisional order of the Board of Trade, made under the authority of General Pier & Harbour Act, 1861, & confirmed by a subsequent special Act, to construct a pier in accordance with certain deposited plans. The plans showed that the pier, when constructed, would be physically inconsistent with the existence of an alleged public right of access to the seashore from a street with which the pier was connected. The provisional order contained no words expressly extinguishing the right of way, or substituting another right of way for it:—*Held*: if the alleged right of way had ever existed, it was extinguished by necessary implication, & it was not saved by General Pier & Harbour Act, 1861 (c. 45).—*YARMOUTH CORPN. v. SIMMONS* (1878), 10 Ch. D. 518; 47 L. J. Ch. 792; 38 L. T. 881; 26 W. R. 802.

*Annotations*.—*Distd. Cole v. Miles* (1888), 57 L. J. M. C. 132. *Refd. St. Mary, Islington, Vestry v. Goodman* (1889), 23 Q. B. D. 151.

**1896. Repeal of statute authorising diversion—Whether public right of way revives.]—**

Where, under a private Act of Parliament, a new turnpike road was directed to be made, & a certain public bridleway across a farm directed to be closed to prevent the evasion of tolls, the freehold in the bridleway being by the same Act vested in the owner of the farm in exchange for lands taken for the purposes of the turnpike road, & penalties being imposed on those continuing to use the bridleway, & when the Act, which had originally been passed for twenty-one years, was continued in force by subsequent Acts, but eventually repealed:—*Held*: the right to use the bridleway was not revived by such repeal.—(*GWYNNE v. DREWITT*, [1894] 2 Ch. 616; 63 L. J. Ch. 870; 71 L. T. 190; 60 J. P. 104; 43 W. R. 551; 8 R. 814.

**1897. Duty to fence diverted road—At point of diversion.]—**A duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury through going astray at the point of diversion.—*HURST v. TAYLOR* (1885), 14 Q. B. D. 918; 49 J. P. 359; 33 W. R. 582; 1 T. L. R. 386; *sub nom. HIRST v. TAYLOR*, 51 L. J. Q. B. 310, D. C.

*Annotations*.—*Apld. Evans, Administratrix v. Rhymney L. B.* (1887), 3 T. L. R. 72. *Refd. McClelland v. Manchester Corp.*, [1912] 1 K. B. 118.

*v. HALIFAX POWER CO.* (1914), 14 E. L. R. 181; 16 D. L. R. 424; 47 N. S. R. 536.—*CAN.*

**PART XII. SECT. 2, SUB-SECT. 2.—A. 1898 I. Provision of new highway—**

**SUB-SECT. 2.—UNDER HIGHWAY ACTS.**

**A. Conditions Requisite.**

*See, now, Highway Act, 1835 (c. 50).*

*See, also, No. 1932, post.*

**1898. Provision of new highway—Before stopping up of old road.]—**Under 13 Geo. 3, c. 78, s. 19, a new highway must be set out before an old one can be stopped up; & it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. & if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road & stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the sessions on appeal, stating the fact of a new road being set out in lieu of the old one.—*WELCH v. NASH* (1807), 8 East, 394; 103 E. R. 394.

*Annotations*.—*Distd. De Ponthieu v. Pennyfeather* (1814), 5 Taunt. 634. *N.F. R. v. Phillips* (1866), L. R. 1 Q. B. 618. *Refd. R. v. Cambridgeshire JJ.* (1835), 4 Ad. & El. 111. *Mentd. Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432; Dyson v. Collick (1822), 5 B. & Ald. 600; Lane v. Dixon (1847), 3 C. B. 776; R. v. Phillips (1848), 8 Q. B. 715; R. v. Grant (1849), 14 Q. B. 43; Colonial Bank of Australasia v. Willan (1874), 1 R. 5 P. C. 417.

**1899. Substituted road—Whether must be entirely new—Widening of another old road.]—***WELCH v. NASH*, No. 1898, ante.

**1900. ————Justices, under Highway Act, 1835 (c. 50), s. 85, may make a certificate for the diversion of a highway, if the new highway is nearer or more commodious; & a certificate is valid which alleges one alternative. The addition of fresh land to an old narrow highway, so as to widen it & make it a commodious road, is sufficient substitution of a "new highway." It is sufficient if the certificate state that the old highway will be unnecessary when the proposed alterations are completed. —R. v. PHILLIPS** (1866), L. R. 1 Q. B. 618; 7 B. & S. 593; 35 L. J. M. C. 217; 30 J. P. 505; 12 Jur. N. S. 920; 14 W. R. 791.

*Annotations*.—*Apld. R. v. Surrey JJ.* (1872), 26 L. T. 22. *Refd. R. v. Surrey JJ. & Wells, Ex p. Lewin* (1892), 66 L. T. 678.

**1901. ————Connections between termini & another highway.]—**(1) It is not necessary for stopping up a road under an order of justices of the peace, that they should, by their order, substitute a new road reaching the whole distance from the *terminus a quo* to the *terminus ad quem*, it suffices if they set out a new road leading from the *terminus a quo* into a public highway, along which, & other highways connected with it, the subject may pass to the *terminus ad quem*. (2) If the orders & certificates of magistrates, diverting & stopping a road, be delivered to the clerk of the peace to be enrolled, it satisfies 13 Geo. 3, c. 78, s. 19, although the clerk of the peace make no transcript thereof, the statute being only directory to the officer as to the enrolment. *Qu.*: whether the statute intend that a transcript shall be made. The statute not prescribing any particular form of certificate by the magistrates that the new road is complete & in good condition & repair, previous to the stopping up of the old road, it seems that a recital that they have so certified, contained either in the order for diverting the road, or in the order for stopping up the old road, is a sufficient certificate within sect. 19.

*Before stopping up of old road.]—*R. S. O., 1877, c. 174, s. 504, only applies to cases where the only means or convenient means of access is over the road closed up, & not where there is already another existing way of access,

though a less convenient one.—*Re McARTHUR & SOUTHWOLD CORPN.* (1878), 3 A. R. 295.—*CAN.*

**h. ————Omission in bye-law—Effect of.]—**The omission in a



**Sect. 2.—Statutory provisions: Sub-sect. 2, A., B. & C.]**

—**DE PONTHEU v. PENNYFEATHER** (1814), 5 Taunt. 634; 1 Marsh. 261; 128 E. R. 839.  
*Annotations:—As to (1) Consd. R. v. Phillips* (1866), L. R. 1 Q. B. 618. *As to (2) Reid. Leigh U. C. v. King*, [1901] 1 K. B. 747. *Generally, Mentd. Adams v. Andrews* (1850), 15 Q. B. 281.

**1902. — Public to have same rights over new road.]**—An order of justices, for diverting & stopping up a highway, substituted for the old highway a new road, which passed partly over a road, described in the order as a new line of turnpike road. The sessions confirmed the order, subject to a case. This ct. quashed the order of sessions, because it did not appear on the face of the order, or of the case, that the public had the same permanent right to pass over the new road as they had to pass along the old one. *Qu.*: whether justices can divert a road for carriages & continue it for foot-passengers.—**R. v. WINTER** (1828), 8 B. & C. 785; 3 Man. & Ry. K. B. 433; 2 Man. & Ry. M. C. 46; 7 L. J. O. S. M. C. 15; 108 E. R. 1234.

*Annotations:—Reid. R. v. Mellor* (1830), 1 B. & Ad. 32; *R. v. Horner* (1831), 2 B. & Ad. 150.

**1903. — Access to all points served by old road.]**—**WILKINSON v. BAGSHAW** (1797), Peake, Ad. Cas. 165.

**1904. — "Nearer & more commodious" way—Whether one alternative sufficient.]**—A footpath led from the hamlet of W. to a turnpike road which led in one direction to the town of A., & in the other to various other places. It was proposed to divert a part of this footpath, by making it join the road at a point somewhat nearer to A. Two justices certified under Highway Act, 1835 (c. 50), s. 85, for the diversion of this footpath described as leading "from W. to A." & stated in their certificate that the intended footpath was "nearer & more commodious" than the old. Against this diversion an appeal was tried at the quarter sessions, under sect. 88, & the grounds of appeal were, that "reference being had to the various places with which the original footpath communicated, the new line was not nearer & more commodious than the old. It appeared that the proposed new line of footpath joined the turnpike road at a point nearer to A. than the old, & was consequently nearer as between W. & A. only, but that it was not so near as between W. & the other places mentioned:—*Held*: the jury were properly directed to construe the word "nearer" not as between W. & A., but as between the point at which the new & old lines of footpath, diverged, & the point where the old line reached the road; the jury having found that the new path was not nearer than the old, but that it was more commodious, the order for diverting the footpath could not be made, as it was necessary under sect. 89 that the substituted line should be both "nearer" & more "commodious."—**R. v. SHILES** (1841), 1 Q. B. 919; 1 Gal. & Dav. 301; 10 L. J. M. C. 157; 6 Jur. 256; 113 E. R. 1383.

*Annotations:—Dtd. Wright v. Frant Overseers* (1863), 4 B. & S. 118. *N.F. R. v. Phillips* (1866), L. R. 1 Q. B. 648.

**1905. — —.]**—The town of T. W. comprises a portion of the parish of F. By the T. W. Improvement Act, 1846, comrs. were appointed in whom the management & control of the streets, footways, etc., within the town were vested, with powers to pave & repair them, & they were made liable to indictment in case of the repair being

insufficient; but no power was given to stop up or divert highways. Proceedings were taken under Highway Act, 1835 (c. 50), s. 84, for the purpose of diverting a footway within that portion of the parish of F. which was in the town of T. W., & a meeting of the inhabitants of F. in vestry assembled having approved the new footway, two justices made a certificate under sect. 85. By sect. 113 nothing in this Act shall apply to any roads or footways "which now are or may hereafter be paved, repaired, or cleansed, broken up or diverted, under or by virtue of the provisions of any local or personal Act or Acts of Parliament":—*Held*: the certificate of the justices was bad. *Scmble*: a certificate of justices under sect. 85 need not state that the proposed new highway is nearer & more commodious to the public.—**WRIGHT v. FRANT OVERSEERS** (1863), 4 B. & S. 118; 32 L. J. M. C. 204; 27 J. P. 645; 10 Jur. N. S. 39; 11 W. R. 883; 122 E. R. 404; *sub nom. R. v. WRIGHT*, 8 L. T. 455.

*Annotation:—Reid. R. v. Phillips* (1866), L. R. 1 Q. B. 648.

**1906. — —.]**—**R. v. PHILLIPS**, No. 1900, *ante*.

**1907. "Nearer" — How construed.]**—**R. v. SHILES**, No. 1904, *ante*.

**1908. How public convenience to be estimated—Not by reference to circumstances not yet existing.]**

—Justices of the peace have no power under Highway Act, 1835 (c. 50), s. 85, to order a highway to be stopped up because, in consequence of matters to arise at some future time, another road not yet made will be "nearer or more commodious to the public." On appeal to the quarter sessions against a certificate of justices ordering certain roads to be diverted & others to be stopped up, the ct. may, under sect. 87, confirm the order as to the stopping up, & quash it as to the diverting.—**R. v. MIDDLESEX** (1861), 5 B. & S. 621; 4 New Rep. 327; 33 L. J. M. C. 188; 29 J. P. 53; 10 Jur. N. S. 125; 12 W. R. 951; 122 E. R. 903.

**1909. Order for diversion & stopping-up—Necessity for separate orders.]**—Under 13 Geo. 3, c. 78, s. 19, the justices in special sessions could not, by one & the same order, direct that a highway should be diverted, & that the old way should be stopped. Nor was any alteration made in this respect by 55 Geo. 3, c. 68.—**R. v. MIDDLESEX JJ.** (1830), 5 Ad. & El. 626; 2 Har. & W. 407; 1 Nev. & P. K. B. 92; 1 Nev. & P. M. C. 6; 6 L. J. M. C. 10; 111 E. R. 1302.

*Annotation:—Reid. R. v. Milverton* (1836), 2 Har. & W. 431.

**1910. Road must be constructed along line approved.]**—*Mandamus* to remove obstructions on a highway. Return, showing that proceedings were taken under Highway Act, 1835 (c. 50), for diverting the highway; that two justices viewed the highway & the proposed new highway, & certified under sect. 85 that they had done so, & that the proposed highway was more commodious to the public, which certificate was laid before the quarter sessions, that no appeal was made; & the proceedings were regular up to the order of the quarter sessions, that the order directed the surveyors to stop the old highway, & before doing so, to make the new one, & in doing this not to pull down any house or building, or take away the ground of any yard, etc. The return then showed that the proposed line passed over a building & a yard, & that the surveyors *bona fide* make the new line as near to the line as could be without pulling

bye-law which closes up a road to provide for the lands abutting thereon some other convenient road or way of

access does not render it void, but only subject to be quashed upon application to one of the superior cts. of com-

mon law within a year.—**VANDERCAR v. EAST OXFORD CORPN.** (1878), 3 A. R. 131.—**CAN.**

down the building & taking the yard, & then stopped up the old way:—*Held*: either the order of quarter sessions was bad, as delegating to the surveyors a discretion as to the line of new highway to be made; or, if the words to this purport were rejected, it did not appear that the order was obeyed, & the old highway was not shown to have been effectually stopped.—*R. v. New-Market Ry. Co.* (1850), 15 Q. B. 702; 4 New Sess. Cas. 241; 19 L. J. M. C. 241; 16 L. T. O. S. 298; 14 J. P. 798; 117 E. R. 625.

*Annotations*:—*Reid*. R. v. Nicholson (1850), 14 J. P. Jo. 752; R. v. Worcestershire JJ. (1854), 3 E. & B. 477.

### B. Jurisdiction of Justices.

**1911. Roads within county boroughs—Jurisdiction of county magistrates.**—The enactment of Highway Act, 1835 (c. 70), s. 8, "that every place & precinct which shall be included within the metes & bounds of any borough, & none other, shall be part of such borough, & in those boroughs which are counties of themselves shall be part of such county, & none other":—*Held*: to make such places within boroughs, which are counties of themselves, part of the borough for all purposes, & the magistrates of the county had no power to make an order for stopping up a way within any such precincts, after the passing of the Act.—*R. v. Gloucestershire JJ.* (1830), 4 Ad. & El. 689; 7 C. & P. 338, n.; 1 Har. & W. 682; 6 Nev. & M. K. B. 115; 5 L. J. M. C. 79; 111 E. R. 947.

*Annotation*:—*Reid*. R. v. New Sarum (1845), 1 New Mag. Cas. 372.

**1912. Justices certifying—Whether must be justices to whom original application made.**—*R. v. Kent JJ.*, No. 1925, *post*.

### C. Consent.

**1913. By owner—Owner at date of order.**—An order of justices for diverting a highway stated that the new road was to pass through the lands of the late T. J., & that the justices had received evidence of the consent of T. J. in his lifetime:—*Held*: this order was bad, because it did not thereby appear that T. J. was the owner of the estate at the time when the order was made.—*R. v. Kirk* (1822), 1 B. & C. 21; 107 E. R. 9; *sub nom.* R. v. Denbighshire JJ., 2 Dow. & Ry. K. B. 52; 1 Dow. & Ry. M. C. 139.

**1914. Recital in certificate—Necessity for.**—Proceedings were taken under Highway Act, 1835 (c. 50), ss. 84 & 85, to divert a footpath which crossed the corner of the grounds of an asylum, the new path being of greater length round the fence, & upon what had been a ditch between the fence & the highway. Two justices certified that the new path was more commodious than the old,

but made no mention in their certificate of any consent of owner. A written consent of the proprietors of the asylum was enrolled with the certificate & plan by the quarter sessions. This consent professed to be by the owners of the lands or grounds through, along, or adjoining which the footpath was intended to be diverted & turned, & they consented to the making & continuing of the new path through, along, or adjoining their said lands or grounds:—*Held*: upon a rule for a *certiorari* to bring up the order of quarter sessions for want of jurisdiction, an appeal having failed by reason of insufficient notice, this was a substitution of a new path; the certificate need not mention the consent of the owner; & this consent contained in effect what was mentioned in the scheduled form.—*R. v. Surrey JJ.* (1872), 26 L. T. 22; 36 J. P. 182.

*Annotation*:—*Folld.* R. v. Kent JJ., [1904] 2 K. B. 319.

**1915.** — — — — — *R. v. Kent JJ.*, No. 1925, *post*.

**1916. Not by agent or solicitor.**—By 55 (Geo. 3, c. 68, s. 2, when a footway, etc., is diverted by an order of justices, three descriptions of notice are to be given, & the order is to be confirmed & enrolled at the quarter sessions held next after the expiration of four weeks from the first day of giving such notice:—*Held*: (1) the computation must be made from the first day of giving that description of notice which is last published; (2) an assent to the turning of the road, given under the hand & seal of an agent of the party through whose ground the new road is to pass, is insufficient.—*R. v. Kent JJ.* (1823), 1 H. & C. 623; 107 E. R. 229; *sub nom.* R. v. Crewe, 3 Dow. & Ry. K. B. 6; 1 Dow. & Ry. M. C. 464.

**1917. By public bodies—When highway in two jurisdictions—Consent of each authority necessary.**—*Qu.*: whether under 32 (Geo. 3, c. 29, s. 79, a thoroughfare in two jurisdictions can be stopped up by either division within their district, without the consent of the other? *R. v. Bateman* (1847), 8 L. T. O. S. 364; 11 J. P. Jo. 53.

**1918. Notice convening meeting at which consent obtained—"Special purpose."** P. having taken legal proceedings against the surveyor of the highway district to compel the repair of a highway in T. called B. Road, a notice was issued by the overseer of the hamlet that "a meeting of the ratepayers of T. would be held for the purpose of taking into consideration the proceedings now taken by P. against the surveyor of the highway district respecting B. Road, & for other purposes connected with the highways of the hamlet." At the vestry meeting so convened it was resolved, that the road should be stopped up under Highway Act, 1835 (c. 50), & proceedings were accordingly taken, & a certificate of two justices obtained,

### PART XII. SECT. 2, SUB-SECT. 2.—B.

**k. Assessment of damages—"Nearest justice."**—An Act directed that the damages caused by an alteration of a road should be assessed by five freeholders, to be appointed by "the nearest justice of the peace":—*Held*: this meant the nearest disinterested justice.—*R. v. Heavyside* (1833), N. B. Dig. 472.—*CAN.*

### PART XII. SECT. 2, SUB-SECT. 2.—C.

**l. By owner—When necessary.**—A land assocn. registered a plan of a subdivision of land in a city, & sold lots according to the plan. M. bought from the assocn. several lots. The assocn. afterwards obtained an order directing that the registered plan should be amended by stopping up a certain part of H. avenue, & that that part of

the street should be closed. The closing of that part did not deprive M. of access to adjacent public highways; but he opposed the application on the ground that the closing would depreciate the value of his lots.—*Held*: M.'s consent to the order for the closing was not necessary under Registry Act, R. S. O., 1914, s. 86 (4).—*Re Hinton Avenue, Ottawa* (1920), 47 O. L. R. 556; 54 D. L. R. 115; 18 O. W. N. 275.—*CAN.*

**m. By public bodies—How given.**—The municipality had by bye-law allowed a railway co. to occupy the street, & ordered that for that purpose a portion of it should be closed altogether as a highway:—*Held*: the consent of the municipality might have been given by resolution as well as by bye-law.—*R. v. Grand Trunk Ry. Co.* (1857), 15 U. C. R. 121.—*CAN.*

**n. Compensation to owner of land affected.**—An application by a railway co. for permission to divert a highway in a city, & for that purpose to take lands of a private individual, was opposed by that individual, but approved by the municipality:—*Held*: the application should be granted, but only on proper compensation being made to the owners of land affected.—*Re Canadian Northern Ry. Co. & St. Boniface (City)* (1914), 27 W. L. R. 830.—*CAN.*

**o. By Government—Bye-law of municipal council.**—The municipal council of T. passed bye-law 4420, stopping up & closing a portion of an avenue:—*Held*: when the bye-law was passed, the powers of the city council were spent, & as it was a void bye-law by reason of the consent of the Dominion Govt. not having been

*Sect. 2.—Statutory provisions: Sub-sect. 2, C., D. & E. (a).]*

for the purpose; & the certificate, etc., were confirmed & inrolled at quarter sessions. A rule was afterwards obtained to quash the order of quarter sessions & certificate on the ground that the notice announcing the meeting did not specify the "special purpose" for which the meeting was held, as required by 58 Geo. 3, c. 69, s. 1:—*Held*: the notice was sufficient.—*R. v. POWELL* (1873), *L. R.* 8 Q. B. 403; 42 *L. J. M. C.* 129; 28 *L. T.* 697, 37 *J. P.* 711; 21 *W. R.* 867.

*Conditional consent.*—See No. 185, *ante*.

#### *D. Notices.*

*See Highway Act, 1835 (c. 50), s. 85.*

**1919. Necessity for notice to justices—Reasonable notice.**—13 Geo. 3, c. 78, s. 62, is applicable to proceedings by order of two justices under 55 Geo. 3, c. 68, s. 2:—*Held*: it was necessary to give reasonable notice of the special sessions at which any such order was to be made to the several justices acting & residing within the division; & unless such notices be given the sessions ought not to confirm & enrol such order, even though there were no appeal against it.—*R. v. WORCESTERSHIRE JJ.* (1818), 2 *B. & Ald.* 228; 100 *E. R.* 350.

*Annotations*—*Reid*, *R. v. Sheppard* (1820), 3 *B. & Ald.* 411; *R. v. Cox* (1881), 48 *J. P.* 410.

**1920. Sufficiency of notice—Description of road.**—An order of justices for diverting a highway & stopping up a part of it, described the highway by termini, & by reference to a plan; the part to be stopped up was described as so many yards of the said highway, lying between certain letters on the plan, & coloured blue. Notice was published, pursuant to 55 Geo. 3, c. 68, of the order having been made; but the notice had no plan annexed, & merely described the road by termini, & the part to be stopped up as so many yards of such road:—*Held*: the order explained by a plan annexed, was good; but the notice was insufficient.—*R. v. HORNER* (1831), 2 *B. & Ald.* 150; 109 *E. R.* 1099.

**1921. — Date of proposed application.**—Although the form of notice of intended application to quarter sessions for the diversion of a highway under Highway Act, 1835 (c. 50), s. 85, contains a blank for the insertion of the date on which the application is proposed to be made, it is not necessary to state the date in the notice; it is enough that the notice makes it clear that the application will be made to the quarter sessions held next after the expiration of four weeks from the day on which the justices' certificate is lodged with the clerk of the peace. A certificate of justices for the diversion of a highway was lodged with the clerk of the peace on May 21. In the notice of intended application to the quarter sessions it was stated that the application would be made on July 4, that being the date on which the summer session would in the ordinary course

be held. Subsequently, the county assizes having been fixed for July 3, it became necessary to alter the date of holding the quarter sessions. The justices accordingly altered it to June 20, & on that day the application for enrolment of the certificate was made. The four weeks from the lodging of the certificate with the clerk of the peace expired on June 18:—*Held*: notwithstanding the alteration of the date, the notice was a good notice, & the quarter sessions had jurisdiction to entertain the application.—*R. v. DERBY JJ.*, [1917] 2 *K. B.* 802; 86 *L. J. K. B.* 1534; 117 *L. T.* 538; 33 *T. L. R.* 539; 61 *Sol. Jo.* 695; 15 *L. G. R.* 720; *sub nom. R. v. DERBYSHIRE JJ.*, *Ex p. GLOSSOP CORPN.*, 81 *J. P.* 292, *D. C.*

**1922. Where posted.**—At each end of portions of highway proposed to be diverted—Several roads forming one system.]—There were three roads, each in a different parish, running from three turnpike roads, & forming, by their junction together, a figure like a capital Y. The three limbs met at D. & the ends of the limbs met the turnpike roads at A., B. & C. On application by the highway board of the district two justices made a separate certificate as to each road under Highway Act, 1864 (c. 101), s. 21, which incorporates Highway Act, 1835 (c. 50), ss. 84–91, that the road from D. to A., from D. to B., & from D. to C. was unnecessary. These certificates were affirmed on appeal by orders of quarter sessions, & it was ordered that the roads should cease to be repaired by the parishes. E., an inhabitant of one of the parishes, & living in the neighbourhood of the roads, obtained a rule for a *certiorari* to bring up the orders & certificates for the purpose of quashing them on the ground that they were void by reason of the notices not having been affixed at the places required by law. By Highway Act, 1835 (c. 50), s. 85, after their view & before making their certificate, the justices are to direct the surveyor to affix a notice in form No. 19 at the place & by the side of each end of the highway from whence the same is proposed to be diverted or stopped up, etc., & such notices having been published, & proof thereof given, the justices shall proceed to certify. A notice had been posted at A., B., C. respectively, but no notice at all had been posted at D.:—*Held*: the actual publication of the prescribed notices at each end of the road to be dealt with was a condition precedent to the jurisdiction of the two justices; & although the roads formed one system, yet each of the roads having been treated as a separate road, this condition had not been fulfilled, & the orders were therefore void as made without jurisdiction.—*R. v. SURREY JJ.* (1870), *L. R.* 5 Q. B. 460; 39 *L. J. M. C.* 145; 34 *J. P.* 614.

*Annotations*—*Reid*, *Cook v. Ipswich I. B. of Health* (1871), 21 *L. T.* 579; *R. v. Kent JJ.* (1904), 73 *L. J. K. B.* 858. *Mentz*, *R. v. Cockrell* (1871), *L. R.* 6 Q. B. 252; *Julius v. Oxford* (1880), 5 *App. Cas.* 214; *R. v. Surrey JJ.* (1888), 52 *J. P.* 423; *R. v. Nicholson*, [1899] 2 *Q. B.* 455; *R. v. Groom* (1901), 70 *L. J. K. B.* 636; *R. v. Williams*, *Ex p. Phillips*, [1914] 1 *K. B.* 608; *R. v. Bedfordshire County Council*, *Ex p. Sear*, [1920] 2 *K. B.* 465; *R. v.*

obtained, it could not be given life & rendered valid by the subsequent consent of the Dominion Govt. & the passing of the amending bye-law.—*Re INGLIS CO. & CITY OF TORONTO* (CORPN.) (1905), 24 *C. L. T.* 396; 8 *O. L. R.* 570; 4 *O. W. R.* 253.—*CAN.*

#### **PART XII. SECT. 2, SUB-SECT. 2.—D.**

*p. Bye-law closing highway—Sufficiency of notice—Date of proposed consideration by council.*—A bye-law closing a street is invalid where the notice of intention to pass it does not

fix a day on which it is to be considered by the council.—*Re CAMPBELL & SOUTHAMPTON VILLAGE*, 18 *C. L. T.* Occ. N. 119.—*CAN.*

*q. Neglect to give notice.*—Where the notices required of a bye-law to close a road had not been regularly given, but appt. knew that the step was in contemplation, & had expressed his intention not to take any part in the matter, the ct. refused to quash.—*Re JANSON & TOWNSHIP* (CORPN. OF REACH (1860), 19 *T. C. R.* 591.—*CAN.*

*r. ———.*—*Re MCKINNON & CALLEDONIA VILLAGE CORPN.* (1873), 33 *U. C. R.* 502.—*CAN.*

*s. ———.*—*WANNAMAKER v. GREEN* (1885), 10 *O. R.* 457.—*CAN.*

*t. Diversion—Inquiry by jury—Notice to objecting parties—Whether necessary.*—Where the proceedings of comrs. in altering a road were objected to & the inhabitants applied to two justices to obtain a warrant for a jury:—*Held*: no notice was necessary to be given to the objecting parties of the

Richmond Confirming Authority, *Ex p. Howitt* (1920), 37 T. L. R. 62; *R. v. Butt, Ex p. Brooke* (1922), 38 T. L. R. 537.

**1923.** — **Portion only being diverted.**—*R. v. SURREY JJ.*, No. 1924, *post*.

**1924.** — **On church door.—In parish where portion of highway situated.**—Highway Act, 1835 (c. 50), s. 85, provides that upon proceedings under that & the preceding sect. for turning, diverting, or stopping up a highway, notices shall be affixed by the surveyor "at the place & by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up," & "on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, or any part thereof, shall lie":—*Held*: it is sufficient to affix notices at the commencement & termination of the particular portion of highway proposed to be dealt with, & on the church door of the parish or parishes in which such portion is situated.—*R. v. SURREY JJ.*, [1892] 1 Q. B. 807; 61 L. J. M. C. 153; 56 J. P. 695; 40 W. R. 500; 8 T. L. R. 518; 36 Sol. Jo. 461; *sub nom. R. v. SURREY JJ. & WELLS, Ex p. LEWIN*, 60 L. T. 578, C. A.

**1925. Time for affixing.**—(1) In proceedings to divert a highway under Highway Act, 1835 (c. 50), ss. 84, 85, it is not a condition precedent to the justices granting a certificate for diversion that the notice required by sect. 85 should have been affixed at each end of the highway at a date which would leave four successive weeks before the issue of the certificate.

(2) Where the district council have passed a resolution for the diversion of a highway & application has been made to two justices, who, after a view, have refused to grant a certificate, a fresh application, without a fresh resolution, can be made to two other justices, & they have power to grant a certificate.

(3) The written consent of the owner of the land through which the new highway is proposed to be made need not appear on the face of the certificate.—*R. v. KENT JJ.*, [1905] 1 K. B. 378; 74 L. J. K. B. 50; 92 L. T. 132; 60 J. P. 69; 53 W. R. 183; 21 T. L. R. 95; 49 Sol. Jo. 99; 3 L. G. R. 261, C. A.

**1926. Whether notice must remain affixed.**—*R. v. KENT JJ.*, No. 1925, *ante*.

**1927. Notice of special sessions—Regularity of service on justices.**—The notices of holding a special sessions for the purpose of diverting a public highway, must be given to the justices of the peace of the county acting within the district, by the high constable of the hundred.—*R. v. SURREY JJ.* (1826), 5 B. & C. 241; 7 Dow. & Ry. K. B. 857; 4 Dow. & Ry. M. C. 3; 4 L. J. O. S. K. B. 246; 108 E. R. 90.

### E. Justices' Certificates.

#### (a) Form.

**1928. Must follow statutory form—13 Geo. 3, c. 78.**—An order made by justices of peace under sect. 19 of above Act, for stopping up an old footway & setting out a new one, must follow the form prescribed in the schedule annexed to the Act, & set forth the length & breadth of the new footway; otherwise it is no answer to a justification of a right of way pleaded to an action of trespass *quare clausum fregit* brought by the owner of the soil over which the old way led. The Act requires, that the form set forth in the schedule

"shall be used on all occasions, with such additions & variations only as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, & may be taken advantage of in a collateral proceeding.—*DAVISON v. GILL* (1800), 1 East, 64; 102 E. R. 25.

*Annotations*:—*Reid. R. v. Milverton* (1836), 5 Ad. & El. 841; *Catterall v. Sweetman* (1847), 1 Rob. Eccl. 580. *Mentd. Goss v. Jackson & Bushell* (1800), 3 Esp. 198; *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374; *Badger v. South Yorkshire Ry. & River Dun Co.* (1858), 1 E. & E. 359; *Salisbury v. G. N. Ry.* (1858), 5 C. B. N. S. 174.

**1929.** — *R. v. MIDDLESEX JJ.* (1900), *Pratt & Mackenzie's Law of Highways*, 17th ed. at p. 307, D. C.

*Annotation*:—*Reid. Birkin v. Smith* (1909), 100 L. T. 835.

**1930. Whether order for sale must be included.**—*R. v. KENYON*, No. 1944, *post*.

**1931.** — *Justices by 55 Geo. 3, c. 68, s. 2, may make an order for stopping up a footway as unnecessary, without ordering it to be sold.*—*R. v. GLOVER* (1830), 1 B. & Ad. 482; 9 L. J. O. S. M. C. 38; 109 E. R. 807.

**1932. Contents of certificate of view—Statement of view.**—(1) An order of justices, for diverting a public highway & substituting a new one for it, containing also an order for stopping up the old highway, is bad, inasmuch as they have no power to stop up the old road until the new one has been made.

(2) An order for diverting an old highway & substituting a new one must show on the face of it that the justices viewed the line of the proposed new road.

(3) Where an order for diverting a road directed that it should be stopped up, but did not show on the face of it that the proposed new road was fit for the reception of travellers: *Held*: bad.—*R. v. KENT JJ.* (1830), 10 B. & C. 477; 8 L. J. O. S. M. C. 73; 109 E. R. 528.

*Annotations*:—*As to (1) Reid. R. v. Middlesex JJ.* (1836), 5 Ad. & El. 626. *As to (2) Reid. R. v. Middlesex JJ.* (1836), 5 Ad. & El. 626; *R. v. Milverton* (1830), 5 Ad. & El. 841. *Generally, Mentd. Jubb v. Kingston-upon-Hull Dock Co.* (1846), 9 Q. B. 413.

**1933.** — *— (1) In an order of justices for stopping up a highway as unnecessary, under 55 Geo. 3, c. 68, s. 2, the following recital, "We, A., B., & C., justices," etc., "assembled at a special sessions held," etc., on, etc., "having upon view found" that a certain part of a highway called, etc., is unnecessary, sufficiently shows that the justices viewed such highway together, & at the time when the order was made.*

(2) Such order, if not made on a joint view, would be bad.

(3) A direction in such order, that the land of the discontinued highway be sold by the surveyors to H., whose lands adjoin thereto, if he shall be willing to purchase the same, if not, to some other person or persons, for the full value thereof, is sufficient under 55 Geo. 3, c. 68, s. 2, & 13 Geo. 3, c. 78, s. 17, though the form of an order given in the schedule to the latter Act introduces the words "for the full value thereof," after the words "purchase the same," as well as in the subsequent part of the sentence.

(4) It is not necessary to the validity of such an order, that a certificate of sale should be subjoined to it, pursuant to 13 Geo. 3, c. 78, Sched. 19; or that any direction should be given in the order, as to the application of the purchase-money.

A public highway led over the land of H. He

time & place of the jury's meeting to inquire into the intended alterations.—*R. v. JOHNSTON PARISH HIGHWAYS COMRS.* (1847), 3 Kerr, 583.—CAN.

*s. Necessity for notice to owner.*—Until notice is given to the owners of all land abutting upon any street or lane which it is proposed to close, city

has no power to pass a bye-law.—*GERMAN v. REGINA (CITY)* (1909), 2 Mask. L. R. 50; 10 W. L. R. 130.—CAN.

*Sect. 2.—Statutory provisions: Sub-sect. 2, E. (a) & (b), & F. (a).]*

opened another road over his own land, between the same points, which the public used, & they ceased using the former road. Nine years afterwards, he obtained an order of justices for stopping up the old road as unnecessary, under 55 Geo. 3, c. 68, s. 2:—*Held*: (5) such order might properly be made, & it was not necessary to proceed as in case of diverting a highway under 13 Geo. 3, c. 78, s. 16; (6) the justices might properly state in their order that they had viewed the old road, if they had viewed the ground over which the right of way was, although the road itself had gone into disuse; (7) an order directing the surveyors to sell the soil of the old highway to H., whose lands adjoin, if he will purchase, if not, to some other person, for the full value, is not bad, although if he himself the surveyor; at least if no fraud appear.—*R. v. CAMBRIDGESHIRE JJ.* (1835), 4 Ad. & El. 111; 1 Har. & W. 600; 5 Nev. & M. K. B. 440; 3 Nev. & M. M. C. 336; 5 L. J. M. C. 6; 111 E. R. 720.

**1934.** ——— & finding.]—In an order of justices for stopping up an unnecessary highway under 55 Geo. 3, c. 68, it must be stated that it appeared to the justices, on view, that the way was unnecessary; & therefore, an order, merely stating that the “justices had, upon view, found, or that it appeared to them,” that the way was unnecessary, is bad.—*R. v. WORCESTERSHIRE JJ.* (1828), 8 B. & C. 254; 108 E. R. 1038; *sub nom.* *R. v. ROGERS*, 2 Man. & Ry. K. B. 289; 1 Man. & Ry. M. C. 461; 6 L. J. O. S. M. C. 106.

**1935.** ———.]—By an order of justices it was stated, that three justices having particularly viewed the public roads within the parish of A. thereafter described, & being satisfied that they were unnecessary to be continued, did order that such roads should be stopped up & extinguished:—*Held*: this order was invalid, inasmuch as it did not appear upon the face of it that the justices were, upon the view, satisfied that the roads were unnecessary. The ct. will make the same intendment in favour of an order of justices as in favour of a conviction.—*R. v. DOWNSHIRE (MARQUIS)* (1836), 4 Ad. & El. 698; 1 Har. & W. 673; 6 Nev. & M. K. B. 92; 3 Nev. & M. M. C. 539; 5 L. J. M. C. 72; 111 E. R. 950.

*Annotations*:—*Foll.* *R. v. Jones* (1840), 12 Ad. & El. 684.

*Reid.* *R. v. Milverton* (1836), 5 Ad. & El. 841; *R. v. Crickeide St. Mary* (1850), 15 L. T. O. S. 296; *Gwyn v. Hardwicke* (1850), 1 H. & N. 49; *Balley v. Jamieson* (1876), 1 C. P. D. 329; *R. v. Kent JJ.* (1904), 73 L. J. K. B. 858.

**1936.** ———.]—(1) An order of justices for stopping an unnecessary highway, under 55 Geo. 3, c. 68, s. 2, is bad, if it stop up half the breadth of a highway, leaving the rest open, although the other half be not within their division.

(2) *Qu.*: whether the justices of the two divisions could, by orders made concurrently, stop both sides.

(3) Justices cannot stop several highways by one order, except so far as they are authorised by Highway Act, 1825 (c. 50), s. 86.

(4) *Semble*: if an order has been properly made & enrolled for stopping a highway, it is not necessary, to make such order completely effectual, that an actual stoppage should have taken place.

(5) If an order for stopping a highway, under 55 Geo. 3, c. 68, begins “We,” etc., “having upon view found, & it appearing to us,” that a certain highway, etc., is unnecessary, the recital does not imply that the justices acted upon any other information than their own view, & is well enough.

—*R. v. MILVERTON (INHABITANTS)* (1836), 5 Ad. & El. 841; 2 Har. & W. 434; 1 Nev. & P. K. B. 179; 1 Nev. & P. M. C. 51; 6 L. J. M. C. 73; 111 E. R. 1385.

*Annotations*:—*As to* (5) *Foll.* *R. v. Jones* (1840), 12 Ad. & El. 684. *Reid.* *R. v. Kent JJ.* (1904), 73 L. J. K. B. 858.

**1937.** ———.]—An order of justices under 55 Geo. 3, c. 68, s. 2, see Highway Act, 1835 (c. 50), s. 85, for stopping a highway, began with this recital, “We,” etc., “having viewed a certain public highway,” etc., “& it appearing to us that such highway is unnecessary,” we do order, etc.:—*Held*: a bad order, the words not necessarily implying that it was made “upon the view” “of the said justices” according to the Act.

There is no part of the administration of the law by justices acting on their own authority in which it is more necessary for the ct. to look closely at their proceedings, than the stopping of highways (COLERIDGE, J.).—*R. v. JONES* (1840), 12 Ad. & El. 684; Arn. & H. 113; 4 Per. & Dav. 520; 10 L. J. M. C. 5; 5 J. P. 192; 5 Jur. 364; 113 E. R. 973.

*Annotation*:—*Reid.* *R. v. Kent JJ.* (1904), 73 L. J. K. B. 858.

**1938.** ———.]—Justices in certifying under Highway Act, 1835 (c. 50), s. 85, that they have viewed a highway proposed to be diverted, & that the proposed new highway is nearer or more commodious to the public, must so certify from their own inspection, & not as the result of inquiries from other persons. When, therefore, justices certified that the proposed new highway would be more commodious to the public than the present highway, because “upon inquiries” they found that the old path was inconvenient & the new path convenient:—*Held*: the certificate was invalid.—*R. v. WALLACE* (1879), 4 Q. B. D. 641; 40 L. T. 518; 43 J. P. 403; 28 W. R. 149, D. C.

*Annotation*:—*Consid.* *R. v. Kent JJ.*, [1904] 2 K. B. 349.

**1939.** ———.]—*Sufficiency of.*—*R. v. CAMBRIDGESHIRE JJ.*, No. 1933, *ante*.

**1940.** ———.]—*Authority of surveyor to apply for view.*—Two justices made a certificate, under Highway Act, 1835 (c. 50), for the diversion of a highway. The certificate stated that the justices had on the application of the surveyor of the highways viewed the highway proposed to be diverted, etc., but did not show that the surveyors were authorised to make the application. On appeal, by a party interested, the sessions held the certificate bad on this ground, & refused to proceed further. A rule nisi having been obtained for a *mandamus* to enter continuances & hear the appeal:—*Held*: (1) the appellate jurisdiction, given to the sessions by the Act, was not limited to the points mentioned in sect. 89, but was general; & consequently the sessions had jurisdiction to entertain the question whether the certificate was good or bad; but having exercised their jurisdiction, *mandamus* did not lie, even if they were wrong; (2) the certificate was defective, as not showing that the preliminaries necessary to give the two justices jurisdiction to certify had been complied with.—*R. v. WORCESTERSHIRE JJ.* (1854), 3 E. & B. 477; 2 C. L. R. 1333; 23 L. J. M. C. 118; 22 L. T. O. S. 332; 18 J. P. 263; 18 Jur. 424; 118 E. R. 1221.

*Annotations*:—*As to* (1) *Reid.* *Wright v. Frant Overseers* (1863), 4 B. & S. 118. *As to* (2) *Dist.* *R. v. Maule* (1871), 41 L. J. M. C. 47. *M.F. R. v. Harvey* (1874), L. R. 10 Q. B. 46.

**1941.** ———.]—A certificate of two justices relative to the stopping up of a highway did not state that the surveyors, at whose request, it was alleged, the justices viewed the highway, had first duly obtained the consent of the inhabitants in

vestry assembled to the proposed stopping up of the highway, after a notice in writing from the party desirous of stopping up the same, requiring the surveyors to convene a meeting of the vestry for the purpose of obtaining such consent, or that the surveyors were, at the time of the said request to view, in possession of & acting under an order in writing of the chairman of a meeting of the inhabitants in vestry assembled:—*Held*: the certificate was not bad for not containing statements as to these matters.—*R. v. HARVEY* (1874), L. R. 10 Q. B. 46; 44 L. J. M. C. 1; 31 L. T. 505; 23 W. R. 231; *sub nom. HARVEY v. BETHNAL GREEN, VESTRY*, 39 J. P. 262.

*Annotation*:—*Reid*. *R. v. Kent JJ.* (1904), 91 L. T. 193.

1942. ——— *Written authority*.—*R. v. MAULE*, No. 1960, *post*.

1943. ——— *Statement that proposed new road fit for travellers*.—*R. v. KENT JJ.*, No. 1932, *ante*.

1944. ——— *Description of highway*.—(1) Where justices of peace, by virtue of 55 Geo. 3, c. 68, s. 2, make an order for stopping up a footway as unnecessary, they must distinctly state, on the face of the order, in what parish, etc., the footway is situate, & must also describe its length & breadth.

(2) *Semble*: the order must be for the sale, as well as the stopping up of such footway.—*R. v. KENYON* (1827), 6 B. & C. 640; 9 Dow. & Ry. K. B. 694; 4 Dow. & Ry. M. C. 476; 5 L. J. O. S. M. C. 160; 108 E. R. 586.

*Annotation*:—*As to* (1) *Reid*. *R. v. Kent JJ.* (1830), 10 B. & C. 477. *As to* (2) *Dtd.* *R. v. Glover* (1830), 1 B. & Ad. 482.

1945. ——— *On proceedings being taken under Highway Act, 1835 (c. 50), s. 85, for the diversion of a highway, the justices certified that the proposed new highway would be more commodious to the public. The plan which it was proposed to enrol together with that certificate consisted of a sheet of the twenty-five inch Ordnance survey map, upon which the lines of the old & new highways were marked in colours, & the width of the new highway was stated in writing, but the lengths of the old & new highways were not so stated:—Held*: the plan did not sufficiently “describe the old & proposed new highway by admeasurement thereof,” & the quarter sessions were consequently right in refusing to enrol the certificate; even if they had been wrong, *mandamus* would not lie under the circumstances to compel them to enrol it.—*R. v. SURREY JJ.*, [1908] 1 K. B. 374; 77 L. J. K. B. 167; *sub nom. R. v. SURREY JJ., Ex p. LOCKE-KING*, 98 L. T. 42; 72 J. P. 53; 24 T. L. R. 185; 6 L. G. R. 98, D. C.

#### (b) *Enrolment.*

1946. *What amounts to—Whether deposit with clerk of peace sufficient*.—*DE PONTHEU v. PENNYFEATHER*, No. 1901, *ante*.

1947. *Necessity for notice to justices—Reasonable notice*.—*R. v. WORCESTERSHIRE JJ.*, No. 1919, *ante*.

1948. *Compliance with statutory conditions*.—*R. v. MIDDLESEX JJ.* (1900), Pratt & Mackenzie's Law of Highways, 17th ed., at p. 307, D. C. *Annotation*:—*Reid*. *Birkin v. Smith* (1909), 100 L. T. 835.

1949. *How enforced—Not by mandamus*.—*R. v. SURREY JJ.*, No. 1915, *ante*.

#### *F. Appeals.*

##### (a) *In General.*

1950. *Whether right of appeal absolute—Right not expressly given in local Act—Authorising stopping up by commissioners*.—A local Act en-

abled the comrs. appointed thereby, with the consent of two justices, to stop up footways, & invested them generally with all the powers of the late Highway Act, 56 Geo. 3, c. 68, but did not in express words, give a right of appeal:—*Held*: a party aggrieved by an order for stopping up a footway by the comrs. could not avail himself of the right of appeal given by the latter Act, as it was not given in express terms in the local Act.—*R. v. BIRMINGHAM JJ.* (1838), 2 J. P. 424.

1951. *Two orders—Appeal against second order—Appeal against first order not in time*.—If two justices make an order for diverting & turning a public footway, & afterwards an order for stopping up the old footway, the party grieved may appeal to the quarter sessions against the last order, though he be too late to appeal against the first.—*R. v. HERTFORDSHIRE JJ.* (1815), 3 M. & S. 459; 105 E. R. 682.

1952. *How far findings of court final—Questions within court's own jurisdiction*.—Where the ct. of quarter sessions confirmed an order of two justices for stopping up a highway without proof that the order was previously made at a special sessions, & an application being made to this ct. for a *mandamus* to enter continuances:—*Held*: the ct. would not interfere where the sessions had already decided upon a point peculiarly within their jurisdiction.—*R. v. --- JJ.* (1819), 1 Chit. 164.

1953. ——— *---*.—*R. v. DORSETSHIRE JJ.* (1841), 2 L. T. O. S. 352.

1954. ——— *---*.—(1) A local Improvement Act gave an appeal to quarter sessions to any person “who may think that he would be injured & aggrieved” if any highway, etc., should be discontinued, etc., upon giving to the comrs. or their clerk ten days' notice in writing of such appeal, together with a statement of the grounds thereof. It also enacted that applt. should not be heard unless he gave such notice & statement, nor on other grounds than those contained in the statement; that a jury should be impanelled to enable the quarter sessions to determine whether such highway, etc., should be discontinued, etc., or whether the party appealing would be thereby injured, etc.; & if, after hearing the evidence produced before them, the jury should return a verdict that such highway, etc., is unnecessary, “& that the party appealing would not be injured or aggrieved thereby,” etc., the ct. should dismiss the appeal; if the jury should return a verdict that such highway, etc., was not unnecessary, etc., “or that the party appealing would be injured or aggrieved thereby,” the ct. should allow the appeal. The comrs. having made an order for stopping up & discontinuing two footpaths, & the consent thereto in writing of two magistrates having been obtained, notice of appeal was given. The notice commenced by stating, “I think I shall be injured or aggrieved if such footpaths shall be discontinued & stopped up & further take notice that the grounds of such appeal are, that the order of the comrs. is bad, that the consent of the magistrates is bad, & that the footpaths were not, nor is either of them either useless or unnecessary.” At the hearing the Recorder discharged the jury without permitting the going into evidence, & made this entry: “Jury discharged on ground of insufficiency of notice of appeal in respect of the statement of the injury or grievance in respect of which applt. thinks that he would be injured or aggrieved”;—*Held*: if the Recorder discharged the jury on the ground that the notice of appeal was insufficient, the ct. could not, since Quarter Sessions Act, 1849



*Sect. 2.—Statutory provisions: Sub-sect. 2, F. (a), (b), (c) & (d), & G.]*

(c. 45), s. 9, interfere with his decision whether right or wrong; & the notice of appeal & statement of grounds of appeal were substantially the same thing, & the entry of the recorder shows that he considered the statement of the grounds of appeal insufficient.

(2) An appeal against an order of comrs. under a local Improvement Act, was entered upon sessions, & at the instance of resp. adjourned to the next:—*Held*: resps. were entitled to object at the sessions to which the appeal stood adjourned, that the notice of grounds of appeal was insufficient.

(3) A local Act of Parliament directed that certain appts. should give notice of appeal & the grounds of their appeal, & be confined to the grounds stated; & also, that a jury should be impanelled to try certain questions of fact raised on appeal:—*Held*: a resp. might, after the jury had been sworn, object to the sufficiency of the statement of the grounds of appeal.—*R. v. SUDBURY RECORDER* (1851), 18 L. T. O. S. 170; 15 J. P. 834.

1955. ———.—*R. v. WORCESTERSHIRE JJ.*, No. 1940, *ante*.

1956. Appeal against part of certificate.—*R. v. MIDGLEY*, No. 1908, *ante*.

1957. ———.—A valuer appointed under Inclosure Act, 1845 (c. 118), s. 62, having given notice of intention to stop up a road from A. to B., a notice of appeal, under sect. 63, against the stopping up of a part of the road is good, & the quarter sessions are bound to hear the appeal. *Qu.*: whether the legal effect of the appeal, if successful, would be to leave the whole road open.—*R. v. HUNTINGDONSHIRE JJ.* (1865), L. R. 1 Q. B. 36; 13 L. T. 443; *sub nom.* JOHNSON v. SMITH, 14 W. R. 209.

#### (b) Who may Appeal.

1958. Person aggrieved—Though new way more commodious—Function of jury.—In construing an Act "or" may be read as "and" if the context makes that the necessary meaning. Highway Act, 1835 (c. 50), s. 89, provides that if, on an appeal to quarter sessions under sect. 88 by a person who thinks that he will be injured or aggrieved by a proposed diversion of a highway, the jury find that the proposed new highway is more commodious to the public, or that the party appealing would not be injured or aggrieved, the ct. shall dismiss the appeal, but that if the jury find that the proposed new highway is not more commodious or that the party appealing would be injured or aggrieved, the ct. shall allow the appeal. A jury at quarter sessions found that a proposed new highway would be more commodious to the public, & that the party appealing would be injured or aggrieved if the existing highway were stopped up & the proposed new one substituted:—*Held*: sect. 89 was contradictory & could only be construed by reading the word "or" in the first part of the sect. as "and" & on the findings of the jury the appeal to quarter sessions must be allowed.—*WALKER v. YORK CORPN.*, [1906] 1 K. B. 724; 75 L. J. K. B. 413; 94 L. T. 744; 70 J. P. 270; 54 W. R. 493; 22 T. L. R. 456; 50 Sol. Jo. 391; 4 L. G. R. 524, D. C.

—Statement of grievance in notice of appeal.]—*See Nos.* 1954, 1957, *ante*, Nos. 1966–1969, *post*.

*See, also*, No. 1950, *ante*.

1959. Who is person aggrieved—User of way.—Prosecutor of an indictment for stopping a common

footway, who had used it for some years before it was stopped, is a party grieved within 5 & 6 Will. & Mar. c. 11, s. 3.—*R. v. WILLIAMSON* (1796), 7 Term Rep. 32; 101 E. R. 841.

#### (c) Notice of Appeal.

1960. Length of notice—Whether ten or fourteen days.—(1) Notwithstanding Highway Act, 1835 (c. 50), s. 88, it is necessary to give the fourteen days' notice required by 12 & 13 Vict. c. 45, s. 1.

(2) Where proceedings are instituted under Highway Act, 1835 (c. 53), s. 84, at the desire of a person or persons other than the inhabitants in vestry, for stopping up or diverting a highway, it is not necessary that the certificate of the justices should state that the surveyor was authorised by an authority in writing of the chairman of the vestry meeting, to apply to the justices to view.—*R. v. MAULE* (1871), 41 L. J. M. C. 47; 23 L. T. 859; 35 J. P. 596; *sub nom.* *R. v. MAULE, FOSTER v. MAULE*, 23 L. T. 859.

*Annotation*:—*As to* (1) *Reid. R. v. Harvey* (1874), 31 L. T. 505.

1961. ———.—How calculated.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, No. 1908, *post*.

1962. ———.—Where quarter sessions are regularly held on certain fixed days at certain places in different divisions of a county, & in each division, except the first, by adjournment from the preceding, the ten days' notice of appeal against a certificate for stopping up a highway under Highway Act, 1835 (c. 50), s. 88, is to be reckoned with reference to the first day of the sessions held in the first of such divisions, though the highway is not situate within such first division.—*R. v. SUFFOLK JJ.* (1848), 5 Dow. & L. 558; 3 New Sess. Cas. 146; 17 L. J. M. C. 143; 12 J. P. 393; 12 Jur. 480.

1963. ———.—Under Highway Act, 1835 (c. 50), s. 88, an appeal against a certificate of justices for stopping a highway cannot be brought unless ten days' notice has been given before the quarter sessions held next after the expiration of four weeks from the lodging of the certificate with the clerk of the peace. Where the sessions had entered & respited an appeal, of which such notice had not been given, this ct. quashed the order of sessions on *certiorari*. Where the general quarter sessions commences on a certain day, & is in practice afterwards adjourned & held on another day in another place, for the purpose of deciding matters in its vicinity, the notice of appeal must be given ten days before the day first mentioned, though the highway is in the vicinity of the latter place.—*R. v. LANCASHIRE JJ.* (1857), 8 E. & B. 563; 27 L. J. M. C. 161; 30 L. T. O. S. 149; 22 J. P. 563; 4 Jur. N. S. 375; 6 W. R. 74; 120 E. R. 210.

*Annotations*:—*Ald. R. v. Lancashire JJ.* (1876), 34 L. T. 124. *Reid. R. v. Surrey JJ.* (1880), 6 Q. B. D. 100.

1964. ———.—Notice of appeal against an order for closing a highway required by the Act must be given ten days before the commencement of the original quarter sessions; not ten days before the adjourned sessions of the district in which the highway is situated.—*SWIFT v. LANCASHIRE JJ.* (1873), 22 W. R. 76.

1965. ———.—Fourteen days.—*R. v. MAULE*, No. 1960, *ante*.

Contents of notice—Statement that applicant is party aggrieved—Necessity for.—A notice of appeal against an order for the stopping up of a footway, under 55 Geo. 3, c. 68, s. 3, must state that the party intending to appeal is "injured or aggrieved" by the order.



Where the ct. of quarter sessions refused to hear an appeal on account of this statement having been omitted in the notice, the ct. would not grant a *mandamus* to hear & determine the merits of the appeal at the next quarter sessions.—*R. v. ESSEX JJ.* (1826), 5 B. & C. 431; 7 Dow. & Ry. K. B. 658; 3 Dow. & Ry. M. C. 483; 5 L. J. O. S. M. C. 65; 108 E. R. 161.

*Annotations*.—*Feld.* R. v. West Riding of Yorkshire JJ. (1828), 7 B. & C. 678. *Apld.* R. v. Poole Recorder (1837), 1 J. P. 183. *Consd.* Walker v. York Corpn., [1906] 1 K. B. 724.

**1967.** ————.]—By a local Act, certain trustees of roads were authorised to make an order for stopping up part of certain old highways, & a right of appeal was given to any person or persons who might be aggrieved by the making of any such order.—*Held*: in a notice of appeal against an order of the trustees for stopping up a highway, it was necessary to state that the party intending to appeal was aggrieved by the order.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1828), 7 B. & C. 678; 1 Man. & Ry. K. B. 547; 1 Man. & Ry. M. C. 215; 6 L. J. O. S. M. C. 59; 108 E. R. 877.

*Annotation*.—*Apld.* R. v. Poole Recorder (1837), 1 J. P. 234.

**1968.** ————.]—A notice of appeal under 55 Geo. 3, c. 68, against an order for the diversion of a highway must show that the person intending to appeal is a party aggrieved by the order. The grievance to applt. is sufficiently shown by stating that he is obliged to use a more circuitous road. The ten days' notice of appeal under the Act must be computed one day inclusive & one day exclusive, & is not affected by a rule of the ct. of quarter sessions, which requires ten days' notice of appeal, exclusive as well of the day of service as the first day of the sessions.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1833), 4 B. & Ad. 685; 1 Nev. & M. K. B. 426; 1 Nev. & M. M. C. 95; 2 L. J. M. C. 93; 110 E. R. 613.

*Annotations*.—*Apld.* R. v. Goodenough (1835), 2 Ad. & El. 463. *Refd.* R. v. Turner (1909), 3 Cr. App. Rep. 103.

**1969.** ————.]—A notice of appeal against an order for stopping up a highway, is sufficient if it state that applts. are aggrieved by being compelled to go a greater distance to the next market town from their respective residences than they would have gone if the road intended to be stopped up were put & kept in a proper state of repair. It need not expressly state that they are aggrieved by the order.—*R. v. ADEY* (1835), 1 Har. & W. 42; 4 Nev. & M. K. B. 365; 2 Nev. & M. M. C. 541; 4 L. J. M. C. 76.

**1970.** ————.]—Whether express statement necessary.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, No. 1968, *ante*.

**1971.** ————.]—*R. v. ADEY*, No. 1969, *ante*.

**1972.** ————.]—*R. v. YEADON* (1883), 47 J. P. Jo. 260.

**1973.** ————.]—Sufficient statement of grievance.—*R. v. SUDBURY RECORDER*, No. 1954, *ante*.

**1974.** Statement of grievance—Sufficiency of.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, No. 1968, *ante*.

**1975.** ————.]—*R. v. ADEY*, No. 1969, *ante*.

**1976.** Appeal against part of order—How far good.—*R. v. HUNTINGDONSHIRE JJ.*, No. 1957, *ante*.

**1977.** Objection to notice—When may be taken—Hearing of appeal adjourned at instance of respondents.—*R. v. SUDBURY RECORDER*, No. 1954, *ante*.

**1978.** ————.]—After jury sworn.—*R. v. SUDBURY RECORDER*, No. 1954, *ante*.

#### (d) Costs.

**1979.** Jurisdiction to award.]—Where a distress warrant was issued to levy the costs incurred by a party in prosecuting an appeal under Highway Act, 1835 (c. 50), s. 88, which did not recite any order of quarter sessions for payment of such costs, but was founded on a subsequent conviction by two justices out of sessions for nonpayment of such costs:—*Held*: the warrant was illegal, & no property passed to the vendee of goods seized & sold under it.—*LOCK v. SELLWOOD* (1841), 1 Q. B. 736; 1 Gal. & Dav. 360, n.; 113 E. R. 1313.

*Annotation*.—*Refd.* R. v. Long (1841), 10 L. J. M. C. 124.

**1980.** Discretion to disallow.]—Highway Act 1835 (c. 50), s. 90, by which "the ct. of quarter sessions is required to award costs to the party giving or receiving notice of appeal, against a certificate of justices for stopping up a highway, whether the same shall be tried or not," etc., is imperative; & the ct. of quarter sessions have no discretion to disallow such costs in any particular case.—*R. v. FINCHLEY SURVEYORS, Ex p. POUNCEY* (1854), 2 C. L. R. 1593.

**1981.** ————.]—*R. v. MIDDLESEX JJ.* (1854), 18 J. P. Jo. 69.

**1982.** ————.]—After notice & grounds of appeal against a certificate of justices for the diversion of a highway, the person at whose instance the certificate was given gave notice that he abandoned further proceedings, & should not apply to the quarter sessions for the enrolment of the certificate. The appeal was entered, & being called on & no one appearing, was struck out. Afterwards on the same day applt. applied for costs under Highway Act, 1835 (c. 50), s. 90, by which the quarter sessions are authorised & required to award to the party having or receiving notice of appeal such costs & expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not:—*Held*: the quarter sessions were bound to make an order for the costs.

—*R. v. WEST RIDING OF YORKSHIRE JJ. & RIPLEY* (1862), 2 B. & S. 811; 6 L. T. 494; 26 J. P. 758; 9 Jur. N. S. 118; 10 W. R. 757; 121 E. R. 1273; *sub nom.* R. v. WEST RIDING OF YORKSHIRE JJ., *Re PEARSON'S APPEAL*, 31 L. J. M. C. 271.

*Annotation*.—*Refd.* R. v. London JJ., [1905] 1 Q. B. 214.

#### G. Effect of Order for Diversion.

**1983.** Extinguishment of highway Private right of way preserved.]—At a meeting of the trustees of a turnpike road it was resolved, under Turnpike Roads Act, 1822 (c. 126), s. 72, that a part of a certain road, subject to the trust, should, between certain specified limits, be stopped up & discontinued as a private highway, on the ground that the same had become unnecessary by the completion of a new road, & "that the remaining part of such old road from the boundary gate before mentioned, be kept open as a private way only for the use of Mr. C., to join the private way leading to his house & lands situate in the parish of I., & that subject thereto such old road is become useless & unnecessary to the public":—*Held*: having regard to sects. 86 & 88 of the Act, after the completion of a new road all the legal rights & consequences incidental to a highway are to cease in respect of the whole of the old road, including a part sold subject to a right of way to particular lands, houses, or places; & the liability to repair any such way or passage, if any, can only be enforced by action, & not by public prosecution.—*R. v. IFIELD (INHABITANTS)* (1856), 27 L. T. O. S. 63; 20 J. P. 262; 4 W. R. 458.

*Sect. 2.—Statutory provisions: Sub-sect. 2, G. & H.; sub-sects. 3, 4 & 5. Part XIII. Sect. 1: Sub-sect. 1. A. (a) & (b), & B.; sub-sect. 2, A.]*

**1984.** — [Pltfs. had been entitled from 1855 to a carriageway to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the co. in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6, & 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, & was thereon marked "roadway & footway," the others being marked simply "footway":—*Held*: upon the true construction of the Act, it did not interfere with private rights of way, but only with public rights of footway, & an injunction restraining the railway co. from obstructing the way had been rightly granted.—*WELLS v. LONDON, TILBURY, & SOUTHEAST RY. CO.* (1877), 5 Ch. D. 120; 37 L. T. 302; 41 J. P. 452; 25 W. R. 325, C. A.

**1985.** — [—] — *Held*: an old highway, which had been diverted & for which a new one over the railway had been substituted by the railway co., under Railways (Clauses Act, 1815 (c. 20), s. 16, was extinguished as a highway.—*MELKSHAM URBAN DISTRICT COUNCIL v. GAY* (1902), 18 T. L. R. 358.

**1986. Soil reverts in original owner.**—By Metropolitan Local Management Act, 1855 (c. 120), s. 96, all streets being highways, & the pavements, stones, & materials thereof, vest in & under the management & control of the vestry or district board, & by sect. 154, the vestry may sell any property whatsoever vested in them which it may appear to them to be properly sold. A street having become closed & disused, *pltf.*, the owner of the adjoining land, claimed the site thereof:—*Held*:—under the words "streets being highways" in sect. 96, a property in the streets was vested in the vestry or district boards so long only as they remained highways, & on their being legally stopped up, they became the property of the person on whose land they had been made.—*ROLLS v. ST. GEORGE THE MARTYR, SOUTHWARK, VESTRY* (1880), 14 Ch. D. 785; 49 L. J. Ch. 691; 43 L. T. 140; 44 J. P. 680; 28 W. R. 807, C. A.

*Annotations:—Expld. & Apprd.* Wandsworth Board of Works v. United Telephone Co. (1884), 13 Q. B. D. 904  
*Consd.* Tunbridge Wells Corpn. v. Baird (1896), 14 L. T. 385; Westminster Corpn. v. Johnson, Westminster Corpn. v. Fuller, [1904] 2 K. B. 737. *Refd.* Burgess v. Northwich L. B. (1880), 6 Q. B. D. 264; A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301; Bradford v. Eastbourne Corpn., [1896] 2 Q. B. 205; Finchley Electric Light Co. v. Finchley U. D. C., [1902] 1 Ch. 866; City of London Tax Comrs. v. C. L. R., [1913] A. C. 364. *Mend.* St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co., [1899] 1 Ch. 474; Kershaw v. Smith, [1913] W. N. 107.

**1987. Public footpath communicating with highway—Extinguishment of path—Construction of order.**—By 13 Geo. 3, c. 78, justices were empowered to divert & stop up certain highways, & to sell the part stopped up; but by sect. 17, if they found it necessary, the old highway was to be sold subject to the right of way & passage to any lands, house, or place, according to the ancient usage in that respect. In 1827 orders for diverting, stopping, & selling a portion of a highway were confirmed at quarter sessions, containing the reservation of a free passage for persons on foot only over & along the land & soil of the said highway to & from a certain public footpath

communicating therewith at the letter E., as delineated on an annexed plan, according to the ancient usage thereof:—*Held*: the effect of these orders was to render another public footpath which communicated with the old highway at another point, & was not marked in the annexed plan, a *cul de sac*; & applt. was justified in closing a door at the point of communication.—*R. v. WALLER* (1875), 31 L. T. 777; 39 J. P. 485.

**1988. Diversion of footpath—Into new private road—Whole road becomes highway.**—A certain public footpath existed prior to the passing of Highway Act, 1835 (c. 50), & was a highway repairable by the inhabitants at large. In 1868 such footpath was closed by a diversion order. In 1869 a road now known as G. road was formed & made by a private owner, & had been used by the public ever since. A plan was annexed to the diversion order, & on that the old footpath was shown coloured blue, & also running along the new road, now known as G. road, on one side thereof was a strip of footpath coloured red, the proposed diversion, which it was admitted was legally to be regarded as a highway repairable by the inhabitants at large. The diversion order recited that the new highway would at all times be open & ready not only for the reception of foot passengers but also for persons travelling with carts & carriages:—*Held*: on an application under Private Street Works Act, 1892 (c. 57), to hear & determine objections, there was evidence upon which the justices could come to the conclusion that the whole breadth of G. road & not only the strip coloured red was a highway repairable by the inhabitants at large, & therefore the local authority had no jurisdiction to make apportionments under the Act in respect of this road.—*KINGSTON-UPON-THAMES CORPN. v. HAVERSTOCK* (1909), 100 L. T. 935; 73 J. P. 378; 7 L. G. R. 831, D. C.

## II. Presumption of Lost Order.

**1989. In what circumstances presumed.**—An inclosure Act authorised the comrs. therein named to divert or stop up any old road, public or private, leading between or over any of the old inclosures within the district to which the Act applied; with a proviso that no such road should be stopped up without the concurrence & order of two justices of the peace for the district. The comrs., by their award, "in pursuance of the powers & authorities vested in them by the said Act, & by the concurrence & order of, etc., two of his Majesty's justices of the peace acting in & for, etc.," stopped up a certain public footpath in the district. No order of justices was to be found in the place of deposit mentioned in the Act for the award & other documents relating thereto:—*Held*: the award itself, & the statement therein contained, was sufficient *prima facie* evidence that the road had been duly stopped up by the concurrence & order of two justices, the subsequent enjoyment not being shown to be inconsistent with the award.—*MANNING v. EASTERN COUNTIES RY. CO.* (1843), 12 M. & W. 237; 3 Ry. & Can. Cas. 637; 13 L. J. Ex. 265; 2 L. T. O. S. 104, 152; 8 J. P. 107; 152 E. R. 1185.

*Annotation:—Refd.* Williams v. Eyton (1858), 27 L. J. Ex. 176.

**1990.** — [—] — Marshes were allotted in 1819, when a gate, which had since been kept locked, was put up across an old road, but the road had since been used by foot passengers occasionally. The award of the comrs., executed in 1830, set out the new roads, & directed the old roads to be stopped up. A certificate of two justices, that the new roads had been formed & completed,

under 41 Geo. 3, c. 109, s. 9, was put in & proved; but no order of two justices for stopping the old road was produced:—*Held*: it might be presumed that an order of two justices for stopping up the old road had been duly made.—*WILLIAMS v. EYTON* (1859), 4 H. & N. 357; 28 L. J. Ex. 146; 32 L. T. O. S. 330; 23 J. P. 243; 5 Jur. N. S. 770; 7 W. R. 291, Ex. Ch.

*Annotations*:—*Apld.* Leigh U. D. C. v. King, [1901] 1 K. B. 747. *Refd.* Cababé v. Walton-upon-Thames District Council, [1913] 1 K. B. 481.

1991. —[.]—In 1842 R. grove was, pursuant to a resolution passed at a vestry meeting, substituted for an older highway called C. lane. R. grove ever since 1842 had been open & used by the general public, & upon one occasion many years back it had been repaired by the surveyor of L., but whether in his capacity as surveyor or not did not appear. No surveyor's accounts were produced, nor was any evidence given as to any certificate of justices having been enrolled or steps taken under Highway Act, 1835 (c. 50), ss. 23 or 84:—*Held*: the justices were justified in finding that R. grove was a highway repairable by the inhabitants at large.

It is, I think, a very violent presumption that the public should acquiesce in the stopping up of the old road unless it were done in a regular way, & I think the justices may well have presumed

that the certificate of the justices was duly granted, & the formal proceedings duly taken to comply with the provisions of sect. 85. After so long a period a certificate of the justices may have been lost (*BRUCE, J.*).—*LEIGH URBAN DISTRICT COUNCIL v. KING*, [1901] 1 K. B. 747; 70 L. J. K. B. 313; 83 L. T. 777; 65 J. P. 243; 17 T. L. R. 205; 45 Sol. Jo. 220, D. C.

*Annotations*:—*Consd.* Esher & Dittens U. C. v. Marks (1902), 71 L. J. K. B. 309; Kingston-upon-Thames Corp'n. v. Baverstock (1909), 100 L. T. 935. *Dbtd.* Cababé v. Walton-on-Thames U. D. C., [1914] A. C. 102.

#### SUB-SECT. 3.—UNDER CHURCH BUILDING ACTS.

Closing of church footpaths by ecclesiastical commissioners.]—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 527, 528, Nos. 3891–3893.

#### SUB-SECT. 4.—UNDER INCLOSURE ACTS.

Effect of inclosure award—On roads & rights of way.]—*See* COMMONS, Vol. XIII., pp. 78 *et seq.*

#### SUB-SECT. 5.—UNDER RAILWAY ACTS.

*See* RAILWAYS.

## Part XIII.—Streets.

### SECT. 1.—METROPOLITAN.

#### SUB-SECT. 1.—STATUTES, AUTHORITIES AND AREAS.

##### A. Statutes and Authorities.

##### (a) In General.

*See* Metropolitan Paving Act, 1817 (c. xxix); Metropolitan Management Acts, 1855 (c. 120), 1862 (c. 102), 1890 (c. 54), 1890 (c. 66); Public Health (London) Act, 1891 (c. 76); London Building Act, 1894 (c. ccciii); General Powers Acts of London County Council.

*Authorities.*—*See, now*, Local Government Acts, 1888 (c. 41), s. 40; 1899 (c. 14), ss. 4, 19, 23.

##### (b) City of London, Precincts, etc.

1992. Liberty of Saffron Hill, Hatton Garden & Ely Rents—5 & 6 Will. 4 (c. xviii).]—Ely Place, part of the liberty of Saffron Hill, Hatton Garden, & Ely Rents, is private property, & though it is generally open to the public during the day, has never been dedicated to the public:—*Held*: the comrs. for paving Saffron Hill, Hatton Garden, & Ely Rents had no authority to enter for the purpose of paving it, under sect. 44 of above Act, which empowers them at all times to pave, etc. all the squares, streets, lanes, courts, ways, footways, or carriageways, passages & places within the liberty.—*PAUL v. JAMES* (1841), 1 Q. B. 832; 1 Gal. & Dav. 316; 10 L. J. Q. B. 246; 113 E. R. 1350.

*See, generally*, City of London Sewers Acts, 1848 (c. clxiii), 1851 (c. xci), 1897 (c. cxxxiii); Public Health (London) Act, 1891 (c. 76), s. 99; London Government Act, 1899 (c. 14), s. 22; Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 73. London Building Act, 1894 (c. ccciii), ss. 4, 30, 104, 135, 165, 199.

##### B. Saving Clauses and Exceptions.

*Saving clauses.*] *See* ELECTRIC LIGHTING, Vol. XX., p. 214; GAS, Vol. XXV., pp. 491 *et seq.*; RAILWAYS.

*Statutes.*] *See* Metropolitan Management Act, 1855 (c. 120), ss. 91, 239, 241; Metropolitan Management (Amendment) Act, 1862 (c. 102), ss. 34, 35, 116, 117; London Building Act, 1894 (c. ccciii) ss. 6, 13, 121, 191, 201, 202, 204, 213; London Building Act (Amendment) Act, 1898 (c. cxxxvii), ss. 3, 9.

#### SUB-SECT. 2.—VESTING, CONTROL, REPAIR AND IMPROVEMENT.

##### A. Vesting and Control.

*See* Metropolitan Management Act, 1855 (c. 120), ss. 90, 96, 140, 160; Metropolitan Management (Amendment) Act, 1862 (c. 102), ss. 71, 86; Metropolitan Paving Act, 1817 (c. 29), ss. 6–9.

1993. Street in more than one district—Presumption as to boundary line.]—An Act of Charles II., creating a new parish of A. in the Metropolitan, described the boundary as the houses abutting on a street. The other side of the street was in the parish of M., & there was evidence that in perambulating the parish boundaries of M., the middle of the street was regarded as the boundary of M.:—*Held*: the boundary of the new parish extended beyond the houses abutting on the highway to the *medium filium* of the highway.—*R. v. STRAND BOARD OF WORKS* (1864), 4 B. & S. 551; 33 L. J. Q. B. 209; 11 L. T. 183; 28 J. P. 532; 12 W. R. 828; 122 E. R. 560, Ex. Ch.

*Annotation*:—*Refd.* C. L. Ry. v. City of London Land Tax Comrs., [1911] 2 Ch. 167.

1994. — Order for exclusive management by one district.]—An order of the Metropolitan Board

**Sect. 1.—Metropolitan: Sub-sect. 2, A. & B.; sub-sect. 3. A. B., C. & D. (a).]**

of Works made under Metropolitan Management Act, 1855 (c. 120), s. 140, & Metropolitan Management Amendment Act, 1862 (c. 102), s. 86, that a new street in more than one parish or district shall be under the exclusive management of one vestry or district board for the purposes of paving, & the expenses payable by each be divided equally between the two parishes or districts, does not entitle the managing vestry or board to require the other vestry or board to pay one-half of the expenses properly chargeable on frontagers under Metropolitan Management Act, 1855 (c. 120), s. 105, & Metropolitan Management Amendment Act, 1862 (c. 102), s. 77.—**ST. GILES, CAMBERWELL, VESTRY v. GREENWICH DISTRICT BOARD OF WORKS** (1887), 19 Q. B. D. 502; 56 L. J. Q. B. 636; 36 W. R. 126; 3 T. L. R. 734, D. C.

**1995. Management transferred to borough council—Contribution by county council towards maintenance.**—An application was made by several metropolitan borough councils to the Local Government Board to determine the amount to be contributed by the county council in respect of the maintenance of main roads which was transferred to the borough councils by London Government Act, 1899 (c. 14), s. 6 (1). The Local Government Board decided "otherwise than as arbitrators" that no contribution should be made:—*Held*: the ct. ought not to interfere.—**R. v. LOCAL GOVERNMENT BOARD, Ex p. HICKNEY BOROUGH COUNCIL** (1908), 72 J. P. 211; 6 L. G. R. 665, D. C.

**B. Repair and Improvement.**

*See* Metropolitan Paving Act, 1817 (c. 29), ss. 53, 80-96; Metropolitan Management Act, 1855 (c. 120), ss. 87, 98, 106; Metropolitan Management (Amendment) Act, 1862 (c. 102) ss. 24, 72, 80, 81, 100; Local Government Act, 1899 (c. 14), s. 6 (3).

**1996. Power of local authority to open up street—To make connection for sewers—Builder's road.**—A builder made drains from certain houses in a road to the boundary of the forecourts of the houses. The road was what is known as a builder's road, made & coated with gravel & ballasted. The footpaths were made with gravel & kerbed with granite. The houses on either side of the road were not completed & inhabited, but the road was open for carriages & foot passengers. It was lighted by the parish but had not been taken to as a public road. The vestry made branches from the drains into a sewer which belonged to them & ran along the centre of the road, & for that purpose they opened the road & footway. The builder declined to repay to the vestry the expenses incurred thereby:—*Held*: (1) the road was not the less a street within the definitions in Metropolitan Management Act, 1855 (c. 120), s. 250, & Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 112, because it came within the definition of a new street in the last-mentioned sect.; (2) Metropolitan Management Act, 1855 (c. 120), s. 78, which authorises the opening of the pavement of any street for the purpose of branching private drains into a sewer, applies equally to streets & to new streets; (3) looking to the definition of the word "pave" in Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 112, the road was paved—& consequently, the vestry had opened a part of the pavement of a street & were entitled under Metropolitan Management Act

1855 (c. 120), s. 78, to recover the expenses incurred by them.—**ST. JOHN, HAMPSTEAD, VESTRY v. HOOFEL** (1885), 15 Q. B. D. 652; 54 L. J. M. C. 147; 49 J. P. 741; 33 W. R. 903; 1 T. L. R. 584, D. C.

**1997. Power to lower level of street—Mains of water company thereunder.**—A water co. in exercise of statutory powers laid down pipes under the surface of a street, & the highway authority of the district afterwards, in exercise of the power in that behalf given by Metropolitan Management Act, 1855 (c. 120), s. 98, proposed to lower the surface of the street, & to do so without altering or disturbing the position of the pipes, but so as to leave only a few inches of soil over them. In an action by the water co. to restrain the highway authority from lowering the surface of the street without at the same time lowering the pipes of the co. to a corresponding depth under the new surface:—*Held*: the sect. did not impose upon the highway authority, when exercising the power thereby given to them of altering the level of a street, any express or implied duty to exercise also at their own expense the power by the same sect. given of altering the position of the pipes thereunder, for the benefit of the water co., in a case where the highway authority did not require for their own purposes to interfere with such pipes.—**SOUTHWARK & VAUXHALL WATER CO. v. WANDSWORTH BOARD OF WORKS**, [1898] 2 Ch. 603; 67 L. J. Ch. 657; 79 L. T. 132; 62 J. P. 756; 47 W. R. 107; 14 T. L. R. 576, C. A.

*Annotations*—**Reid**, *East Fremantle Corp'n v. Annois* (1901), 71 L. J. P. C. 39. **Mentid**, *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217. *Ash v. G. N. Plec. & Brompton Ry.* (1903), 67 J. P. 417; *Roberts v. Charing Cross, Euston & Hampstead Ry.* (1903), 87 L. T. 732. *The Johannesburg*, [1907] P. 65.

**1998. Power to compromise with frontager.**—The corp'n. of a metropolitan borough has power for the purpose of widening & improving a street, to enter into an agreement with the owner of a public-house in the street, whereby he shall be permitted to erect a signpost at the edge of the footpath.—**HOARE & CO., LTD. v. LEWISHAM CORPN.** (1902), 87 L. T. 464; 67 J. P. 20; 18 T. L. R. 816; 46 Sol. Jo. 715, C. A.

**1999. Power to reduce width of footway.**—In 1883 building land in the metropolis was demised to C. for a term of eighty-two years, & L., under an agreement with C., built several shops on a part of the land which fronted a highway. The shops were not built to the edge of the demised land, but a strip of land 3 feet wide was left between the front wall of the shops & the public footway. Subsequently in 1883 L. applied to the local authority to pave the footway in front of his shops right up to the building line, & the local authority informed him that on the slip of land being given up to form part of the public footway the footway would be paved. L. made no reply, & the footway was paved up to the wall of the shops. In the meantime C., who had no knowledge of L.'s application to the local authority, had granted L. separate underleases of the shops for eighty years, & had also assigned to him for value the head lease with a proviso against merger. In 1898 C. repurchased the head lease for value from L.'s successors in title. In 1906 the London County Council under the powers of a special Act converted a horse tramway in the highway in question into an electric tramway, & in connection with this work they widened the road & reduced the width of the footway & took up the pavement (including the pavement of the 3 foot strip of land) in front of the shops. This

work was done under an agreement made in May, 1906, with the borough council, whereby the borough council, in consideration of the reconstruction of the tramway, consented to the narrowing of the footway & agreed to pay part of the cost of paving, which was to be done by the county council. C. & the assignees of some of the underleases then brought this action against the London County Council for an injunction & damages in respect of the taking up of the pavement of the strip of land & the reduction of the width of the footway. In answer to the first claim defts. alleged that the strip of land had been dedicated to the public by L. in 1883 & was part of the public footway, & in answer to the second that the borough council had power to authorise defts. to make the reduction in the width of the footway, & that the work was done by defts. under the authority of the borough council given by the agreement of May, 1906: *Held*: Metropolitan Paving Act, 1817 (c. xxix), s. 52, empowered the borough council, as the road authority, to alter the division of the roadway into footway & carriageway; they must be taken by their agreement to have authorised defts. to execute these alterations on their behalf, & this was not a delegation of their statutory powers; consequently in respect of the narrowing of the footway plffs.' claim failed.—*CORSELLIS v. LONDON COUNTY COUNCIL*, [1908] 1 Ch. 13; 77 L. J. Ch. 120; 98 L. T. 475; 71 J. P. 561; 24 T. L. R. 80; 6 L. G. R. 78, C. A.

**2000. Improvement by London County Council—Power to impose improvement charge—London County Council (Improvements) Act, 1899 (c. cclxvi), s. 61.**—The improvement charge, which by above Act is placed upon all lands adjacent to, & enhanced in value by, the operations carried out under the Act, is an overriding charge upon the lands as a whole. The council have a statutory right to recover the full amount of the charge from any owner, lessee, or occupier, & they are not limited in their right to recover against lessees by the fact that the council have abandoned the charge as against the freehold reversioners.—*HOLBORN & FRASCATI, LTD. v. LONDON COUNTY COUNCIL* (1916), 85 L. J. Ch. 266; 114 L. T. 511; 80 J. P. 225; 11 L. G. R. 538.

**Compulsory purchase of land for public purposes—Under Metropolitan Local Management Acts.**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 295, Nos. 2243–2251.

**Under Metropolitan Paving Act, 1817 (c. xxix).**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 295–297, Nos. 2252–2287.

**Under other Acts.**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 297, 298, Nos. 2288–2298.

### SUB-SECT. 3.—PAVING NEW STREET.

#### A. What is a New Street.

*See Part I., Sect. 6.*

#### B. Width of Carriageway and Footway.

**2001. Power of local authority to vary widths—Liability of frontagers.**—The council of a metropolitan borough, when proposing in the exercise of the powers conferred by Metropolitan Management Act, 1855 (c. 120), s. 105, to pave an old road which has become a new street, have no power to alter the respective widths of the carriageway & footpaths, so as to cast upon the frontagers the expense of throwing portions of the footpaths into the carriage-way.

Speaking for myself, I should have great difficulty in coming to the conclusion that the construction of a gully, that is to say of the connection of the channel with the sewer, is part either of the paving or the formation of the road. The paving of the road is one thing. The making of improved drainage to take away water which will require to be taken away more rapidly in consequence of that paving is another (*LORD ALVERSTONE, C.J.*).—*WANDSWORTH BOROUGH COUNCIL v. GOLDS*, [1911] 1 K. B. 60; 80 L. J. K. B. 126; 103 L. T. 568; 74 J. P. 464; 8 L. G. R. 1102, D. C.

*Compare No. 2259, post.*

#### C. What amounts to Paving.

*See Metropolitan Management Act, 1855 (c. 120), s. 105; Metropolitan Management (Amendment) Act, 1862 (c. 102), ss. 77, 112.*

**2002. Opening surface of unpaved road—to connect sewers.**—*ST. JOHN, HAMPTSTEAD, VESTRY v. HOOPER*, No. 1996, *ante*.

**2003. Improvement in surface drainage.**—*WANDSWORTH BOROUGH COUNCIL v. GOLDS*, No. 2001, *ante*.

#### D. Liability of Owners of Adjoining Property.

##### (a) In General.

*See Metropolitan Management Act, 1855 (c. 120), ss. 105, 106; Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77.*

**2004. Notice by local authority to repair new street—Subsequent resolution to pave Right to recover cost of paving from frontage owners.**—A metropolitan vestry, on Dec. 27, resolved that notice under Metropolitan Management Act, 1855 (c. 120), s. 106, & Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 80, be given of their intention to repair E. street, a new street. On Feb. 7, following, the vestry resolved that E. street be paved according to a plan submitted by the surveyor, & the expense was apportioned among the owners, of whom P. was one. Under the first resolution the vestry contemplated general repairs, but under the second paving only, & the costs under the first proceeding would not fall on the owners, whereas the second would:—*Held*: though the vestry under the second resolution, proceeded under a different sect. of their Act, still that circumstance did not prevent them from afterwards proceeding with that, & executing the paving before the general repairs.—*ST. GEORGE THE MARTYR, SOUTHWARK, VESTRY v. PETHBRIDGE* (1867), 31 J. P. 279.

**2005. Duty of authority to charge paving on frontagers—Not on general rate.**—When within the metropolis, as defined by Metropolitan Management Act, 1855 (c. 120), s. 250, a new street is paved for the first time, the vestry or district board executing the work cannot at their discretion charge the cost thereof upon the general rate under ss. 90, 98 of that Act; they are bound to charge the expense of laying the pavement upon the owners of the adjoining houses & land, under sect. 105 of that statute, as varied by Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77. In 1855 a road in P., within the metropolis, as defined by Metropolitan Management Act, 1855 (c. 120), s. 250, ran between an irregular line of houses & market gardens upon the south side, & market gardens upon the north. Between that year & 1874, a continuous line of houses was built along the north side, & several houses along the south. The district board, within whose

Sect. 1.—Metropolitan: Sub-sect. 3, D. (a) & (b). ]

jurisdiction the road lay, in 1874, paved a footpath by the side of the road, & paid for the cost of the work under Metropolitan Management Act, 1855 (c. 120), ss. 96, 98, out of the general rate levied upon the inhabitants of P.:—*Held*: (1) between 1855 & 1874 the road had become a "new street" within Metropolitan Management Act, 1855 (c. 120), s. 105; (2) the district board had no power to charge the cost of paving the footpath upon the general rate, but it was compulsory upon them to obtain payment thereof from the owners of the adjoining houses & land, under that sect., as varied by Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77.—*DRYDEN v. PUTNEY OVERSEERS* (1876), 1 Ex. D. 223; 34 L. T. 69; 40 J. P. 263, D. C.

*Annotations*:—As to (1) *Reid*, A.-G. v. Wandsworth District Board of Works (1877), 6 Ch. D. 539; *Robinson v. Barton, Eccles, Winton & Minton L. B.* (1882), 46 L. T. 193; *Property Exchange (No. 1) v. Wandsworth Board of Works* (1902), 71 L. J. K. B. 515.

**2006.** ———. ]—Where within the metropolis a road has become a "new street" within the Metropolitan Management Act, 1855 (c. 120), s. 105, & the district board has improperly charged the cost of paving the footpath of such new street upon the general rate of the parish in which it is situated, the ct. will order the district board to restore to the general rate the amount so expended, & to levy same upon the owners of the adjoining houses & land, as provided by the sect. as varied by Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77.—*A.-G. v. WANDSWORTH DISTRICT BOARD OF WORKS* (1877), 6 Ch. D. 539; 46 L. J. Ch. 771.

**2007. Street may not be repaved at expense of frontagers.** ]—A board of works in a metropolitan district paved a new street, which had not been dedicated as a highway, under Metropolitan Management Act, 1855 (c. 120), s. 105, which enacts that the district board may pave any new street at the expense of the owners of the adjoining houses, & shall from time to time keep such pavement in repair. The street having afterwards become out of repair, the board refused to repair it on the ground that a post & rails had been erected along the kerb of the footway by the owner of the estate. On motion for a *mandamus* to the board to repair:—*Held*: the board, having paved a new street, were bound afterwards to keep the pavement in repair, whether it had become a highway or not.—*R. v. HACKNEY BOARD OF WORKS* (1873), L. R. 8 Q. B. 528; 42 L. J. M. C. 151.

*Annotation*:—*Reid*, *White v. Fulham Vestry* (1896), 74 L. T. 425.

**2008.** ———. ]—In 1876 a local authority caused the footpaths of a new street, within Metropolitan Management Act, 1855 (c. 120), to be paved at a cost of £1,425 raised out of the general rates, & subsequently repaired them from time to time. Ten years afterwards a resolution was passed at a vestry that these paths should be paved under the powers of Metropolitan Management Act, 1855 (c. 120), s. 105, & Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, & the costs apportioned among the adjoining owners. Upon an objection being taken by an adjoining owner that the local authority, having laid out a substantial sum in making permanent footpaths in 1876, which was then charged to the general rates, were estopped from exercising their power of paving the street again under these sects. & throwing the cost upon the adjoining owners:—*Held*: the work having been once done the local authority

could not, ten years afterwards, throw the burden of paving upon the adjoining owners.—*ST. GILES, CAMBERWELL, VESTRY v. HUNT* (1887), 56 L. J. M. C. 65; 52 J. P. 132, D. C.  
*Annotations*:—*Distd. Wilson v. St. Giles, Camberwell Vestry*, [1892] 1 Q. B. 1. *Consd. White v. Fulham Vestry* (1896), 74 L. T. 425; *Wandsworth B. C. v. Golds*, [1911] 1 K. B. 60.

**2009. Street laid out without sanction of London County Council—London Building Act, 1894, c. cxxiii.** ]—Although a street has been laid out without the sanction of the London County Council, rendered necessary by above Act, the local authority, which have decided to pave it, are entitled to contributions for the expenses thereof from the owners of houses forming that street, under Metropolitan Management Act, 1855 (c. 120), s. 105, the only question being whether in fact the street in question is a new street.—*CAMBERWELL CORPN. v. DIXON*, [1910] 1 K. B. 424; 79 L. J. K. B. 318; 102 L. T. 33; 74 J. P. 77; 8 L. G. R. 238, D. C.

(b) *Who are Owners.*

**2010. Premises not let at rack rent.** ]—*WRIGHT v. INGLE*, No. 2018, *post*.

**2011. Land let on building agreement—Lease to be granted on completion—Liability of freeholder.** ]—A., the owner in fee of land, entered into a building agreement with B., by which B. was to have possession of such land & to build thereon a certain number of houses, & to inclose & lay out a portion of the land as an ornamental pleasure ground, for the exclusive use of the inhabitants of such houses. A lease was to be granted by A. of each house when finished, & with the lease of the last house was to be granted a lease of the inclosed pleasure ground; & until all the leases were granted B. was to pay A. yearly rent in respect of the whole land, but the agreement was not to operate as a demise nor to give B. any estate or interest in the premises until the leases were executed. B., under this agreement, inclosed & laid out the pleasure ground, & built some of the houses of which, & of which only, leases were granted to him; but not having completed all the houses:—*Held*: A. remained the owner of the land which had been inclosed as such pleasure ground within Metropolitan Management Act, 1855 (c. 120), s. 250, & therefore, as such owner, liable under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, to contribute to the expense incurred by the parish vestry in paving a new street abutting on such pleasure ground.—*HOLLAND (LADY) v. KENSINGTON VESTRY* (1867), L. R. 2 C. P. 565; 36 L. J. M. C. 105; 17 L. T. 73; 31 J. P. 758; 15 W. R. 1045.

*Annotation*:—*Folld. Driscoll v. Battersea B. C.*, [1903] 1 K. B. 881.

**2012.** ———. ]—The freeholder of certain land made a building agreement with a builder, the scheme of which was that the builder was to take possession of the land & immediately commence to erect thereon a certain number of houses, & was in the meantime, until leases should have been granted, to pay to the lessor a rent of £200 a year, or so much thereof as should not have been reserved by any lease actually granted, & upon each house being completed a lease of such house was to be granted to the builder for a term of years, & the agreement contained a clause that "this agreement is intended to operate as an agreement only, & not as an actual demise of the premises, or to give the intended lessee any legal interest therein until the leases herein before

agreed to be granted shall have been executed." No houses had been built & no use of the land had been made by the builder, but he had paid the £200 yearly rent, which was found not to be the rack rent of the land:—*Held*: the freeholder, & not the builder, was the person who would be entitled to receive the rack rent of the premises, & the builder was therefore not the "owner" within Metropolis Management Act, 1855 (c. 120), s. 250, & was not liable for the expenses of paving a new street upon which such land abutted.—*DRISCOLL v. BATTERSEA BOROUGH COUNCIL*, [1903] 1 K. B. 881; 72 L. J. K. B. 564; 88 L. T. 795; 67 J. P. 264; 19 T. L. R. 403; 47 Sol. Jo. 452; 1 L. G. R. 511, D. C.

**2013. — Builder holding land on terms of lease—Liability of builder.**—Deft. was owner of some houses, & occupied land abounding or abutting on a new street, which plffs. had paved under Metropolis Management Act, 1855 (c. 120), s. 105, & sewered under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 52. Amongst other items which plffs. had apportioned to deft.'s contribution were costs of collecting apportioned amounts, of survey plan & obtaining names of owners, & of filling up, printing, advertising, & serving notices. These sums were all paid to persons employed for the purpose, & not plff.'s servants, although plffs. had in their employ a surveyor & a clerk, & payments were requested at their office. Deft. occupied the land under a building agreement, by which the owner of the land agreed to demise to deft. or his nominees the several pieces of land upon which deft. was to build, as the houses & buildings respectively became erected & covered, for eighty years, at the rent of the pepper-corn for two years, & of sums increasing every year up to £361 in the sixth & following years. Deft. was to be considered as holding the undemised portion on the terms of the leases. There was a power of re-entry upon non-completion of the building covenants. The houses at this time were in every stage of building progress, & some had been demised to other persons at deft.'s nomination:—*Held*: upon an action to recover deft.'s apportionment, with the exception of the houses demised to other persons, deft. was liable as owner of all the premises, & the above items were incidental costs & charges within Metropolis Management Amendment Act, 1862 (c. 120), s. 77.—*POPULAR BOARD OF WORKS v. LOVE* (1874), 29 L. T. 915; 38 J. P. 246.

*Annotations*:—*Consd.* *Driscoll v. Battersea B. C.*, [1903] 1 K. B. 881. *Refd.* *Truman, Hanbury, Buxton v. Kerslake*, [1894] 2 Q. B. 774.

**2014. Consecrated church—Liability of Ecclesiastical Commissioners.**—A church, built on land conveyed to the Comrs. for building additional churches, is not liable to be assessed to the expenses of forming a new street, either as "house" or "land," under Metropolis Management Acts. *Semble*: the Comrs. were not "owners" within the statutes.—*ANGELL v. PADDINGTON VESTRY* (1868), L. R. 3 Q. B. 714; 9 B. & S. 496; 37 L. J. M. C. 171; 32 J. P. 742; 16 W. R. 1167.

*Annotations*:—*Consd.* *Bowditch v. Wakefield L. B.* (1871), L. R. 6 Q. B. 567; *Higgins v. Harding* (1872), L. R. 8 Q. B. 7. *Distd.* *Folkestone Corp. v. Woodward* (1872), L. R. 15 Eq. 159. *Appld.* *Plumstead Board of Works v. British Land Co.* (1875), L. R. 10 Q. B. 203. *Distd.* *Caiger v. St. Mary, Islington, Vestry* (1881), 50 L. J. M. C. 59. *Consd.* *Wright v. Ingle* (1885), 16 Q. B. D. 379. *St. Giles, Camberwell, Vestry v. London Cemetery Co.*, [1894] 1 Q. B. 699; *Thames Conservators v. Port of London Sanitary Authority*, [1894] 1 Q. B. 647. *Refd.* *G. E. Ry. v. Hackney Board of Works* (1883), 8 App. Cas. 687. *St. Mary, Islington, Vestry v. Cobbett*, [1895] 1 Q. B. 369; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843.

**2015. — — — — —**—Land having been conveyed under the Church Building Acts to the Ecclesiastical Comrs. as a site for a church, a church was afterwards erected on a part of the land, & the church & part only of the land were consecrated:—*Held*: upon such consecration, the whole of the land so conveyed to the comrs. vested in the incumbent; the comrs. ceased to be the owners of it, & were not liable under Metropolis Management Act, 1855 (c. 120), & Metropolis Management Amendment Act, 1862 (c. 102), to contribute in respect of it towards the cost of paving a new street.—*PLUMSTEAD DISTRICT BOARD OF WORKS v. ECCLESIASTICAL COMRS. FOR ENGLAND*, [1891] 2 Q. B. 361; 64 L. T. 830; 55 J. P. 791; 39 W. R. 700, D. C.

**2016. — — — — —**—*WRIGHT v. INGLE*, No. 2018, *post*.

**2017. Dissenting chapel—Liability of trustees.**—Appls. were the trustees of a chapel which abutted on & formed part of a new street within Metropolis Management Act, 1855 (c. 120). The chapel was registered as a place of religious worship, but had not been consecrated, & there was no dedication of the land in perpetuity. Attached to the chapel was a vestry, & there were also rooms for a caretaker, besides lecture & schoolrooms underneath the chapel: *Held*: the trustees were the owners of a "house" within Metropolis Management Act, 1855 (c. 120), s. 105, or of land within Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, & were liable to contribute to the expense of making & paving the street.—*CAIGER v. ST. MARY, ISLINGTON, VESTRY* (1881), 50 L. J. M. C. 59; 44 L. T. 605; 45 J. P. 570; 29 W. R. 538, D. C.

*Annotation*:—*Consd.* *Wright v. Ingle* (1885), 16 Q. B. D. 379.

**2018. — — — — —** (1) By the term "houses," in Metropolis Management Act, 1855 (c. 120), s. 105, & the term "land," in Metropolis Management (Amendment) Act, 1862, (c. 103), s. 77, it is intended to include, with certain exceptions, all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street. The word "house" includes every building which is capable of being used as a human habitation. If a building which is physically capable of being so used is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense.

(2) A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as an habitation for man. (3) A leasehold chapel fronting on a new street, the chapel being vested in trustees, on trust to permit it to be used as a place of religious worship by congregation of Wesleyans, is a house within Metropolis Management Act, 1855 (c. 120), s. 105, on the ground that, by the consent of the landlord, the trustees, & the *census que trustent*, the trusts might at any moment be put an end to. (4) The trustees are the "owners" of the chapel, & as such liable to contribute to the expense of paving the new street.

(5) Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent there ever could be an owner within [Metropolis Management Act, 1855 (c. 120)], s. 250, I very much doubt (*BOWEN, L.J.*).—*WRIGHT v. INGLE* (1885), 16 Q. B. D. 379; 55 L. J. M. C. 17; 54 L. T. 511; 50 J. P. 436; 34 W. R. 220; 2 T. L. R. 143, C. A.

*Annotations*:—*As to* (1) *Consd.* *Re Christchurch Inclosure Act, Meyrick v. A.-G.*, [1894] 3 Ch. 209; *St. Giles, Camberwell, Vestry v. London Cemetery Co.*, [1894] 1 Q. B. 699;



**Sec. 1.—Metropolitan: Sub-sect. 3, D. (b), (c) & (d).]**

Hornsey District Council v. Smith, [1897] 1 Ch. 843; Fulham Vestry v. Minter, [1901] 1 K. B. 501. **Appl.** Hampstead Corp'n. v. Mid. Ry., [1905] 1 K. B. 538. **Consol.** North Manchester Overseers v. Winstanley, [1908] 1 K. B. 835. **Id.** to (5) **Consol.** L. C. C. v. Wandsworth B. C., [1903] 1 K. B. 797; Herne Bay U. C. v. Payne & Wood, [1907] 2 K. B. 130. **Reid.** Truman, Hanbury, Buxton v. Kerslake, [1894] 2 Q. B. 774; St. Mary, Islington, Vestry v. Cobbett, [1895] 1 Q. B. 369; Hackney Corp'n. v. Lee Conservancy Board, [1904] 2 K. B. 541. **Generally, Mentd.** Fowke v. Berington, [1914] 2 Ch. 308.

**2019. School.—Liability of a school board.**—**LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON, No. 2029, post.**

**2020. Lessee sub-letting at same rent.—Liability of sub-lessee.**—Where a lessee sub-lets the premises at the same rent as he was liable for to his landlord, & though collecting the rent from the sub-lessee pays it over to his own landlord, & derives no benefit or profit therefrom for himself, he is not liable to contribute as "owner" to the expense of paving the street by the district board. —**WALFORD v. HACKNEY BOARD OF WORKS** (1894), 43 W. R. 110; 11 T. L. R. 17; 15 R. 10, D. C.

**2021. Burial ground.—Liability of cemetery company.**—A cemetery co. were, by statute, prohibited from selling or disposing of any of the consecrated land belonging to them, & such land was for ever to be set apart & used exclusively for purposes of Christian burial; but they were empowered to make profits by selling or disposing of, at prices to be agreed upon, the exclusive right of burial, either in perpetuity or for a limited period, in vaults made by them, & the right to make family & other vaults, with the exclusive right of burial therein either in perpetuity or for a limited period. The co. having been called upon by the vestry of the parish to contribute to the expenses of paving a new street on which consecrated land, forming part of their cemetery, abutted:—**Held:** the co. were "owners" of the land within Metropolitan Management Act, 1855 (c. 120), s. 250, & liable to contribute to such expenses. **ST. GILES, CAMBERWELL, VESTRY v. LONDON CEMETERY CO.**, [1891] 1 Q. B. 609; 63 L. J. M. C. 74; 70 L. T. 734; 58 J. P. 382; 42 W. R. 410; 10 T. L. R. 270; 38 Sol. Jo. 251, D. C. **Annotations.**—**Appl.** Fulham Vestry v. Minter, [1901] 1 K. B. 501. **Reid.** L. C. C. v. Wandsworth B. C., [1903] 1 K. B. 797.

**2022. Public recreation ground Liability of local authority.**—An open space in a square, the roads in which were streets within Metropolitan Management Acts, was acquired by a vestry, under Metropolitan Open Spaces Act, 1881 (c. 34), by assignment of a lease, under which the vestry held in trust to allow the enjoyment by the public of the open space. The assignment contained a covenant by the vestry that the land should be held & used for the purposes of a public garden, pleasure ground, or open space, & on failure so to use it, to reassign. The owners of houses in the square refused to pay the amount apportioned on them in respect of the expenses of flagging the footway of one of the roads, on the ground that the apportionment was bad, because the vestry had not been charged, as owners of the open space, with any proportion of the expenses:—**Held:** the vestry was the "owner" of the open space, within Metropolitan Management Acts, & the apportionment was bad.—**ST. MARY, ISLINGTON, VESTRY v. COBBETT**, [1895] 1 Q. B. 369; 64 L. J. M. C. 36; 71 L. T. 573; 43 W. R. 44; 39 Sol. Jo. 10; 58 J. P. Jo. 716; 15 R. 83, D. C. **Annotations.**—**Reid.** Hornsey District Council v. Smith, [1897] 1 Ch. 843; L. C. C. v. Wandsworth B. C. (1903), 74 L. J. K. B. 399.

**2023. ———.]—Land was conveyed to a vestry in fee simple "to the end & intent that the same premises should be at all times thereafter kept & maintained as an open space for the perpetual use thereof by the public for exercise & recreation." The land was an open space abutting on a new street, & was acquired under the powers conferred on the vestry by Open Spaces Acts, 1877 (c. 35), & 1881 (c. 34), by which the land was held in trust for the perpetual use thereof by the public for exercise & recreation & for no other purpose. By London Open Spaces Act, 1893 (c. lxxi), the vestry might erect on the land convenient & ornamental buildings & such appliances as they might think fit for purposes of exercise & recreation & for other like purposes. They erected a band stand a cloak room & a refreshment stall. The refreshment stall was let at a rent to a caterer. The band stand was not let but seats for the public were let by the vestry to a contractor at a rental. The vestry assessed resp., as owner of houses on the opposite side of the street, upon the basis that the cost of paving the new street should be defrayed by the owners of the houses & lands on the opposite side of the street & not in any part by the owners of the land which included the open space. A summons to recover the amount apportioned on the resp. was dismissed on the ground that the apportionment was invalid because a part of the cost of paving ought to have been apportioned on the vestry as owners of the open space:—**Held:** the open space was not land which was incapable of becoming a source of profit & therefore the vestry were the persons who would receive the rent of the land if the same were let at a rack rent & were owners of the open space within Metropolitan Management Act, 1855 (c. 120), s. 250, & were liable as owners to contribute to the cost of paving the new street, & the summons was rightly dismissed.—**FULHAM VESTRY v. MINTER**, [1901] 1 K. B. 501; 70 L. J. K. B. 348; 84 L. T. 49; 65 J. P. 180; 49 W. R. 415; 17 T. L. R. 102; 45 Sol. Jo. 205, D. C. **Annotations.**—**Overd.** L. C. C. v. Wandsworth B. C., [1903] 1 K. B. 797. **Reid.** Herne Bay U. C. v. Payne (1907), 76 L. J. K. B. 685.**

**2024. ———.]—By virtue of a scheme certified by the Inclosure Comrs. pursuant to Metropolitan Commons Act, 1866 (c. 122), & afterwards confirmed by Metropolitan Commons (Supplemental) Act, 1873 (c. lxxxvi), a common was vested in the Metropolitan Board of Works, whose successors are the London County Council, for the purpose of being dedicated to the public as a recreation ground. By the scheme it was provided that the common should be regulated & managed by the Board, & that no house or other buildings should be erected on it, except such lodges or other buildings as might be necessary for the maintenance & management of the common or recreation ground. The county council derived small annual profits from the herbage on the common & from certain buildings erected thereon for purposes subsidiary to its use as a public recreation ground, but the expenses annually incurred by the county council in the management & regulation of the common far exceeded the amount of any profits so received by them. The Wandsworth Borough Council claimed from the London County Council, as owners of the common, a sum of £319 as their proportion of the estimated expenses of paving a new street, on which the common abutted to the extent of 474 feet, under Metropolitan Management Act, 1855 (c. 120), s. 105, & Metropolitan Management Amendment Act, 1862 (c. 102), s. 77:—**Held:****

the London County Council were not "owners of the common within Metropolis Management Act, 1855 (c. 120), s. 250, & they were not liable to pay the amount claimed.

*Fulham Vestry v. Minter*, No. 2023, *ante*, overrd.—LONDON COUNTY COUNCIL *v.* WANDSWORTH BOROUGH COUNCIL, [1903] 1 K. B. 797; 72 L. J. K. B. 399; 88 L. T. 783; 67 J. P. 215; 51 W. R. 499; 19 T. L. R. 372; 47 Sol. Jo. 405; 1 L. G. R. 462, C. A.

*Annotations*:—*Consd.* Hackney Corp'n. *v.* Lee Conservancy Board, [1904] 2 K. B. 541. *Distd.* Heme Bay U. C. *v.* Payne & Wood, [1907] 2 K. B. 130. *Reid.* Westminster Corp'n. *v.* Johnson, Westminster Corp'n. *v.* Fuller, [1904] 2 K. B. 737.

**2025. Embankment of river—Liability of conservators.**—The conservators of a public navigable river purchased under their statutory powers a strip of land, which they used for the purpose of a retaining bank for the waters of a cut forming part of the navigation. They were empowered to take tolls for the use of the navigation, but any moneys received by them under their Acts were applicable only to payment of the expenses of carrying out their Acts, & of moneys borrowed for the purposes of those Acts, & interest thereon, & not to any purposes of profit beyond what might be necessary for such payment. They had power to construct docks, wharves, & other works on the river, & to sell any lands vested in them which they might not require for the purposes of their Acts. It appeared that it would be possible if a retaining wall were substituted for the bank, that the residue of the before mentioned land might be otherwise applied for purposes of profit:—*Held*: the conservators were "owners" of the land within Metropolis Management Act, 1855 (c. 120), s. 250, & liable under Metropolis Management Acts to contribute in respect of it to the paving expenses of a new street on which it abutted.—*HACKNEY CORPN. v. LEE CONSERVANCY BOARD*, [1904] 2 K. B. 541; 73 L. J. K. B. 768; 91 L. T. 13; 68 J. P. 485; 20 T. L. R. 646; 2 L. G. R. 1144, C. A.

**2026. — Fenced off strip of land at side of street—Subject to restrictions on user.**—By a special Act of a railway co., inserted for the protection of a landowner, the co. were bound to acquire all his land adjoining a certain street, & to leave a strip of land along the whole length of the street, & to plant the strip with trees & shrubs & fence it off from the street, & to maintain it in that condition. The co. acquired the land, & planted & fenced a strip along & contiguous to the whole length of the street:—*Held*: the railway co. were "owners" of the strip of land within Metropolis Management Act, 1855 (c. 120), s. 250, & were liable to contribute to the expense of paving the street as a new street.—*HAMPSTEAD CORPN. v. MIDLAND RY. CO.*, [1905] 1 K. B. 538; 74 L. J. K. B. 431; 92 L. T. 252; 69 J. P. 133; 21 T. L. R. 272; 3 L. G. R. 455, C. A.

*Annotation*:—*Reid.* Corbett *v.* S. E. & C. Ry. Co.'s Managing Committee, [1905] 2 Ch. 230.

#### (c) Exempted Premises.

See Sub-sect. 3, D. (b), *post*.

#### (d) Land and Premises Forming, Fronting or Abutting.

See Metropolitan Paving Act, 1817 (c. xxix), s. 24; Metropolis Management Act, 1855 (c. 120), s. 105; Metropolis Management Amendment Act, 1862 (c. 102), s. 77.

**2027. "Houses" & "land."**—*WRIGHT v. INGLE*, No. 2018, *ante*.

**2028. Building standing back from street—Communicating with street by passage.**—To the north of High street, Whitechapel, & communicating with the street by means of a covered gateway there is a yard called the "Kent & Essex Yard," around which are several dwelling houses, warehouses, stables, sheds, a booking office, & other buildings. The yard, with the exception of the width of the gateway, & all the dwelling houses, etc., round same, are suitable at the back of several houses & premises which front High street. The entrance into the yard is through carriage gates & along a covered gateway. No part of the yard was ever paved or repaired by the courts, nor had they, within the yard, at any time exercised any of the powers conferred on them by 11 Geo. 3, c. 15, & Metropolis Paving Act, 1817 (c. xxix):—*Held*: the occupiers of the yard & houses therein were liable to be rated in respect of the paving & repairing of High street, the premises being, for that purpose, "within the street," inasmuch as they had a frontage on the street, & their sole communication was with the street.—*BADDELEY v. GINGELL* (1847), 1 Exch. 319; 2 New Mag. Cas. 204; 17 L. J. Ex. 63; 10 L. T. O. S. 114; 11 J. P. Jo. 838; 151 E. R. 136.

*Annotations*:—*Fold.* London School Board *v.* St. Mary, Islington Vestry (1875), 1 Q. B. D. 65. *Consd.* Wakefield L. B. *v.* Lee (1876), 1 Ex. D. 336. *Distd.* Lightbound *v.* Higher Bebbington L. B. (1885), 16 Q. B. D. 577. *Reid.* Elliott *v.* South Devon Ry. (1848), 2 Exch. 725.

**2029. — — —** The vestry of a metropolitan parish having paved a new street under Metropolis Management Act, 1855 (c. 120), s. 105, assessed the London School Board in respect of a school house as being "owners" of one "of the houses forming the street." The school house did not immediately front the street but stood back from it some seventy or eighty feet in a large yard, the whole area being about 20,500 square feet. There was a row of eleven small houses, with gardens at the back of them, between this area & the street; but the only access to the school was by a private passage which ran along one side of the last house & garden into the school yard with gates opening from the street in question, the width of the passage being 20 feet & the length about 64 feet:—*Held*: (1) the school house though not actually one of the houses "forming the street" yet practically formed part of it, within sect. 105; (2) the school board were "owners" within the definition in Metropolis Management Act, 1855 (c. 120), s. 250.—*LONDON SCHOOL BOARD v. ST. MARY, ISLINGTON* (1875), 1 Q. B. D. 65; 45 L. J. M. C. 1; 33 L. T. 504; 40 J. P. 310; 24 W. R. 137.

*Annotations*:—*As to* (1) *Consd.* Wakefield L. B. *v.* Lee (1876), 1 Ex. D. 336. *Apid.* Paddington Vestry *v.* Bramwell (1880), 44 J. P. 815. *Distd.* Lightbound *v.* Higher Bebbington L. B. (1885), 16 Q. B. D. 577. *Reid.* Stotobury *v.* St. Giles, Camberwell Vestry (1888), 57 L. J. M. C. 114; L. C. *v.* Collins (1905), 93 L. T. 540; Newquay U. D. *v.* R. Rickard (1911), 9 L. G. R. 1042. *As to* (2) *Apid.* St. Mary, Islington Vestry *v.* Corbett (1894), 64 L. J. M. C. 36; Met. Dist. Ry. *v.* Fulham Vestry, [1895] 2 Q. B. 443.

**2030. Land on different level—Railway in cutting.**—By Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, it is enacted that where a vestry have paved, or are about to pave, a new street, the owners of land bounding or abutting on such street shall be liable to contribute to the expenses, as well as the occupiers of houses, provided that it shall be lawful for the vestry to charge the owners of land in a less proportion than the owners of house property, should they deem it just & expedient so to do:—*Held*: (1) a railway which ran in a cutting, & was adjoining to a new street which the vestry were

*Sect. 1.—Metropolitan: Sub-sect. 3, D. (d).]*

about to pave, & was separated from it by a wall, through which there was no communication between the street & the railway, "bounded" the street within the meaning of the Act; the co. were therefore liable to contribute to the expense of paving the street; (2) the vestry having charged the co. in the same proportion as the owners of house property, the ct. had no power to control the discretion vested in them by the Act.—*LONDON & NORTH-WESTERN RY. CO. v. ST. PANCRA'S, VESTRY* (1868), 17 L. T. 654.

*Annotations: As to (1) Distd. L. B. & S. C. Ry. v. St. Giles, Camberwell Vestry* (1879), 4 Ex. D. 239; *G. E. Ry. v. Hackney Works Board* (1883), 8 App. Cas. 687. *Folld. Williams v. Wandsworth Board of Works* (1884), 13 Q. B. D. 211. *Appld. Hackney Corp'n. v. Lee Conservancy Board*, [1904] 2 K. B. 541.

**2031.** ————]—(1) A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over on a bridge from one boundary of the line to the other, but supported on stone piers erected on the slope of the cutting. On an information under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, against the railway co. for not contributing to the paving of the road:—*Held*: the line & the slopes of the cutting did not bound or abut upon the road within the Act.

(2) The line of houses adjoining the road terminated at the east end of the bridge, while after crossing the bridge there was but one cottage, & the roadway ceased to be a public thoroughfare, being closed by a private gate. A small portion of the slope of the cutting abutted on the road, between the west end of the bridge & the private gate:—*Held*: the railway co. were not liable to contribute to the paving of the road, as it ceased at the eastern extremity of the bridge to be a "new street" within the Act.—*LONDON, BRIGHTON & SOUTH COAST RY. CO. v. ST. GILES, CAMBERWELL* (1879), 4 Ex. D. 239; 48 L. J. M. C. 184; 41 L. T. 162.

*Annotations: As to (1) Consd. G. E. Ry. v. Hackney Works Board* (1883), 8 App. Cas. 687. *Reid. Lightbound v. Higher Bebbington L. B.* (1885), 16 Q. B. D. 677.

**2032.** ————]—A railway line ran in a deep cutting much below the level of a highway, which was carried over the railway, nearly at right angles, by a bridge built by the railway co. under statutory powers & in pursuance of Railways (Clauses) Act, 1845 (c. 20), ss. 40-51. The parapets of the bridge consisted of two walls resting upon arches which had their foundations, outside the lines of the roadway, in the railway co.'s land. The walls were not used by the co. otherwise than as fences for the bridge. The district board of works having paved the highway, which was admitted to be a new street within Metropolitan Management Act, 1855 (c. 120), s. 105:—*Held*: (1) assuming the fence walls to be the railway co.'s land, the company were not "owners of land bounding or abutting on" the highway within Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, & were not liable as owners of the fence walls to contribute to the expenses of paving; (2) the railway line & slopes being much below the level of the highway, the co. were not in respect of such line & slopes "owners of land bounding or abutting on" the highway within the above sect., & were not liable as owners of the line & slopes to contribute to the expenses of paving.—*GREAT EASTERN RY. CO. v. HACKNEY BOARD OF WORKS* (1883), 8 App. Cas. 687; 52 L. J. M. C. 105; 49 L. T. 509; 48 J. P. 52; 31 W. R. 769; H. L.; *revers. S. C. sub nom. HACKNEY, BOARD OF WORKS*

*v. GREAT EASTERN RY. CO.* (1882), 9 Q. B. D. 412, C. A.

*Annotations: As to (1) Distd. Williams v. Wandsworth Board of Works* (1884), 13 Q. B. D. 211. *Consd. Wright v. Ingle* (1885), 16 Q. B. D. 379; *St. Giles, Camberwell Vestry v. London Cemetery Co.*, [1894] 1 Q. B. 599. *Distd. St. Mary, Islington Vestry v. Cobbett*, [1895] 1 Q. B. 369. *Consd. Hornsey District Council v. Smith*, [1897] 1 Ch. 843. *Fulham Vestry v. Minter*, [1901] 1 K. B. 501. *Appld. L. C. C. v. Wandsworth B. C.* [1903] 1 K. B. 787. *Distd. Hackney Corp'n. v. Lee Conservancy Board* [1904] 2 K. B. 541. *Appld. Macey v. James* (1917), 86 L. J. K. B. 1257. *Reid. Lightbound v. Bebbington L. B.* (1885), 14 Q. B. D. 849; *White v. Fulham Vestry* (1896), 74 L. T. 425; *Hampstead Corp'n. v. Mid. Ry.*, [1905] 1 K. B. 538; *Horne Bay U. C. v. Payne & Wood*, (1897) 2 K. B. 130; *Regent's Canal & Docks Co. v. Gibbons*, [1925] 1 K. B. 81. *Generally, Mentd. C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467; *Regent's Canal & Docks Co. v. Gibbons* (1924), 41 T. L. R. 12.

**2033.** ————]—*Railway crossing street.*—A railway in the metropolitan district was carried across a new street by an arch. On one side of the street the railway was carried forward on arches, & on that side was a strip of land, 10 feet wide, left open for the purpose of repairing the arches; this abutted for 10 feet on the street. On the other side, the railway was carried forward on an embankment, & the sloping part or buttress of the embankment abutted on the street about 36 feet, & at the foot of the embankment was an open space, also about 36 feet wide, also abutting on the street, which was left for the purpose of allowing of slips in the embankment. The vestry of the parish, having determined to pave the street, sought to make the railway company contribute, under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, as owners of "land" abutting on the street:—*Held*: the above pieces of land, including the slope of the embankment were "land" within that sect.—*HIGGINS v. HARDING* (1872), L. R. 8 Q. B. 7; 42 L. J. M. C. 31; 27 L. T. 483; 37 J. P. 677; 21 W. R. 191.

*Annotations: As to (1) Consd. G. E. Ry. v. St. Giles, Camberwell Vestry* (1879), 4 Ex. D. 239; *G. E. Ry. v. Hackney Works Board* (1883), 8 App. Cas. 687; *Williams v. Wandsworth Board of Works* (1884), 48 J. P. 439.

**2034.** *Premises at end of cul de sac.*—D. was owner of a house, the back premises of which had a door leading into an alley or lane which had been used about fifty years in common by tenants of nine houses as an access, but there was no thoroughfare through it:—*Held*: there was evidence justifying the magistrate in finding that this was a new street, the expense of paving which fell on the owners of the houses abutting on the alley.—*DODD v. ST. PANCRA'S VESTRY* (1869), 31 J. P. 517.

**2035.** *Private road intersecting highway.*—On Jan. 1, 1856, when the Metropolitan Management Act, 1855 (c. 120), passed, there was an ancient highway & public carriageway in the parish of L., within the district of the Plumstead Board of Works, which from time out of mind had been repaired by the parish. At that time there were two houses adjoining the highway, but distinct from one another. Between Jan. 1, 1856, & Aug. 7, 1862, when the Metropolitan Local Management Amendment Act, 1862 (c. 102), passed, twenty-one more houses were built along one side of the highway, some being in a block & some detached. Between 1862 & June 23, 1869, ninety additional houses were built, of which fifty-six were built on the opposite side. Roads were made intersecting the highway, the roads being private, & the soil thereof being in appt. N. Appt., P., was the owner of some of the houses. Resps., the Board of Works, having determined that the highway should be made into a hard road to an extent greater than it had been before, & that

pathways should be formed, apportioned the amount which was to be paid by N., in respect of the soil of the private roads, & by P. in respect of the houses of which he was the owner:—*Held*: the highway was a "new street" within Metropolis Management Act, 1855 (c. 120), & Metropolis Management (Amendment) Act, 1862 (c. 102), & resps had a right to throw upon the appts. the cost apportioned upon them of the work to be done.—*POUND v. PLUMSTEAD BOARD OF WORKS, NORTHBROOK (LORD) v. PLUMSTEAD BOARD OF WORKS* (1871), L. R. 7 Q. B. 183; 41 L. J. M. C. 51; 25 L. T. 461; 36 J. P. 468; 20 W. R. 177; 35 J. P. Jo. 772.

*Annotations*:—*Consd.* St. Mary, Islington, Vestry v. Barrett (1874), L. R. 9 Q. B. 278. *Distd.* Plumstead Board of Works v. British Land Co. (1875), L. R. 10 Q. B. 203. *Appl.* Dryden v. Putney Overseers (1876), 1 Ex. D. 223. *Distd.* G. E. Ry. v. Hackney Board of Works (1883), 8 App. Cas. 687. *Appl.* St. Giles, Camberwell, Vestry v. Crystal Palace Co., [1892] 2 Q. B. 33. *Consd.* Allen v. Fulham, Vestry (1898), 79 L. T. 190. *Distd.* Clerkenwell Vestry v. Edmondson, [1901] 1 K. B. 264; Stretford U. D. C. v. Manchester South Junction & Altrincham Ry. (1903), 68 J. P. 59. *Refd.* L. B. & S. C. Ry. v. St. Giles, Camberwell, Vestry (1879), 4 Ex. D. 239; Hornsey District Council v. Smith, [1897] 1 Ch. 813. *Mentd.* Robinson v. Barton Eccles L. B. (1883), 6 App. Cas. 798.

**2036.** —.]—*Defts.*, a land co., being owners of certain lands, in 1863 laid them out for building purposes, & made roads & ways across them; & nearly the whole of the estate was sold in lots to different purchasers, & conveyed to them by metes, bounds, & admeasurements set forth on coloured plans attached to the conveyance. Each lot had a frontage upon one of the roads. The roads had been dedicated to the public, as far as any act of *defts.* could do so, but no proceedings were taken to make them repairable by the parish. *Pltfs.*, the board of works of the district, from time to time paved the new streets formed by the houses on the estate, & apportioned the costs among the owners of houses forming the streets & the owners of land bounding & abutting on the street; & in so doing they assessed *defts.* in respect of the new streets & roads were bounding or abutting on the sides or ends of the streets paved, as "lands abutting" on those streets, under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77.—*Held*: assuming the soil of the roads to be in *defts.*, they were improperly charged under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, for that they were not, in respect of the roads which had been irrevocably dedicated to the public, "owners of land" within the meaning of that sect. & Metropolis Management Act, 1855 (c. 120), s. 250.—*PLUMSTEAD BOARD OF WORKS v. BRITISH LAND CO.* (1875), L. R. 10 Q. B. 203; 44 L. J. Q. B. 38; 32 L. T. 94; 39 J. P. 376; 23 W. R. 634, Ex. Ch.

*Annotations*:—*Distd.* Gauger v. St. Mary, Islington, Vestry (1881), 50 L. J. M. C. 59. *Consd.* G. E. Ry. v. Hackney Works Board (1883), 8 App. Cas. 687; Wright v. Jingle (1885), 16 Q. B. D. 379. *Appld.* Hornsey District Council v. Smith, [1897] 1 Ch. 813. *Appld.* L. C. C. v. Wandsworth B. C., [1903] 1 K. B. 797; Macey v. James (1917), 86 L. J. K. B. 1257. *Refd.* London School Board v. St. Mary, Islington, Vestry (1875), 1 Q. B. D. 65; St. John, Hampstead, Vestry v. Cotton (1885), 16 Q. B. D. 475; Fulham, Vestry v. Minter (1901), 84 L. T. 19; Hackney Corp'n. v. Lee Conservancy Board, [1901] 2 K. B. 541. *Mentd.* Thames Conservators v. Ports of London Sanitary Authority, [1894] 1 Q. B. 647; Mappin v. Liberty, [1903] 1 Ch. 118.

**2037. Premises without access to street—Dead wall.**—B. was the owner of a house which had its front & only entrance in F. street, & behind it a garden with a dead wall at the further end. A new street was made parallel to F. street, of which the dead wall at the end of B.'s garden was part of the line of street. This new street was a mew which the metropolitan board allowed to

be made of 20 feet width:—*Held*: B.'s land abutted on this new street, & so B. was liable for his proportion of expenses of paving, etc., it under Metropolis Management (Amendment) Act, (c. 102), s. 77.—*PADDINGTON, VESTRY v. BRAMWELL* (1880), 44 J. P. 815, D. C.

**2038. Effect of narrow strip of land at side of street.**—By Metropolis Management Act, 1855 (c. 120), s. 250, the word "owner" shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, or who would so receive same if such lands or premises were let at a rack rent; & by Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, which is to be read as one with the Act of 1855, "owners" of land abutting on any new street are made liable to contribute towards the expenses of paving same. *Appl.* having a strip of land about 4 inches wide & 265 feet in length, abutting upon the north side of a new street, had erected a boundary fence upon the land along its whole extent, under a covenant to erect & for ever after maintain a fence thereon made with his vendor, who was owner of the land adjoining the strip on the north side:—*Held*: *appl.* was the "owner" of the strip of land within Metropolis Management Act, 1855 (c. 120), s. 250, & therefore liable to contribute towards the expense of paving the new street.—*WILLIAMS v. WANDSWORTH BOARD OF WORKS* (1884), 13 Q. B. D. 211; 53 L. J. M. C. 187; 48 J. P. 439; 32 W. R. 908, D. C.

*Annotations*:—*Consd.* Lightbound v. Behington L. B. (1885), 14 Q. B. D. 819. *Foll.* Scott v. Investors' Property Corp'n. (1901), 68 J. P. Jo. 362. *Mentd.* Standing v. Bechill Corp'n. (1909), 73 J. P. 211.

**2039.** —.] Metropolis Management Act, 1855 (c. 120), s. 105, empowers the local authority to pave any new street within its district which is not paved to their satisfaction & charge the owners of the houses forming such street with the expenses thereof; & by Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, the owners of the land bounding or abutting on such street are made liable to contribute to the expenses of paving it as well as the owners of houses therein. B. land, which had never been dedicated to the public, was bounded on the east side by old buildings, & along the same side there was a paved footpath over which was a public right of way, but the remainder of the road was private. On the west side the road was bounded by the backs of other old buildings, including a public-house, a row of cottages, & an oil mill, from none of which was there any access to the road. In order to prevent such access ever being had, *appl.*, the owner of the road, had reserved to himself & marked off partly by a fence & partly by stones let into the soil, a narrow strip of land, a few inches wide, between the containing walls of the above mentioned buildings & the road:—*Held*: (1) there was evidence on which the magistrates could find, as they did, that *appl.* was a frontager, on the west side of the road; (2) B. lane was not a "new street" within Metropolis Management Act, 1855 (c. 120), s. 105.—*ARTER v. HAMMER-SMITH, VESTRY*, [1897] 1 Q. B. 646; 66 L. J. Q. B. 460; 76 L. T. 390; 61 J. P. 279; 45 W. R. 398; 41 Sol. Jo. 351, D. C.

*Annotation*:—As to (2) *Consd.* Allen v. Fulham, Vestry (1898), 79 L. T. 190.

**2040.** —.]—*SCOTT v. INVESTORS' PROPERTY CORPN.* (1904), 68 J. P. Jo. 352, D. C.

**2041.** —.]—A new street which a local authority in the metropolis were about to pave was formed on the east side by houses, & on the west

*Sect. 1.—Metropolitan: Sub-sect. 3, D. (d) & (e), & E. (a) & (b).]*

there was a piece of land on which houses had been erected fronting upon a road which ran parallel to the new street & having gardens at the back which ran down to an old wooden fence which separated them from the new street. The local authority apportioned the expenses among the owners of the houses on both sides. The owners of the houses on the west side objected upon the ground that the land upon which the fence stood belonged to another person & that therefore their houses & land did not bound or abut on the new street. The local authority thereupon, before the works were completed, rescinded the apportionment, & made a new apportionment, charging the expenses upon the owners of the houses on the east side only & charging a nominal sum in respect of the strip of land upon which the fence stood:—*Held*: upon the facts, the land upon which the fence stood belonged to the owners of the houses on the west side of the new street, & therefore the gardens of those houses bounded or abutted on the new street, & the owners were liable to have some of the expenses apportioned upon them; & the second apportionment not being upon the right persons, even though made *bond fide*, was invalid, & a declaration to that effect was accordingly made.—*ELSDON v. HAMPSTEAD CORPN.*, [1905] 2 Ch. 633; 75 L. J. Ch. 27; 93 L. T. 335; 54 W. R. 433; 21 T. L. R. 772; 3 L. G. R. 1199; *sub nom.* *ELSTON v. HAMPSTEAD CORPN.*, 69 J. P. 434.

2042. — — —.]—*HAMPSTEAD CORPN. v. MIDLAND RY. CO.*, No. 2026, *ante*.

2043. — — —.]—*Strip added to street.*—(1) In apportioning the expenses of making up a new street under Metropolitan Management Acts, a borough council apportioned a nominal sum of 10s. on a strip of land on which an old fence stood, lying on one side of the new street. Relying on this apportionment, deft. took building leases of certain plots of land lying behind the old fence, & built houses thereon. The houses fronted on another street & had gardens behind them extending up to the strip of land, but had no access over the strip to the new street. In *Eldson v. Hampstead Corpn.*, No. 2041, *ante*, it was held that the strip of land had been conveyed to the adjoining owners together with the land on either side of it, & that the houses & gardens abutted on the new street. A fresh apportionment was then made, including the houses & gardens. In an action to recover the money so apportioned:—*Held*: it was a question for the jury whether there was or was not an intervening strip between deft.'s land & the new street at the time when deft. bought the land.

(2) The jury finding that there was such a strip, but that the borough council, *pliffs.*, had taken possession of it as part of the new street:—*Held*: deft. was liable to pay the contribution apportioned on his houses & lands as aforesaid.—*HAMPSTEAD BOROUGH COUNCIL v. WESTERN* (1907), 71 J. P. 565.

(e) *Successive Owners.*

See Metropolitan Management Act, 1855 (c. 120), s. 105; Metropolitan Management (Amendment) Act, 1862 (c. 102), ss. 77, 96.

2044. Expenses may be levied upon succeeding owners.—After judgment recovered against one.]—Metropolis Management (Amendment) Act, 1862 (c. 102), ss. 77, 96, make certain paving expenses

recoverable by the vestry by action from the present or any future owner of premises, or from any person who then or thereafter occupies the premises. The vestry had recovered a judgment against a former owner of certain premises in respect of such expenses, which remained unsatisfied:—*Held*: such judgment was no bar to a subsequent action for the same expenses against deft., who occupied the premises as tenant to a succeeding owner.—*BERMONDSEY VESTRY v. RAMSEY* (1871), L. R. 6 C. P. 247; 40 L. J. C. P. 206; 24 L. T. 429; 35 J. P. 567; 19 W. R. 774.

*Annotations*:—*Apld.* *Plumstead District Board of Works v. Planet Bldg. Soc.* (1872), 27 L. T. 656. *Refd.* *Egg v. Blayney* (1888), 59 L. T. 65.

2045. — — —.]—The assessments for paving expenses apportioned by the vestry or district board under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, are a charge upon the premises in respect of which they are assessed; & the amount may be recovered from the future owners of such premises, although there has been no arrangement to accept payment by instalments.—*PLUMSTEAD BOARD OF WORKS v. INGOLDBY* (1873), L. R. 8 Exch. 174; 37 J. P. 759; *sub nom.* *INGOLDBY v. PLUMSTEAD BOARD OF WORKS*, 42 L. J. Ex. 136; 29 L. T. 375; 21 W. R. 817, Ex. Ch.

2046. Whether charge on land.]—*PLUMSTEAD BOARD OF WORKS v. INGOLDBY*, No. 2045, *ante*.

2047. — — —.]—The expenses of paving a new street apportioned under Metropolitan Management (Amendment) Act, 1862, (c. 102), s. 77, are not a charge upon the property in respect of which they are payable, & therefore if the owner sells the property while the expenses are unpaid, & conveys as beneficial owner, & the purchaser is compelled to pay such expenses, the purchaser cannot recover the amount so paid from the vendor under the implied covenant against incumbrances contained in the conveyance by virtue of Conveyancing & Law of Property Act, 1881 (c. 41), s. 7 (1) (A).—*Egg v. Blayney* (1888), 21 Q. B. D. 107; 57 L. J. Q. B. 460; 59 L. T. 65; 52 J. P. 517; 36 W. R. 893, D. C.

*E. Apportionment of Expenses by Local Authority.*

(a) *In General.*

See Metropolitan Management Act, 1855 (c. 120), ss. 105, 152; Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77; Metropolitan Management Act, 1890 (c. 66), s. 3.

2048. What may be included as expenses.—Incidental costs—Work done by third parties.]—*POPULAR BOARD OF WORKS v. LOVE*, No. 2013, *ante*.

2049. — — —.]—*Work done by permanent salaried officials.*—An apportionment under Metropolitan Management (Amendment) Act, 1890 (c. 66), s. 3, which includes a sum expended for repairs to the footpaths by straightening the kerbstones & filling up with cinders, & a further sum for establishment expenses, calculated at the rate of 4 per cent. on the actual cost of the works, for the making of plans & estimates & the apportionment, serving notices, collecting the money, & supervising the work, all of which was done by the permanent salaried officials of the local authority & as part of their regular duties, is invalid.—*BALLARD v. WANDSWORTH BOROUGH COUNCIL* (1906), 95 L. T. 118; 70 J. P. 331; 4 L. G. R. 708, D. C.

*Annotation*:—*Refd.* *Shoeburyness U. D. C. v. Burges* (1924), 22 L. G. R. 684.

**2050. — Costs of paving point of intersection.**—The words "point of intersection of streets" are not limited to the cutting or crossing of at least two streets each by the other, each street continuing its course from each end of the intersection, so as to constitute in effect four streets running into each other, forming the shape of an X., but also apply to the case of where street A. runs into street B. on one side thereof, but is not continued, forming the shape of a T., & the expenses of paving a granite crossing wholly on the soil of street B., the cross line of the T., connecting the footpaths on one side of street B., where street A., joins it, may be apportioned under Metropolis Management Acts on the frontagers of street A. *BRIDGETT v. WANDSWORTH CORPN.* (1905), 93 L. T. 519; 69 J. P. 391; 3 L. G. R. 1186, D. C.

**2051. No limit of time for apportionment.**—[Under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 53], there is no limitation of the time within which the amount payable by the owners of land & houses is to be apportioned. Where therefore a sewer had been constructed, within the sect., in 1868, & no apportionment of the amount of the cost of constructing it, to be borne by the owners of the houses in the street, was made until 1876: *Held*: the apportionment was valid.—*BRADLEY v. GREENWICH BOARD OF WORKS* (1878), 3 Q. B. D. 381; 47 L. J. M. C. 111; 38 L. T. 819; 42 J. P. 725; 26 W. R. 693, D. C.

**2052. Estimate by surveyor** What is sufficient proof.]—The G. metropolitan vestry, having resolved to pave a new street, & part of the expenses being apportioned on H., laid a complaint for non-payment by H. before a magistrate. An estimate was given in evidence, signed by the surveyor, who was not called as a witness, but the estimate had been acted on by the vestry: *Held*: the signed estimate was some evidence that the surveyor had made it & determined the amount, & the magistrate was right in enforcing payment. *HOBMAN v. GREENWICH DISTRICT BOARD OF WORKS* (1894), 58 J. P. 703, C. A.

**2053. — "Surveyor for the time being"** *Metropolis Management Act, 1855 (c. 120), s. 105.*—*KENDAL v. LEWISHAM CORPN.* (1903), 20 T. L. R. 21; 2 L. G. R. 31, C. A.; *previous proceedings*, 67 J. P. 236.

**2054. Right to make fresh apportionment.**—On Nov. 9, 1898, the H. vestry resolved that R. street be paved as a new street, & apportioned the sum of £37 16s. 8d. on resp., which he refused to pay. On Sept. 15, 1899, the H. vestry summoned resp. for that sum, but the summons was dismissed on the ground that R. street was not a new street within the Metropolis Management Acts. On June 13, 1900, a resolution was passed by the H. vestry rescinding the above apportionment, & on Mar. 14, 1901, the H. borough council resolved that R. street be paved as a new street, & apportioned on resp. the sum of £32 16s. 1d., which he refused to pay, & thereupon the present summons was issued. The magistrate held that the adjudication of Sept. 15, 1899, was conclusive, & dismissed the summons: *Held*: the decision of Sept. 15, 1899, was not conclusive & the present case should be heard on its merits.—*SCOTT v. LOWE* (1902), 86 L. T. 421; 66 J. P. 520, D. C.

#### (b) Mode of Apportionment.

**2055. Resolution to pave whole street—Expenses must be apportioned between whole body of owners.**—A board of works, under Metropolis Management Acts, passed a resolution that a certain road

should be repaired, & instructed the surveyor to estimate the cost & apportion it on the owners of property through which the road passed. The surveyor divided the road into four sections, & apportioned the cost of repairing each section amongst the owners of property in each section respectively. These apportionments were confirmed by resolutions of the board:—*Held*: although the board might, under Metropolis Management Acts, 1855 (c. 120), s. 105; 1862 (c. 102), ss. 77, 112, have resolved that part of the road should be repaired, yet as they had resolved that the whole road should be repaired, there ought to have been but one apportionment on all the owners along the entire road; & the separate apportionments were invalid, & could not be enforced. *WHITCHURCH v. FULHAM BOARD OF WORKS* (1866), L. R. 1 Q. B. 233; 7 B. & S. 212; 35 L. J. M. C. 115; 13 L. T. 631; 30 J. P. 229; 12 Jur. N. S. 353; 14 W. R. 277.

*Annotat.*: *Reid*. Pound v. Plumstead District Board of Works, Northbrook v. Plumstead District Board of Works (1871), 25 L. T. 461; R. v. Hutchings (1881), 6 Q. B. D. 300; Paddington Vestry v. North Metropolitan Ry. & Canal Co. (1893), 12 W. R. 223. *Ment*. Mile End Vestry v. Whitechapel Union (1876), 1 Q. B. D. 680.

**2056. Street paved on one side—Apportionment on owners on both sides.**—By Metropolis Management Act, 1855 (c. 120), s. 105, & Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, the costs of paving a new street, under the compulsory powers of the former Act, are payable by the owners of the houses forming & of the land abutting upon such street, & are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter Act the expression "new street" is to include a part of any such street. Buildings & land belonging to defts. abutting upon a new street which the vestry directed to be paved over half its breadth only, the part paved being that nearest defts.' premises. The vestry apportioned the whole cost of the paving upon the houses forming defts.' side of the street, omitting those on the other side:—*Held*: the apportionment was invalid, & the owners of the houses on both sides of the street ought to have been charged. *MILE END VESTRY v. WHITECHAPEL UNION* (1876), 1 Q. B. D. 680; 46 L. J. M. C. 138; 35 L. T. 351; 41 J. P. 20; 21 W. R. 719, C. A.

*Annotat.*: *Reid*. R. v. Hutchings (1881), 6 Q. B. D. 300; Paddington Vestry v. North Metropolitan Ry. & Canal Co. (1893), 12 W. R. 223; *Davis v. Greenwich District Board of Works* (1895), 61 L. J. M. C. 257; *Property Exchange v. Wandsworth Board of Works*, [1902] 2 K. B. 61.

**2057. — — — Unless part paved amounts to new street.**—In 1870, a road which was then an unpaved new street, with houses & a footpath on the north side only, & vacant land on the south side, was paved to the satisfaction of the local authority under the provisions of Metropolis Management Act, 1855 (c. 120), s. 105. The expenses of such paving were apportioned upon & were paid wholly by the owners of the houses on the north side, & the vestry afterwards kept the whole of such pavement in repair, & paid the cost out of the general rates. In 1888 the owner of the vacant land on the south side, by an arrangement with the vestry for widening the road, set back his fence 13 feet, & dedicated this strip, & the vestry kerbed a new footpath 7 feet in width on the south side, & paved & metalled the remaining 6 feet, making it uniform with the carriage way already paved, & they paid the expenses, as well as the expenses of the subsequent repairs, out of the general rates. The only part left unpaved



*Sect. 1.—Metropolitan: Sub-sect. 3, E. (b), (c) &*

was the new footpath of 7 feet, & houses having been built on the south side of this footpath, the vestry resolved in 1894 to pave this footpath, being, as they said, a new street, & they apportioned the expenses of paving the new footpath on the owners on the north side of the road as well as the owners on the south side:—*Held*: the apportionment was upon a wrong basis; as in 1870 the whole breadth of the road was completely paved to the satisfaction of the local authority under sect. 105, & as they had exercised their powers under the sect., & compelled contribution from the owners of the houses adjoining, they had no jurisdiction afterwards to declare this road a new street, & the only new street was the new footpath which formed no part of the old road, & as the houses on the north side did not abut on this new footpath, the owners of such houses could not be called upon to contribute to the expenses of paving same.—*WHITE v. FULHAM PARISH VESTRY* (1896), 74 L. T. 425; 60 J. P. 327; 12 T. L. R. 328; 40 Sol. Jo. 439, D. C.

*Annotations*:—*Consd.* Property Exchange v. Wandsworth Board of Works, [1902] 2 K. B. 61. *Refd.* St. James & St. John, Clerkenwell, Vestry v. Edmondson (1902), 66 J. P. 324.

2058. — — —.] Where an old street repairable by the inhabitants at large, & having houses upon one side of it, is widened by the addition of a longitudinal strip of land of a substantial width upon the opposite side, the strip so added becomes itself a new street, & the expenses of paving the added strip, whether under Metropolis Management Act, 1855 (c. 120), & Metropolis Management (Amendment) Act, 1862 (c. 102), or Public Health Act, 1875 (c. 55), must be apportioned solely among the owners of property abutting upon that strip, & not upon the owners of property abutting upon the old street.—*PROPERTY EXCHANGE, LTD. v. WANDSWORTH BOARD OF WORKS*, [1902] 2 K. B. 61; 71 L. J. K. B. 515; 86 L. T. 481; 66 J. P. 435; 18 T. L. R. 404; 46 Sol. Jo. 378, C. A.

*Annotations*:—*Consd.* Andrews v. Abertillery U. C. (1911), 80 L. J. Ch. 721. *Refd.* St. James & St. John, Clerkenwell, Vestry v. Edmondson (1902), 66 J. P. 324; Leeds Corp'n. v. Tetley (1907), 71 J. P. Jo. 53.

2059. *Flagging footway Apportionment on owners on both sides.*—Under Metropolis Management Act, 1862, Amendment Act, 1890 (c. 51), s. 1, the expense of flagging is to be borne by the owners of the houses & the owners of the land on both sides of the road or street, or on both sides of the section of the road or street, in which the footway is situate. *PADDINGTON VESTRY v. NORTH METROPOLITAN RAILWAY & CANAL CO.*, [1894] 1 Q. B. 633; 63 L. J. Q. B. 316; 58 J. P. 413; 42 W. R. 223; 38 Sol. Jo. 113; 10 R. 41, D. C.

*(c) Conclusiveness of Apportionment.*

*See* Metropolis Management Act, 1855 (c. 120), s. 105; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77; Metropolis Management Act, 1890 (c. 66), s. 3.

2060. *As to amount of expenditure.*—The vestry having resolved to pave a new street, & having proceeded under Metropolis Management Act, 1855 (c. 120), s. 105, & Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, demanded £28 from the owner of some houses abutting, as his share of the expenses ascertained by the surveyor:—*Held*: the magistrate, on

proof of the notice, resolution of vestry & appointment, was bound to order payment, & could not entertain questions as to the expediency of the work or its excessive cost.—*CHELSEA VESTRY v. EVANS* (1870), 35 J. P. 23.

*Annotation*:—*Consd.* Stotesbury v. St. Giles, Camberwell, Vestry (1888), 57 L. J. M. C. 114.

2061. — *In absence of mala fides.*—The apportionment by a district board of works, under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, of their expenses, under Metropolis Management Act, 1855 (c. 120), s. 105, in paving a new street is not conclusive for all purposes.—*R. v. MARSHAM*, [1892] 1 Q. B. 371; 61 L. J. M. C. 52; 65 L. T. 778; 56 J. P. 164; 40 W. R. 84; 8 T. L. R. 3; 36 Sol. Jo. 11, C. A.

*Annotations*:—*Consd.* Stroud v. Wandsworth District Board of Works, [1894] 2 Q. B. 1; Met. Dist. Ry. v. Fulham Parish Vestry [1895] 2 Q. B. 443; R. v. Cheshire J.J., *Ex p.* Heaver (1912), 108 L. T. 374. *Refd.* Davis v. Greenwich District Board of Works (1895), 61 L. J. M. C. 257; Ballard v. Wandsworth B. C. (1906), 95 L. T. 118; Bower v. Calster R. D. C. (1911), 75 J. P. 186. *Mentd.* R. v. Stepney B. C. (1901), 71 L. J. K. B. 238; R. v. Offow General Income Tax Comrs. (1911), 27 T. L. R. 353.

2062. *As to necessity of expenditure.*—*CHELSEA VESTRY v. EVANS*, No. 2060, *ante*.

2063. —.]—Under Metropolis Management (Amendment) Act, 1890 (c. 66), s. 3, which empowers certain local authorities to execute any necessary works of repair upon carriage roads, it is for the local authority & not for the magistrate before whom they seek to recover the expenses to decide as to the necessity of the works.—*STROUD v. WANDSWORTH DISTRICT BOARD OF WORKS*, [1894] 2 Q. B. 1; 63 L. J. M. C. 88; 70 L. T. 190; 58 J. P. 652; 42 W. R. 355; 10 T. L. R. 232; 38 Sol. Jo. 215; 9 R. 194, C. A.

*Annotations*:—*Consd.* Met. Dist. Ry. v. Fulham Parish Vestry, [1895] 2 Q. B. 443. *Refd.* Derby Corp'n. v. Grudgings (1894), 63 L. J. M. C. 170; Harrison v. New Street News (1906), 75 L. J. K. B. 510.

2064. *As to principle of apportionment.*—The principle on which the expenses of paving a new street have been apportioned amongst the adjoining owners by a district board, pursuant to Metropolis Management Act, 1855 (c. 120), s. 105, & Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, cannot be questioned before any tribunal.—*NESBITT v. GREENWICH DISTRICT BOARD OF WORKS* (1875), L. R. 10 Q. B. 465; *sub nom.* NISBET v. GREENWICH DISTRICT BOARD OF WORKS, 44 L. J. M. C. 110; 32 L. T. 762; 39 J. P. 582; 24 W. R. 223, D. C.

*Annotations*:—*Consd.* Stotesbury v. St. Giles Vestry (1888), 53 J. P. 5. *Refd.* Davis v. Greenwich District Board of Works (1895), 61 L. J. M. C. 257; Met. Dist. Ry. v. Fulham Parish Vestry, [1895] 2 Q. B. 443.

2065. — *In absence of mala fides.*—An apportionment by a vestry or district board of the expenses of paving a new street under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, is not invalid by reason of its being at a higher rate in the case of one piece of land abutting on the street than in the case of another. Such an apportionment, on the true construction of the sect., need not be made on any uniform principle, but is in the absolute discretion of the vestry or board, & can only be questioned on the ground of want of good faith.—*STOTESBURY v. ST. GILES, CAMBERWELL, VESTRY* (1888), 57 L. J. M. C. 114; 59 L. T. 473; 53 J. P. 5; 4 T. L. R. 582, D. C.

*Annotation*:—*Apprvd.* Met. Dist. Ry. v. Fulham Parish Vestry, [1895] 2 Q. B. 443.

2066. —.]—In making, under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, an apportionment of the expenses, or estimated expenses, of paving a new street, the local



authority is not bound to charge the owners of land bounding on such street ratably *inter se*, according to frontage or otherwise, & the apportionment cannot, in the absence of *mala fides*, be questioned.—**METROPOLITAN DISTRICT RY. CO. v. FULHAM PARISH VESTRY**, [1895] 2 Q. B. 443; 65 L. J. Q. B. 29; 73 L. T. 330; 59 J. P. 679; 44 W. R. 53; 14 R. 685, C. A.

**2067.** —[1] The expression "new street" in Metropolis Management Act, 1855 (c. 120), s. 105, is not limited by the definition of "new street" in Metropolis Management (Amendment) Act, 1862 (c. 102), & includes a new street in the popular sense of the term. Therefore a district board can under Metropolis Management Act, 1855 (c. 120), s. 105, pave & charge the expenses of so doing on the frontagers of a road which, although it was a turnpike road until 1865, & from that date until 1869 was bounded by open fields separated from the road by a hedge & ditch, yet after the latter date became a new street in the popular sense of the term by reason of the erection of a number of houses; & the district board are not prevented from enforcing the provisions of sect. 105 by reason of their having done temporary repairs to the footway of such road.

(2) The principle upon which the costs & expenses of paving a new street are apportioned by a district board amongst the frontagers cannot be questioned either before a magistrate or in any other ct.

(3) The words "comrs., trustees, or other authorities" in Metropolis Management Amendment Act, 1862 (c. 102), s. 112, do not include turnpike trustees, but authorities who have the general control of the pavements or highways in the parish or place within their district.—**DAVIS v. GREENWICH DISTRICT BOARD OF WORKS**, [1895] 2 Q. B. 219; 64 L. J. M. C. 257; 72 L. T. 671; 59 J. P. 517; 14 R. 552, C. A.

*Annotation* :—*Is to* (1) *Refd.* **St. Mary, Battersea, Vestry v. Palmer & Winder** (1896), 60 J. P. 774.

**2068. Persons liable to assessment omitted.]** **ST. MARY, ISLINGTON, VESTRY v. COBBETT**, No. 2022, *ante*.

**2069. Assessment on wrong person.]**—**ELSDON v. HAMPTSTEAD CORPN.**, No. 2011, *ante*.

**2070. Power of local authority to rescind.]**—Resolutions of a local authority as to the paving of the footpaths of a new street followed by a valid apportionment of expenses are not necessarily final & conclusive. They may, unless completely carried out, be rescinded by the local authority, under the powers conferred upon them by Metropolis Management Act, 1855 (c. 120), s. 57, & a second apportionment made in respect of the paving expenses of the same street. **BISHOP v. WANDSWORTH BOARD OF WORKS** (1900), 69 L. J. Q. B. 632; 82 L. T. 766; 64 J. P. 630, D. C.

*Annotation* :—*Consd.* **Elsdon v. Hampstead Corpn.**, [1905] 2 Ch. 633.

#### (d) Recovery of Amount Apportioned.

See Metropolis Management Act, 1855 (c. 120), ss. 105, 225; Metropolis Management (Amendment) Act, 1862 (c. 102), ss. 77, 96; Summary Jurisdiction Act, 1848 (c. 43), s. 11.

**2071. Summary proceedings—Metropolis Management Act, 1855 (c. 120), s. 225.]**—Where a pecuniary obligation is created by a statute & a remedy expressly given for enforcing it, that remedy must be adopted. An action in a superior ct. will not lie against the owner or occupier of a house, for the recovery of his proportion of the expenses of

paving a street, under Metropolis Management Act, 1855 (c. 120), but recourse must be had to the remedy pointed out by sect. 225 of the Act, viz. by a proceeding before two justices.—**ST. PANCRAS VESTRY v. BATTERBURY** (1857), 2 C. B. N. S. 477; 26 L. J. C. P. 243; 29 L. T. O. S. 198; 21 J. P. 424; 3 Jur. N. S. 1106; 140 E. R. 502.

*Annotations* :—*Consd.* **Crystal Palace Gas Co. v. Idris** (1900), 82 L. T. 200. *Refd.* **New River Co. v. Mather** (1875), L. R. 10 C. P. 442; **Blackburn Corpn. v. Sanderson**, [1902] 1 K. B. 794; **Horne v. Franklin**, [1905] 1 K. B. 479.

**2072. Liability of successive owners.]**—**BERMONDSEY VESTRY v. RAMSEY**, No. 2044, *ante*.

**2073.** —[Under Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77, the amount apportioned by the vestry or district board of a parish, to be paid by the owners of houses or land towards the expense of paving new streets under Metropolis Management Act, 1855 (c. 120), s. 105, may be recovered by the vestry or board, in an action against either the person who is owner of the premises at the time when the apportionment is made, & the right to recover first accrues, or against any future or subsequent owner of the premises; & that, whether such amount is made payable at once in one sum, or at intervals by instalments, the effect of the above mentioned two Acts, taken together, being to impose the liability upon the land. **PLUMSTEAD BOARD OF WORKS v. INGOLDBY** (1872), L. R. 8 Exch. 63; 42 L. J. Ex. 50; *sub nom.* **PLUMSTEAD DISTRICT BOARD OF WORKS v. PLANET BUILDING SOCIETY**, 27 L. T. 656; 21 W. R. 77; *affd.*, *sub nom.* **PLUMSTEAD BOARD OF WORKS v. INGOLDBY** (1873), L. R. 8 Exch. 171, Ex. Ch.

See, *note*, Metropolis Management (Amendment) Act, 1862 (c. 102), s. 77.

**2074. Within what time proceedings must be begun Six months from demand.]**—A board of works in the metropolis in June, 1876, made a sewer & apportioned the expense among the owners of lands, finding £107 to be the sum due by M., the owner of certain lands. No demand of the sum was made on M., the owner, till Dec. 30, 1878, though the occupiers had been summoned for part of the sum, & the summons dismissed. On May 14, 1879, M. was summoned for payment of the whole sum : *Held* : the six months counted from May 14, 1879, & not from the notice of apportionment, & therefore the magistrate properly ordered M. to pay same. **MARK v. GREENWICH BOARD OF WORKS** (1880), 44 J. P. 121, D. C.

**2075. Applicability of Statutes of Limitation.]** In 1871 a metropolitan vestry apportioned paving expenses on the then owner of a house & made demand, but these were not paid. In 1885 a fresh demand was made on W., the new owner, & the justices made an order on W. within six months thereafter : *Held* : there was no Statute of Limitations or other bar to the recovery of the expenses, & the order was right. **WORTLEY v. ST. MARY, ISLINGTON, VESTRY** (1886), 51 J. P. 166, D. C.

*Annotation* :—*Refd.* **Prescott v. Nicholson** (1889), 60 L. T. 563.

**2076.** —[In 1891 a vestry paved a new street in the metropolis & apportioned the expenses; in the same year they demanded payment of an apportioned part of the expenses from the then owner of a house in the street, but he did not pay. In 1896 deft. became owner of the house, & in 1898 the vestry demanded payment of the amount from him. In an action brought in 1903 to recover the amount :—*Held* : under Metropolis Management Act, 1855 (c. 120), s. 105,

**Sect. 1.—Metropolitan: Sub-sect. 3, E. (d) & (e), & F.; sub-sects. 4, 5, 6 & 7, A.]**

as amended by Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 77, an action would lie to recover the apportioned part of the expenses, & Stat. Limitations would not begin to run in favour of deft., if at all, until payment was demanded from him.—*HAMSTEAD CORPN. v. CAUNT*, [1903] 2 K. B. 1; 72 L. J. K. B. 440; 88 L. T. 599; 67 J. P. 344; 51 W. R. 700; 19 T. L. R. 407; 47 Sol. Jo. 452; 1 L. G. R. 507.

**2077. Time for demand—Payment by instalments.**—Where a district board have paved a new street under the powers given by Metropolitan Management Act, 1855 (c. 120), s. 105, & have accepted payment of the amount apportioned in respect of any house or premises by instalments spread over a period not exceeding twenty years, summary proceedings can be taken to recover any instalment provided the information is laid within six calendar months of the demand therefor; although a previous application for the whole sum apportioned may have been made more than six months before such information was laid.—*PRESCOTT v. NICHOLSON* (1889), 60 L. T. 563; 53 J. P. 597; 5 T. L. R. 276, D. C.  
*Annotation.*—*Mentd.* *Salford Corpn. v. Hale* (1921), 131 L. T. 153.

**2078. Demand of wrong sum by mistake of clerk & payment—Right to sue for balance.**—G., the owner of houses abutting on a new street, had a sum of £562 apportioned as his share of expense of paving. He was summoned for the same, but, by a mistake of the clerk, he entered the sum as £392, & that sum was paid by G. The actual expenses exceeded the estimate, & G. was summoned for the balance, including the correct amount:—*Held*: the magistrate was wrong in treating the mistake as an estoppel, & G. was bound to pay the correct amount.—*ST. MARY, ISLINGTON, VESTRY v. GOODMAN* (1894), 58 J. P. 703, D. C.

**(e) Recovery of Amount Wrongly Paid.**

**2079. Money paid under compulsion of legal process—Not recoverable.**—The rule that money paid under compulsion of legal process cannot be recovered back applies although the process may never have terminated in a final order or judgment, & although it may have been withdrawn at the rate when proceedings are taken for the recovery of the money.

Defts. issued a summons against pltf., under Metropolitan Management Acts, to recover his proportion of certain street improvement expenses alleged to be due from him as the owner of premises abutting on a street in the district of defts. Pltf. paid the money before the summons was heard, & the summons was withdrawn. Pltf. having discovered that his premises did not abut on the street in question, brought an action to recover back from defts. the amount paid by him:—*Held*: the money having been paid under compulsion of legal process, could not be recovered back.—*MOORE v. FULHAM VESTRY*, [1895] 1 Q. B. 309; 64 L. J. Q. B. 226; 71 L. T. 802; 59 J. P. 596; 43 W. R. 277; 11 T. L. R. 122; 39 Sol. Jo. 133; 14 R. 313, C. A.

*Annotation.*—*Refd.* *Ward v. Wallis*, [1900] 1 Q. B. 675.

*See, generally*, *CONTRACT*, Vol. XII., pp. 560, 561.

**F. Liability as between Landlord and Tenant.**

**Right of tenant to deduct expenses from rent.**—*See LANDLORD & TENANT.*

—**Effect on landlord's right to distrain.**—*See DISTRESS*, Vol. XVIII., p. 321, No. 549.

**SUB-SECT. 4.—TEMPORARY REPAIRS TO PRIVATE STREETS.**

*See Metropolitan Management (Amendment) Act, 1890 (c. 66), s. 3.*

**2080. Necessary works or repairs to carriage road—Local authority judge of necessity.**—*STROUD v. WANDSWORTH DISTRICT BOARD OF WORKS*, No. 2063, *ante*.

**2081. —Repairs to footpath—Inclusion of establishment charges.**—*BALLARD v. WANDSWORTH BOROUGH COUNCIL*, No. 2049, *ante*.

**2082. —Recovery of expenses—Jurisdiction of magistrate.**—A metropolitan police magistrate is a "ct. of competent jurisdiction" within Metropolitan Management (Amendment) Act, 1890 (c. 66), s. 3, & has jurisdiction to entertain proceedings for the recovery from the frontagers of the expenses of repairs done by a borough council under that sect. to a carriage road which is not repairable by the inhabitants at large.—*R. v. GARRETT*, [1907] 1 K. B. 881; 76 L. J. K. B. 353; 96 L. T. 407; 71 J. P. 171; 23 T. L. R. 308; 51 Sol. Jo. 265; 5 L. G. R. 358, C. A.

**SUB-SECT. 5.—FLAGGING AND PAVING OF FOOTWAYS, COURTS, ETC.**

*See Metropolitan Management Act, 1855 (c. 120), ss. 99, 100; Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 81; Metropolitan Management (Amendment) Act, 1890 (c. 54), s. 1.*

**2083. Paving court not a thoroughfare—Compliance with requisition to pave—Second requisition to repave with different material.**—The owner of a court, passage, or public place, not being a thoroughfare, who has once in obedience to a notice in that behalf under Metropolitan Management Act, 1855 (c. 120), s. 100, paved or covered the same to the satisfaction of the vestry, cannot be called upon a second time to pave or cover it with a different material; all he can be required to do is to repair the existing pavement or covering.—*HARRISON v. NEW STREET MEWS (OWNER)*, [1906] 1 K. B. 703; 75 L. J. K. B. 510; 95 L. T. 57; 70 J. P. 355; 50 Sol. Jo. 527; 4 L. G. R. 703, D. C.

**2084. Flagging footways—Declaratory judgment as to when footways laid out.**—*WANDSWORTH METROPOLITAN BOROUGH v. ASHCOMBE (LORD)* (1915), 79 J. P. Jo. 256.

**SUB-SECT. 6.—CLOSING OF COURTS AND ALLEYS.**

*See Metropolitan Paving Act, 1817 (c. xxix), s. 79.*

**2085. Jurisdiction of justices—Nuisance from filth or rubbish.**—At a special session of justices held under Metropolitan Paving Act (c. xxix), s. 79, an application for an order to close a certain passage was refused solely on the ground that there was no jurisdiction to make the order, because it did not appear that the passage was in fact "a harbour or receptacle for filth & rubbish" within the preamble to the sect.:—*Held*: the construction put upon the sect. by the justices was erroneous, for its meaning was to give them jurisdiction if the passage was likely to, or might possibly become, a harbour or receptacle for filth & rubbish.

Harbours for "filth" would mean that they were capable of becoming so, or were likely to

become so. One cannot suppose that places of this sort are kept as receptacles for filth, or for depositing filth, but that they are places which might become filthy, or which might be used for filthy purposes (DAX, J.).—*R. v. CLOETE, ETC.*, JJ. (1890), 64 L. T. 90; 55 J. P. 310, D. C.

#### SUB-SECT. 7.—BUILDING LINE.

##### A. In General.

See Metropolis Management Act, 1855 (c. 120), s. 143; Metropolis Management (Amendment) Act, 1862 (c. 102), s. 75; London Building Act, 1894 (c. cccxiii), ss. 22 (2), 23 (1) (2), 26, 28, 49.

**2086. What constitutes "regular line."**—By Metropolis Management Act, 1855 (c. 120), after Jan. 1, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate":—*Held*: this does not mean a strict mathematical line, but a substantially regular line.—*TEAR v. FREEBODY* (1858), 4 C. B. N. S. 228; 140 E. R. 1071; *sub nom.* SEAR *v.* FREEBODY, 31 L. T. O. S. 131; 22 J. P. 707; *sub nom.* FEAR *v.* FREEBODY, 6 W. R. 520.

*Annotations*:—*Consd.* Simpson *v.* Smith (1871), L. R. 6 C. P. 87. *Refd.* Manners *v.* Johnson (1875), 1 Ch. D. 673; St. Mary, Islington, Vestry *v.* Goodman (1889), 23 Q. B. D. 151.

**2087. Houses previously existing & capable of being rebuilt.**—Metropolis Management (Amendment) Act, 1862 (c. 102), s. 75, does not apply to ground formerly covered with buildings, unless the owner has relinquished his right of rebuilding on the same site. If, therefore, the district board of works threatens to proceed under sect. 75 to demolish houses which are being rebuilt on an old site, on the ground that they are beyond the general line of buildings, it is acting *ultra vires*, & may be restrained by the Ct. of Ch. In such a case the Metropolitan Board ought to proceed under sect. 74 of the same Act, which provides for compensation to the landowners.

A railway co. took land covered with houses, & pulled down the houses for the purpose of constructing their railway, & then sold the land as building ground to plff.:—*Held*: plff. had not lost the right to rebuild the houses on the same site as that occupied by the houses before they were pulled down; & for this purpose the yard of a house was held to be equivalent to a house. In determining the general line of buildings of a street the architect of the Metropolitan Board of Works ought to have regard to the frontage of houses previously existing, & which may be rebuilt, as well as to those still standing.—*AUCKLAND (LORD) v. WESTMINSTER DISTRICT BOARD OF WORKS* (1872), 7 Ch. App. 597; 41 L. J. Ch. 723; 26 L. T. 961; 20 W. R. 845, L. J.J.

*Annotations*:—*Distd.* Barlow *v.* Kensington Vestry (1884), 27 Ch. D. 362; Worley *v.* St. Mary Abbot's, Kensington, Vestry, [1892] 2 Ch. 401. *Consd.* Lavy *v.* L. C. C., [1896] 2 Q. B. 577. *Distd.* L. C. C. *v.* Pryor, [1896] 1 Q. B. 465. *Refd.* Wilson *v.* Culliffe (1874), 29 L. T. 913; Kerr *v.* Preston Corp'n. (1876), 6 Ch. D. 463; Hedley *v.* Bates (1880), 42 L. T. 41; St. Mary, Islington, Vestry *v.* Goodman (1889), 23 Q. B. D. 154; Wendon *v.* L. C. C., [1894] 1 Q. B. 812; Grand Junction Waterworks Co. *v.* Hampton U. C., [1898] 2 Ch. 331; St. James's Hall *v.* L. C. C. (1900), 33 L. T. 98; Merrick *v.* Liverpool Corp'n., [1910] 2 Ch. 449.

**2088. Application to churches.**—The Ecclesiastical Comrs. have no power, under Metropolis Management (Amendment) Act, 1856 (c. 112), s. 3, to contravene the provisions of Fire Protection (Metropolis) Act, 1774 (c. 78), or of Metropolis Management Act, 1855 (c. 120), s. 143, by erecting the chancel of a church, part of which

projects beyond the general line of buildings in a street, without the sanction of the Board of Works, as required by the last mentioned Act.

By the express enactment of sect. 143, if the building be erected beyond the general line of the buildings of the street in which the same is situate, then, without the consent in writing of the Metropolitan Board of Works, it may be dealt with as the subsequent part of that sect. provides. Therefore, I cannot say that this Ct. has any power to grant an injunction against that being done which the law permits (LORD CAMPBELL, C.).—*ECCELESIASTICAL COMRS. v. CLERKENWELL VESTRY* (1861), 3 De G. F. & J. 688; 30 L. J. Ch. 454; 4 L. T. 599; 25 J. P. 580; 7 Jur. N. S. 810; 9 W. R. 681; 45 E. R. 1045, L. C.

**2089. Application to streets not highways.**—A street in the metropolis had been newly laid out, & buildings completed along half of it, each building having a space of about five feet between the front line & the edge of the foot pavement. N. built stables on one plot on same side coming close to the foot pavement. The street had no gate at either end, & was already watered & sewered by the vestry. N. being summoned for building beyond the general line of street:—*Held*: Metropolis Management (Amendment) Act, 1862 (c. 102), s. 75, applied whether the street had become a highway in the legal sense of the term or not; & N. was liable to the penalty.—*POPPIAR BOARD OF WORKS v. NORTH METROPOLITAN TRAMWAYS CO.* (1879), 43 J. P. 590, D. C.

**2090. Power of local authority to consent to building beyond line—Subject to conditions.**—*LONDON COUNTY COUNCIL v. BEST & CO.* (1893), 9 T. L. R. 499, D. C.

**2091. Building in course of erection when line fixed.**—*NATHAN J. METROPOLITAN BOARD OF WORKS* (1886), [1891] 1 Q. B. 230, n.; 70 L. T. 96, n., D. C.

**2092. —** In 1890 the owner of land in the Metropolis adjoining a newly laid out street deposited with the vestry of the parish plans for the erection of a shop on the side of such street, & in the same year, in accordance with the plans, he constructed the footings for the external walls of two sides of the shop, one side being that adjoining the street, & upon the footings on that side he raised the external wall to a height of twelve feet above the level of the street; he then suspended his building operations. At that date there was no other building on either side of the street. In 1892 he built a row of houses on the same side of the street, but standing ten feet further back from the street than the shop above mentioned. Subsequently he leased the site of the shop to applt., who in Jan. 1893, without obtaining the consent of the London County Council, proceeded to erect the shop in accordance with the plans deposited by his lessor. In Mar. 1893, the superintending architect of the London County Council decided the general line of buildings on that side of the street to be the main fronts of the above mentioned row of houses. Applt. was thereupon summoned for having, contrary to Metropolis Management (Amendment) Act, 1862 (c. 102), s. 75, erected a building beyond the general line of buildings in the street without the consent in writing of the London County Council:—*Held*: the wall which had been built before the general building line came into existence was not, in fact, a building, structure, or erection within the Act, & the land was therefore at that time vacant land for the purposes of the Act; the acts of applt. after the building line came



County Council, erected upon the steps & landing a show case of wood & glass, the length of which was 7 feet 6 inches, the width 1 foot 10 inches, & the height above the street level 9 feet 3 inches. The show case stood upon resps.' property, & took the place of a shop front, which projected 6 feet 3 inches beyond the general line of buildings. The houses in the street in which resps.' premises were situated had bay windows in front of the general line of buildings, & the show case was slightly in front of the bays:—*Held*: the show case was not a "structure" within London Building Act, 1894 (c. cxxiii), s. 22, & resps., by erecting it without the consent of the Council, had not acted in contravention of that sect.—*LONDON COUNTY COUNCIL v. HANCOCK & JAMES*, [1907] 2 K. B. 45; 76 L. J. K. B. 526; 96 L. T. 618; 71 J. P. 268; 23 T. L. R. 417; 5 L. G. R. 572, D. C.

**2100. Wall.**—Applt. erected upon his land in a new street in the Metropolis a wall in advance of & at right angles to the general line of buildings without the consent in writing of the London County Council. The said wall extended 20 feet towards the centre of the roadway from the front of applt.'s house which was in the general line of buildings, & within 50 feet of the highway. The wall was 9 inches thick, & from 7 feet to 7 feet 8 inches high above the level of the pavement, & 14 inches thick & 8 feet deep below the said level:—*Held*: the wall was a "building, structure, or erection" within Metropolis Management (Amendment) Act, 1862 (c. 102), s. 75, & could not be erected within 50 feet of the highway, & in advance of the general line of buildings in the street, without the consent in writing of the London County Council.—*ELLIS v. PLUMSTEAD BOARD OF WORKS* (1893), 68 L. T. 291; 57 J. P. 359; 41 W. R. 496; 37 Sol. Jo. 253; 5 R. 237, D. C.

*Annotations*.—*Consd.* *Lavy v. L. C. C.*, [1895] 2 Q. B. 577. *Refd.* *A.-G. v. Harrison* (1920), 84 J. P. 141.

**2101.**—*WENDON v. LONDON COUNTY COUNCIL*, No. 2092, ante.

**2102.**—The question whether a wall is a "building, structure, or erection" within Metropolis Management (Amendment) Act, 1862 (c. 102), s. 75, depends upon the height of the wall & the purpose for which it is built. The forecourt of a house in a street in the Metropolis had for many years been bounded on the side nearest the street by a dwarf wall between 2 & 3 feet high. The owner of the premises pulled down the dwarf wall & built on its site a wall 11 feet high, which was intended to be used as a screen on which to exhibit advertisements, & also to serve as a boundary to the forecourt. The new wall was beyond the general line of buildings in the street, & was erected without the consent of the London County Council:—*Held*: (1) the dwarf wall was not a "building, structure, or erection" within above sect., & so long as it existed the site on which it stood was to be regarded as vacant land for the purposes of the sect., but the substituted wall was a "building, structure, or erection" within the sect., & the magistrate had jurisdiction to order its demolition; (2) the issuing of the certificate of the superintending architect of the general line of buildings was not a condition precedent to the taking out of the summons against the owner of the house; & as the order was made after the certificate had been issued, the order was valid.—*LAVY v. LONDON COUNTY COUNCIL*, [1895] 2 Q. B. 577; 64 L. J. M. C. 262; 73 L. T. 106; 59 J. P. 630; 43 W. R. 677; 11 T. L. R. 525; 39 Sol. Jo. 655; 14 R. 634, C. A.

*Annotations*.—*As to* (1) *Consd.* *L. C. C. v. Pryor*, [1896] 1 Q. B. 330. *Refd.* *L. C. C. v. Aylesbury Dairy Co.* (1897), 61 J. P. 759; *A.-G. v. Harrison* (1920), 84 J. P. 141.

**2103. Glass portico.**—A glass & iron portico or shelter which projects beyond the general building line of the street, & which is dovetailed into the main structure of a building, if not erected by the consent of the London County Council, is within London Building Act, 1891 (c. cxxiii), s. 22.—*COBURG HOTEL v. LONDON COUNTY COUNCIL* (1899), 81 L. T. 450; 63 J. P. 805; 16 T. L. R. 9; 19 Cox, C. C. 411, D. C.

*Annotations*.—*Refd.* *Hull v. L. C. C.* (1901), 84 L. T. 160; *L. C. C. v. Illuminated Advertisement Co.* (1904), 91 L. T. 352; *L. C. C. v. Schewzik*, [1905] 2 K. B. 695; *L. C. C. v. Hancock* (1907), 96 L. T. 618; *R. v. Denman*, *Ex p. Palace Co.* (1907), 96 L. T. 672.

**2104.**—An iron framework, filled in on the front sides with leaded glass & covered on the top with zinc, about 10 feet 6 inches long, & about 5 feet 6 inches high from the bottom to the top of the gable, was fixed to the front wall of a building by means of bolts at the bottom & stayrods at the top. It came forward about 4 feet 6 inches from the front wall of the building, & at its lowest point was 11 feet above the pavement:—*Held*: the framework was not "a structure erected beyond the general line of buildings" within London Building Act, 1894 (c. cxxiii), s. 22 (1), & was not a "projection" within sect. 73 (8).—*LONDON COUNTY COUNCIL v. SCHEWZIK*, [1905] 2 K. B. 695; 74 L. J. K. B. 959; 93 L. T. 550; 69 J. P. 409; 54 W. R. 168; 21 T. L. R. 731; 49 Sol. Jo. 714; 3 L. G. R. 1159, D. C.

*Annotations*.—*Refd.* *London Electric Supply Co. v. Perkins* (1908), 24 T. L. R. 327; *Pears v. L. C. C.* (1911), 105 L. T. 525.

**2105. Advertisement case.**—Applt. was convicted on an information charging him with the offence specified in London Building Act, 1894 (c. cxxiii), s. 73 (8), the projection complained of being a wooden case attached to the external wall of a building by iron brackets, & used as an advertising sign. It had been put up more than six months before the information was laid:—*Held*: the conviction was wrong because, first, the sign was not a projection within the sub-sect., which applies only to projections forming part of the building from which they project, & secondly, the prosecution was barred by Summary Jurisdiction Act, 1848 (c. 43), s. 11.—*HULL v. LONDON COUNTY COUNCIL*, [1901] 1 K. B. 580; 70 L. J. K. B. 364; 84 L. T. 160; 65 J. P. 309; 49 W. R. 396; 17 T. L. R. 270; 45 Sol. Jo. 295; 19 Cox, C. C. 635, D. C.

*Annotations*.—*Obtd.* *L. C. C. v. Illuminated Advertisements Co.*, [1904] 2 K. B. 886. *Consd.* & *Folld.* *L. C. C. v. Schewzik*, [1905] 2 K. B. 695. *Consd.* *L. C. C. v. Hancock & James*, [1907] 2 K. B. 45. *Refd.* *Chilvers v. Schenzik*, *Ex p. L. C. C.* (1904), 48 Sol. Jo. 605; *Pears v. L. C. C.* (1911), 105 L. T. 525. *Mentd.* *Chepstow Electric Light & Power Co. v. Chepstow Gas & Coke Consumers Co.*, [1905] 1 K. B. 198.

**2106.**—Resps., without the consent of applt., erected upon the front walls of their house twelve cases used as electrical advertisement signs; they were constructed of sheet-iron & supported by iron supports pinned through the wall, & stood out 10 inches in front of the wall & of the general line of buildings; the whole of the cases, except the iron supports, could be removed in a day without injury to the building:—*Held*: the cases were not structures within the meaning of London Building Act, 1894 (c. cxxiii), s. 22.—*LONDON COUNTY COUNCIL v. ILLUMINATED ADVERTISEMENTS CO.*, [1904] 2 K. B. 880; 73 L. J. K. B. 1034; 91 L. T. 352; 68 J. P. 445; 53 W. R. 220; 20 T. L. R. 527; 48 Sol. Jo. 493; 2 L. G. R. 905, D. C.

*Annotations*.—*Consd.* *L. C. C. v. Hancock & James*, [1907] 2 K. B. 45. *Refd.* *L. C. C. v. Schewzik*, [1905] 2 K. B. 695; *R. v. Denman*, *Ex p. Palace Co.* (1907), 96 L. T. 672.

Sect. 1.—Metropolitan: Sub-sect. 7, C. & D.]

**2107. Advertisement frame.]**—The P. Theatre Co., Ltd., were summoned for erecting a structure beyond the general line of buildings without the written consent of the London County Council, in contravention of Part III. of London Building Act, 1894 (c. ccxiii). The construction in question was admitted to be beyond the general line of buildings, but the co. contended that it was not a "structure" within sect. 22 of the Act, & that, therefore, no written consent was required. It consisted of a framework of wood which acted as a foundation for plaster work intended to imitate stone-work. It was over 13 feet high & 7 feet wide, & extended 2 feet beyond the building line. It was fastened by iron holdfasts to the wall of the theatre, but could have been removed without serious injury to the wall, & it stood on the pavement lights without being fastened to the pavement. The centre was hollow & contained lights for the purpose of illuminating advertisements printed on the centre of the front, which was of transparent material. The magistrate found as a fact that it was a "structure" within sect. 22, & imposed a penalty & made an order of removal, & on the ground that the question was one of fact, he declined to state a case:—*Held*: as the question was one of fact, & as there was evidence on which the magistrate could come to the conclusion he arrived at, the ct. would not issue a *mandamus* to compel him to state a case. *R. v. DENMAN, Ex p. PALACE CO.* (1907), 96 L. T. 672; 71 J. P. 279; 5 L. G. R. 619, D. C.

*Annotation*:—*Refd.* *Pears v. L. C. C.* (1911), 105 L. T. 525.

**2108. —.]**—Applts. caused to be placed over the main entrance of a building in O. Street a projection consisting of an open iron framework filled in with glass & illuminated by lamps inside. It was fixed by tailing into the building the two ends of the channel iron & of the iron rod, & for this purpose it had been necessary to cut into the wall of the building to the depth of about a foot, & there was also two stay rods bolted into the wall. The projection was in advance of the general line of buildings to the extent of 5 feet 6 inches, & no consent had been given by the London County Council to its erection. The magistrate found as a fact that the projection was a structure within sect. 22 (1) & also a projection within sect. 73 (8) of London Building Act, 1891 (c. ccxiii) & that the erection had become part of the structure of the building. He therefore convicted applts.:—*Held*: there was evidence to support the findings of the magistrate, & the conviction was right.—*PEARS (A. & F.), LTD. v. LONDON COUNTY COUNCIL* (1911), 105 L. T. 525; 75 J. P. 461; 9 L. G. R. 831, D. C.

**2109. Hoarding.]**—(1) T., owner of a house & garden in London, by an agreement, which was expressed not to be a lease, allowed P., in return for monthly payments, to display for a term advertisements upon her boundary wall. P. was to have "free & uninterrupted use" of the wall for this purpose. P. accordingly erected a hoarding upon the wall. The London County Council afterwards served on P. a notice alleging that the hoarding projected beyond the general line of buildings; in consequence of which notice P. removed the hoarding. T. sued to recover the sums stipulated for in the agreement:—*Held*: the words quoted amounted only to a personal covenant that T. & persons holding under her would not interfere with P.'s enjoyment, & T. was entitled to recover.

(2) *Qu.*: whether a hoarding for advertisements erected on the top of a boundary wall is a "structure" within the meaning of London Building Act, 1894 (c. ccxiii).—*TUNMER v. PARTINGTON ADVERTISING CO.* (1904), 68 J. P. 318.

*D. Decision of Superintending Architect.*

*Ser. now*, London Building Act, 1891 (c. ccxiii), ss. 22 (1), 24, 25, 29, 182.

**2110. Conclusiveness of decision—As to general line of buildings.]**—(1) In a proceeding before the magistrate, under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, for erecting an "erection" beyond the general line of buildings in a street, the certificate of the superintending architect of the Metropolitan Board of Works as to what line is "the general line of buildings," does not preclude the magistrate from questioning & determining whether such line be the general true line of buildings in that street or not.

(2) A small conservatory having been erected over a projecting shop-front in a street, & the magistrate having decided that it was not an erection within above sect., the ct. refused to review his decision.—*ST. GEORGE VESTRY v. SPARROW* (1864), 16 C. B. N. S. 209; 33 L. J. M. C. 118; 10 L. T. 504; 10 Jur. N. S. 771; 12 W. R. 832; 143 E. R. 1106.

*Annotations*:—As to (1) *N.F. Bauman v. St. Pancras Vestry* (1867), L. R. 2 Q. B. 528. *Consd.* *Wandsworth Board of Works v. Hall* (1868), L. R. 4 C. P. 85. *Fold.* *Simpson v. Smith* (1871), L. R. 6 C. P. 87. *Distd.* *Cheetham v. Manchester Corp.* (1875), L. R. 10 C. P. 249. *N.F.* *Plumstead Board of Works v. Spackman* (1884), 13 Q. B. D. 878. *Refd.* *L. C. C. v. Cross* (1892), 61 L. J. M. C. 160. *Generally, Refd.* *St. Marylebone Vestry v. Vuet* (1865), 19 C. B. N. S. 424, *Clode v. L. C. C.* (1914) 3 K. B. 852. *Mentd.* *Leader v. Yell* (1864), 16 C. B. N. S. 584.

**2111. —.]**—Applt. having premises in a street, the original line of houses being some distance from the highway, with a forecourt in front, applied to the Metropolitan Board of Works, under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, for leave to erect a building on this forecourt: the board granted a consent conditioned that the building was not erected higher than the next adjoining; this consent applt. never took up, but he erected a building higher than the next adjoining. The vestry of the parish then made complaint before a magistrate, charging that applt. had erected a building beyond the general line of buildings, contrary to the conditions of consent of the board, & in contravention of above sect. The day before the hearing of the complaint, the superintending architect of the board certified that the "original line of buildings" was the "general line of buildings." The magistrate held the complaint proved, & ordered that applt. should demolish so much of the building as was beyond the general line of buildings fixed by the architect:—*Held*: the order was right.—*BAUMAN v. ST. PANCRAS VESTRY* (1867), L. R. 2 Q. B. 528; 8 B. & S. 440; 36 L. J. M. C. 127; 31 J. P. 676; 15 W. R. 904.

*Annotations*:—*Consd.* *Wandsworth Board of Works v. Hall* (1868), L. R. 4 C. P. 85. *Distd.* & *Expld.* *Simpson v. Smith* (1871), L. R. 6 C. P. 87. *Distd.* *Cheetham v. Manchester Corp.* (1875), L. R. 10 C. P. 249. *Fold.* *Plumstead Board of Works v. Spackman* (1884), 13 Q. B. D. 878. *Consd.* *L. C. C. v. Cross* (1892), 61 L. J. M. C. 160. *Refd.* *Lavy v. L. C. C.* (1895), 64 L. J. M. C. 196; *L. C. C. v. Clode*, [1915] A. C. 947.

**2112. —.]**—(1) In a proceeding before a magistrate under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, for erecting a building without the consent of the Metropolitan Board of Works, beyond the general line of

buildings in a street, the certificate of the superintending architect of such board is not absolutely conclusive, but the magistrate is entitled to judge for himself whether the line fixed by such certificate be in fact the general line of buildings in the street.

(2) It was laid down in that case [*Tear v. Freebody*, No. 2086, *ante*], & the decision was not afterwards quarrelled with, that "regular" line did not mean absolutely straight line or regular curve, but such line as would preserve a general uniformity of appearance. It was to be a question of substantial regularity, not of mere inches or even, perhaps, feet (WILLES, J.).—*SIMPSON v. SMITH* (1871), L. R. 6 C. P. 87; 40 L. J. M. C. 89; 24 L. T. 100; 35 J. P. 310; 19 W. R. 355.

*Annotations*.—As to (1) *Distd.* (Cheetham v. Manchester Corpn. (1875), L. R. 10 C. P. 249. *N.F.* Plumstead Board of Works v. Spackman (1884), 13 Q. B. D. 878. *Refd.* L. C. C. v. Cross (1892), 61 L. J. M. C. 160. *Generally*, *Mentd.* Manners v. Johnson (1875), 1 Ch. D. 673.

**2113.** ———. —[The certificate of the superintending architect of the Metropolitan Board of Works made under Metropolis Management (Amendment) Act, 1892 (c. 102), s. 75, & fixing the "general line of buildings" in a road is conclusive as to a building erected before the certificate is made; & on the hearing of a summons, issued after the making of the certificate, for an offence under the sect. alleged to have been committed in respect of such building the justice has no jurisdiction to review the architect's decision or decide for himself whether the line fixed by the certificate is the true general line.

*Simpson v. Smith*, No. 2112, *ante*, *overd.* —*SPACKMAN v. PLUMSTEAD BOARD OF WORKS* (1885), 10 App. Cas. 229; 54 L. J. M. C. 81; 53 L. T. 157; 49 J. P. 420; 33 W. R. 661; 1 T. L. R. 313, H. L.; *affg.* S. C. *sub nom.* PLUMSTEAD BOARD OF WORKS v. SPACKMAN (1884), 13 Q. B. D. 878, C. A.

*Annotations*.—*Consd.* Barlow v. St. Mary Abbots, Kensington, Vestry (1886), 11 App. Cas. 257; L. C. C. v. Cross (1892), 61 L. J. M. C. 160; Clode v. L. C. C. [1915] 3 K. B. 852. *Refd.* (Gilbert v. Wandsworth District Board of Works (1888), 60 L. T. 149; Worley v. St. Mary Abbots, Kensington, Vestry, [1892] 2 Ch. 404; Wendon v. L. C. C. (1893), 70 L. T. 94; Allen v. L. C. C. (1895), 61 L. J. M. C. 228; Lavy v. L. C. C. [1895] 2 Q. B. 577; L. C. C. v. Ghaswathay, [1918] A. C. 851; L. C. C. v. Met. Ry., [1919] 1 K. B. 283. *Mentd.* R. v. L. C. C., *Ex p.* Edwards (1894), 15 R. 66; City of London Electric Lighting Co. v. London Corpn. (1901), 65 J. P. 563; Hall v. Manchester Corpn. (1915), 84 L. J. Ch. 732; L. G. Board v. Arlidge, [1915] A. C. 120; De Verteuil v. Knaggs, [1918] A. C. 557.

**2114.** ———. **Power of local authority to change line by giving consent.**—[In part of a London street there were old houses built before 1802. Between 1802 & 1894, with the consent of the Metropolitan Board of Works under Metropolis Management (Amendment) Act, 1892 (c. 102), s. 75, shops of one storey were built in front of the old houses & between them & the pavement line of the street. Upon an application by the owners of the shops in pursuance of London Building Act, 1894 (c. cxxiii), s. 22, the superintending architect certified that the frontage line of the old houses formed the general line of buildings in that part of the street. The tribunal of appeal varied that certificate by determining that the frontage line of the shops was the general line of buildings in that part of the street:—*Held*: without expressing any opinion upon the construction of London Building Act, 1894 (c. cxxiii), ss. 27, 216, the Metropolitan Board of Works had not altered the old general building line by consenting to the erection of the shops.—*FLEMING v. LONDON COUNTY COUNCIL, METROPOLITAN RY. CO. v. LONDON COUNTY COUNCIL*, [1911] A. C. 1; 80 L. J. K. B. 35; 103 L. T. 466; 75 J. P. 9; 55

Sol. Jo. 28; 8 L. G. R. 1055, H. L.; *affg.* S. C. *sub nom.* LONDON COUNTY COUNCIL v. METROPOLITAN RY. CO., [1909] 2 K. B. 317, C. A.

*Annotation*.—*Consd.* L. C. C. v. Clode, [1915] A. C. 947.

**2115.** ———. —[E. Road was laid out in 1755 under an Act of Parliament which enacted that no buildings should be erected on new foundations in the road within 50 feet of the highway & that if so erected the buildings should be deemed to be common nuisances. This provision was repealed & re-enacted from time to time, but was ultimately repealed by Metropolis Management (Amendment) Act, 1892 (c. 102), which enacted that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings, if the distance of that line from the highway did not exceed 50 feet, such line of buildings to be decided by the superintending architect. This provision was repealed & substantially re-enacted by London Building Act, 1894 (c. cxxiii), the London County Council being substituted for the Metropolitan Board of Works.

There existed at the present time in E. Road a row of buildings about 50 feet back from the highway & a second row of buildings of irregular size & shape erected on the forecourts of the main buildings with frontages to the inner edge of the pavement, & substantially all these buildings had been erected before 1802. In 1807 some of the frontagers presented a memorial to the Metropolitan Board of Works, praying that the inner edge of the pavement should be adopted as the general building line. The superintending architect reported that if the suggestion of the frontagers were found practicable the building line should be kept at least 11 feet from the kerb line of the road, & the Board passed a resolution recommending that the 11-foot building line as proposed by the architect should be adopted as the general building line. In 1909 the lessee of the owners of a building in this road was proceeding to re-erect it on the 11-foot line. The superintending architect being called in to define the general line of buildings certified that it was the old building line lying 50 feet back from the road, & his certificate was affirmed, as to the part of the road in question, by the tribunal of appeal:—*Held*: (1) the resolution of the Metropolitan Board of Works, so far as it purported to alter the general building line, was *ultra vires* & ought to be disregarded; (2) in defining the general line of buildings, such of the buildings in front of the old 50-foot line as had been erected either unlawfully or with the consent of the proper authority ought to be disregarded; (3) there was evidence to support the finding of the tribunal of appeal that the bulk of the buildings in the front row had been erected on new foundations; (4) the general line of buildings had been rightly defined by the superintending architect.—*LONDON COUNTY COUNCIL v. CLODE*, [1915] A. C. 947; 84 L. J. K. B. 1705; 113 L. T. 754; 80 J. P. 1; 31 T. L. R. 483; 59 Sol. Jo. 628; 13 L. G. R. 1234, H. L.; *revg.* S. C. *sub nom.* CLODE v. LONDON COUNTY COUNCIL, [1914] 3 K. B. 852, C. A.

**2116.** ———. **As to street in which house situate—House fronting two streets.**—(1) *Applts.* house was built at the corner of K. Road & a new street called D. Gardens. The side of the house abutting on the eastern side of D. Gardens projected beyond a row of houses on that side of D. Gardens. Under Metropolis Management (Amendment) Act, 1892 (c. 102), s. 75, the superintending architect to the Metropolitan Board of Works gave a certificate that the main fronts of that row of houses was the



*Sect. 1.—Metropolitan: Sub-sect. 7, D. & E.]*

general line of buildings on the eastern side of D. Gardens, but did not decide that that was the general line of buildings, either of the row of houses or of the street in which applts.' house was situate:—*Held*: no offence under the sect. had been committed by the building of applts.' house, & there was no jurisdiction for a magistrate's order under the sect. directing the demolition of the projecting part of the house.

(2) A magistrate made a verbal order under the sect. directing the builder to demolish part of a house within eight weeks. The builder was present when the order was made, but it was not reduced into writing till the day when the eight weeks expired; after that day a copy was served upon him or came to his knowledge:—*Held*: the order was not "an order in writing made on" the builder within the sect., & was therefore invalid.—*BARLOW v. ST. MARY ABBOTTS, KENSINGTON, VESTRY* (1886), 11 App. Cas. 257; 55 L. J. Ch. 680; 55 L. T. 221; 50 J. P. 691; 34 W. R. 521; 2 T. L. R. 452, 11 L.

*Annotations*:—As to (1) *Distd. Gilbart v. Wandsworth District Board of Works* (1888), 60 L. T. 149. *Conrad. L. C. v. Cross* (1892), 61 L. J. M. C. 160; *Worley v. St. Mary Abbots, Kensington, Vestry*, [1892] 2 Ch. 104; *Wendon v. L. C. C.*, [1894] 1 Q. B. 812; *Allen v. L. C. C.*, [1895] 2 Q. B. 587; *L. C. C. v. Pryor*, [1896] 1 Q. B. 330; *L. C. C. v. Galsworthy*, [1918] A. C. 851; *L. C. C. v. Met. Ry.*, [1919] 1 K. B. 283. *Generally, Rejd. Warren v. Mustard* (1891), 61 L. J. M. C. 18; *Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.*, [1899] 1 Ch. 474.

**2117.** — — — — —.]—Applt.'s house was built at the corner of S. Road & C. Road. The superintending architect of the Metropolitan Board of Works gave his certificate under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, that the building line in the C. Road exceeded 50 feet from the highway. At the date of this certificate all the houses on the west side of the S. Road, including applt.'s house, had a uniform line of frontage to that road only, & there was no access to applt.'s house from any other road. Applt.'s house was within 50 feet of the C. Road, & it was found as a fact that the site on which applt.'s house was built was in the C. Road:—*Held*: although applt.'s house faced to the S. Road, as it was within the building line of the C. Road, it was bound to follow the building line in C. Road, & the magistrate had power to order the removal of the house, or so much of it as projected beyond the building line in the C. Road.—*GILBART v. WANDSWORTH DISTRICT BOARD OF WORKS* (1888), 60 L. T. 149; 53 J. P. 229; 5 T. L. R. 31, D. C.

*Annotation*:—*Rejd. Allen v. L. C. C.*, [1895] 2 Q. B. 587.

**2118.** — — — — —.]—When an application is made to a magistrate under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75 (1) for an order to demolish a building on the ground that it is beyond the line decided by the superintending architect to be the line of building of the street in which the building is situate, the question whether the building is in that particular street of which the line has been so laid down is to be decided by the superintending architect's certificate, & not by the magistrate to whom the application is made.—*ALLEN v. LONDON COUNTY COUNCIL*, [1895] 2 Q. B. 587; 64 L. J. M. C. 228; 73 L. T. 101; 59 J. P. 644; 43 W. R. 674; 11 T. L. R. 537; 39 Sol. Jo. 670; 14 R. 749, C. A.

**2119.** — — — — —.]—Where the superintending architect has certified the general line of buildings under Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, & on appeal to the tribunal of appeal

under London County Council (General Powers) Act, 1890 (c. ccxliii), s. 28, his certificate has been confirmed, then, notwithstanding that that tribunal may have found that the case was within the exceptions contained in sect. 33 of the latter Act, the building owner is not entitled to build beyond the general line of buildings as certified by the superintending architect.—*NIXEY v. LONDON COUNTY COUNCIL* (1894), 60 J. P. 217, D. C.

**2120. Appeal to tribunal of appeal—London Building Act, 1894 (c. ccxlii), s. 183—Right of tribunal to fix building line between different points.**—(1) Where the general building line is to be defined & drawn within sect. 22 of the above Act, is a question of fact which ought to be decided with reference to the physical aspect of the streets & buildings, etc. Therefore on an appeal to the tribunal of appeal from the certificate of the superintending architect, that tribunal in fixing the building line can take different points from which & to which they will define the general building line, to those which the superintending architect has chosen.

(2) The tribunal of appeal can award a lump sum for costs to a successful applt. instead of simply awarding costs.—*Re LONDON COUNTY COUNCIL & LONDON BUILDING ACT, 1894* (1904), 91 L. T. 501, D. C.

*Annotations*:—As to (1) *Apprvd. L. C. C. v. Galsworthy*, [1917] 1 K. B. 902. *Rejd. L. C. C. v. Met. Ry.*, [1919] 1 K. B. 283.

**2121.** — — — — —.]—Upon an appeal against a certificate of the superintending architect of metropolitan buildings appointed under the above Act, whereby he defined the general line of buildings in respect of a block of buildings in which applt.'s house was situate, the tribunal of appeal has jurisdiction to take into consideration the frontages of the buildings situate in the section of the street immediately beyond the block in question & to define the line as continuous with the building line in that section of the street.—*LONDON COUNTY COUNCIL v. GALSWORTHY*, [1918] A. C. 851; 87 L. J. K. B. 1053; 119 L. T. 719; 82 J. P. 297; 16 L. G. R. 729, 11 L.

*Annotation*:—*Rejd. L. C. C. v. Met. Ry.*, [1919] 1 K. B. 283.

**2122.** — — — — —.]—The superintending architect of metropolitan buildings was required under sect. 22 of the above Act, to define the general line of buildings in that part of a street in which a building was in course of erection. The superintending architect by his certificate defined the general line of buildings in that part of the street by a line drawn between two points. The owners of several buildings affected by the line so drawn appealed to the tribunal of appeal under sect. 25 of the Act. The tribunal of appeal divided that part of the street dealt with by the certificate of the architect into three sections, A to C., C. to D., D. to E. The building in reference to which the application to define the line was made was situate in that part of the street covered by the section C. to D. The tribunal of appeal confirmed the certificate as to the section C. to D., & reversing the certificate as to the sections A. to C. & D. to E., decided that there was no general line of buildings between A. & C., & defined a different general line of buildings between D. & E. Upon a case stated as to the jurisdiction of the tribunal of appeal to deal with the general line of buildings between A. & C.:—*Held*: as the tribunal of appeal had decided that the "part of the street" in which the building, in reference to which the jurisdiction of the superintending architect was invoked, was situate

ended at the points C. & D., they had no jurisdiction to deal with the general line of buildings in that section.—*LONDON COUNTY COUNCIL v. METROPOLITAN RY. CO.*, [1919] 1 K. B. 283; 88 L. J. K. B. 448; 120 L. T. 182; 83 J. P. 105; 17 L. G. R. 210, C. A.

**2123. ——— Right of tribunal to award costs.**—*Re LONDON COUNTY COUNCIL & LONDON BUILDING ACT, 1894, No. 2120, ante.*

**2124. ———**—[On an appeal by parties interested to the tribunal of appeal, the county council supported the decision of the superintending architect, & the tribunal varied the decision of the superintending architect & awarded the parties interested their costs against the London County Council. Upon an appeal by the council against the order as to costs on the ground that the tribunal had no power under sect. 183 [of the above Act] or otherwise to make an order for costs against the London County Council:—*Held*: if the council chose to make itself a party to the proceedings under sect. 181 [of the above Act] it became entitled to receive costs or liable to pay them.—*LONDON COUNTY COUNCIL v. METROPOLITAN RY. CO., LTD.* (1907), 97 L. T. 136; 71 J. P. 372; 5 L. G. R. 814, D. C.

**2125. ——— Defence of statutory power to build within line.**—[The tribunal of appeal under above Act has no jurisdiction to entertain an appeal by a railway co. against a certificate of the superintending architect defining the general line of buildings in a street if the only ground of the appeal is that the certificate would affect the exercise of powers conferred on the railway co. by their special Acts.—*SOUTH EASTERN & CHATHAM RY. CO.'S MANAGING COMMITTEE v. LONDON COUNTY COUNCIL*, [1907] 2 K. B. 91; 76 L. J. K. B. 528; 96 L. T. 676; 71 J. P. 260; 5 L. G. R. 626, D. C.]

**2126. ——— Original certificate not appealed against—No alteration in general line of building.**—[Where under the above Act, the superintending architect has by his certificate defined the general line of buildings in a street, the tribunal of appeal under the Act has no power to define a general line of buildings in that part of the street other than the general line defined by the certificate, if the certificate has not been appealed against & no buildings have been erected since the date of the certificate which altered or might alter the general line defined by it. The object of the Act was to secure general lines of building to which all must conform.—*LILLEY v. LONDON COUNTY COUNCIL*, [1910] A. C. 1; 79 L. J. K. B. 202; 100 L. T. 709; 73 J. P. 297 53 Sol. Jo. 429; 7 L. G. R. 675, H. L.]

*Annotation*:—*Refd. Clode v. L. C. C.*, [1914] 3 K. B. 852.

**2127. Time when decision may be given—Before hearing of summons.**—*BAUMAN v. ST. PANCRA'S, VESTRY*, No. 2111, *ante*.

**2128. ———**—[H. erected a building beyond a line which was subsequently decided by the superintending architect to the Metropolitan Board of Works to be the general line of buildings of the row of houses in which the same was situated. The superintending architect had not decided what was the general line of buildings for that row of houses previously to the date when H. erected his building. A complaint having been made by the district board of works before a magistrate, under Metropolitan Management (Amendment) Act (c. 102), s. 75, the magistrate was of opinion that the line determined by the architect was, in fact, the "general line of buildings" at the time that H. built.—*Held*: H. had committed a breach of the Act, & the magistrate

had jurisdiction to order the building to be pulled down.—*WANDSWORTH BOARD OF WORKS v. HALL* (1868), L. R. 4 C. P. 85; 38 L. J. M. C. 69; 19 L. T. 641; 33 J. P. 183; 17 W. R. 250.

*Annotations*:—*Consd. Paddington Vestry v. Snow* (1881), 45 L. T. 475. *Refd. Simpson v. Smith* (1871), L. R. 6 C. P. 87; *Plumstead Board of Works v. Spackman* (1884), 13 Q. B. D. 878; *L. C. C. v. Cross* (1892), 61 L. J. M. C. 160.

**2129. ———**—[The "general line of buildings" referred to in the Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, exists independently of the certificate of the architect, which merely points it out for the guidance of the magistrate.

The magistrate has found that the offence complained of was complete, & discovered more than six months before proceedings were taken in the matter, but it was said that the certificate of the architect was not given more than six months before these proceedings . . . An architect might, if this view be true, by an *ex post facto* certificate, order half a street to be pulled down. I hold therefore that the certificate of the architect does not necessarily create the offence (*LORD COLERIDGE, C.J.*).

(2) Although there is nothing in above Act, to limit the time within which proceedings under sect. 75 of the Act must be taken, yet Summary Jurisdiction Act, 1847 (c. 43), s. 11 applies, & they must, therefore, be taken within six calendar months.—*PADDINGTON VESTRY v. SNOW* (1881), 45 L. T. 475; 46 J. P. 87; 30 W. R. 46, D. C.]

*Annotation*:—*As to* (1) *Consd. L. C. C. v. Cross* (1892), 61 L. J. M. C. 160.

**2130. ———**—[*LAVY v. LONDON COUNTY COUNCIL*, No. 2102, *ante*.

#### *E. Works Authorised by Special Acts.*

**2131. General Act inconsistent with existing special Act.**—(1) Whenever the legislature has, by a special Act, conferred powers upon a corp. or body of comrs., for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule the powers given by the former Act. A railway co. were empowered by their special Act to widen a branch of their railway passing through London, & to build additional stations. In conformity with the powers so given they proceeded to erect a station on their land by the side of a highway, within the distance required to be left between buildings & highways in London, by Metropolitan Management Act, 1855 (c. 120), which had passed shortly after the special Act of the co.:—*Held*: the powers conferred on the co. by their special Act were not controlled by the later statute, & the co. were authorised so to build their station.

(2) By a statute passed prior to the railway Act the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. Metropolitan Management Act repealed this statute, & vested this authority in the managing body thereby constituted:—*Held*: the trustees of the road must be taken to have been present at the passing of the railway Act, as well as of the Metropolitan Act, & therefore, the powers given by the railway Act must prevail.—*LONDON & BLACKWALL RY. CO. v. LIMEHOUSE DISTRICT BOARD OF WORKS* (1856), 3 K. & J. 123; 26 L. J. Ch. 164; 28 L. T. O. S. 140; 20 J. P. 789; 5 W. R. 64; 69 E. R. 1048.

*Annotations*:—*As to* (1) *Apld. Ashton-under-Lyne Corp. v. Pugh*, [1898] 1 Q. B. 45. *Refd. Daw v. Metropolitan Board of Works* (1862), 12 C. B. N. S. 161; *L. & S. W. Ry.*

**Sect. 1.—Metropolitan: Sub-sect. 7, E. & F.; sub-sect. 8.]**

*v. Myers* (1881), 45 J. P. 731; *L. & N. W. Ry. v. Runcorn R. Co.* (1898) 1 Ch. 34; *Uckfield R. Co. v. Crowborough District Water Co.* (1899) 2 Q. B. 664; *Kershaw v. London, Midland & Scottish Ry.* (1924), 23 L. G. R. 592. *As to (2) Refd. C. & S. L. Ry. v. L. C. Co.* (1891) 2 Q. B. 513; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843; *Grand Junction Waterworks Co. v. Hampton U. C.* (1898), 67 L. J. Q. B. 903.

**2132. Special Act inconsistent with existing general Act.]—LONDON & BLACKWALL RY. CO. v. LIMEHOUSE DISTRICT BOARD OF WORKS, No. 2131, *ante*.**

**2133. —.**—[A railway co. was empowered by a special Act passed subsequently to Metropolitan Management (Amendment) Act, 1862 (c. 102), to make under a street in London a subway "with all necessary works connected therewith," & to take & use such of the lands delineated on the deposited plans, & described in the deposited books of reference as might be required for that purpose. The co. built in the street within the limits of deviation a station, a part of which projected beyond the general line of buildings. This station was necessary for the purposes of the railway, & apart from the provisions of the Metropolitan Management Acts was unobjectionable, but it could have been erected within the general line of buildings without any inconvenience except a considerable increase of expense.—*Held*: the station being necessary, the special Act empowered the co. to make it upon any of the scheduled lands lying within the limits of deviation; that the effect was to repeal sect. 75 of Metropolitan Management (Amendment) Act, 1862 (c. 102), so far as related to the station, & that there was therefore no jurisdiction to make an order under that sect. for the demolition of the projecting part.—*CITY & SOUTH LONDON RY. CO. v. LONDON COUNTY COUNCIL*, [1891] 2 Q. B. 513; 60 L. J. M. C. 119; 65 L. T. 362; 56 J. P. 6; 40 W. R. 166; 7 T. L. R. 613, C. A.]

*Annotations*: **Appl.** *L. C. v. London School Board*, [1892] 2 Q. B. 606. **Distd.** *Uckfield R. Co. v. Crowborough District Water Co.* (1899) 2 Q. B. 664. **Consd.** *Surrey Commercial Dock Co. v. Bermondsey Corp'n.* [1904] 1 K. B. 474. **Refd.** *L. & N. W. Ry. & G. W. Ry. v. Runcorn R. Co.* (1898) 1 Ch. 34; *L. C. Co. v. Wandsworth & Putney Gas Co.* (1900), 82 L. T. 562; *Whitechapel Board of Works v. Crow* (1901), 84 L. T. 595; *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59; *Moran v. Marsland*, [1909] 1 K. B. 744; *Kershaw v. London, Midland & Scottish Ry.* (1924), 23 L. G. R. 592.

**2134. —.**—[By sect. 19 of Elementary Education Act, 1870 (c. 75), power is given to a school board to purchase land for the purpose of providing sufficient public school accommodation for their district, & by sect. 20 the Education Department may make a provisional order authorising a school board, subject to confirmation of the order by Act of Parliament, to put in force the powers contained in Lands Clauses Consolidation Acts with reference to the purchase of land otherwise than by agreement. The school board for London, acting under Elementary Education Act, 1870, & of a special Act confirming a provisional order, compulsorily acquired a piece of land for the purpose of providing sufficient public school accommodation, the land being defined by metes & bounds in the schedule to the special Act. The school board then built upon the land a school with a playground attached, the external fence of the playground being within 20 feet of the centre of a public highway.—*Held*: sects. 4 & 6 of Metropolitan Management & Buildings Acts Amendment Act, 1876 (c. 22), which forbid the erection without the consent of the Metropolitan Board of Works of any building, wall, or fence within 20 feet of the centre of a highway, were

inconsistent with the statutory powers given to the school board for the acquisition & user of the land, & that the school board could therefore use the land for the statutory purposes for which it was acquired free from the restrictions imposed by those provisions.—*LONDON COUNTY COUNCIL v. LONDON SCHOOL BOARD*, [1892] 2 Q. B. 606; 62 L. J. M. C. 30; 56 J. P. 791; 40 W. R. 604; 8 T. L. R. 643; 36 Sol. Jo. 572; 5 R. 1, D. C.]

*Annotations*: **Refd.** *L. & N. W. Ry. v. Runcorn R. Co.* (1898) 1 Ch. 34; *Whitechapel Board of Works v. Crow* (1901), 84 L. T. 595; *Stretford U. D. C. v. Manchester South Junction & Altrincham Ry.* (1903), 68 J. P. 59; *Moran v. Marsland*, [1909] 1 K. B. 744.

**2135. —.**—[*Resps.*, on land demised to them by a railway co. for the purpose, built a coal order office, & the whole business done at the coal office was the selling of coal which had been carried over the railway. The coal office was wholly beyond the general line of buildings subsequently fixed by the London County Council. The land had been acquired by the railway co. under a special Act in 1862, which contained a clause that nothing in the Act should prejudice or take away any of the rights of the Metropolitan Board of Works (now the London County Council) or of any vestry or district board.—*Held*: *resps.* were liable to be convicted for erecting the coal office beyond the general building line (*CHANNELL, J.*), on the ground that, as before the passing of the special Act there was power in the Metropolitan Board of Works or vestries to prevent building on this land beyond the building line, the railway co. were under the clause in their Act restricted to the same extent from erecting or getting erected a building on that land which went beyond the building line, & (*SUTTON, J.*), on the ground that *resps.* had not shown that the railway co. were exercising any special powers conferred upon them by some special Act within sect. 31. of London Building Act, 1894 (c. cxxiii).—*LONDON COUNTY COUNCIL v. COAL CO-OPERATIVE SOCIETY, LTD.* (1907), 98 L. T. 580; 72 J. P. 68; 21 T. L. R. 209; 6 L. G. R. 387.]

**F. Proceedings for Infringement of Line.**

*See* Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75.

**2136. Nature of remedy.]—**Where a statute creates a new offence by prohibiting & making unlawful anything which was lawful before, & appoints a specific remedy against such new offence by a particular method of proceeding that particular method of proceeding must be pursued, & no other. Where, therefore, deft. had, as was alleged, violated the provisions of Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 75, by erecting a building without the consent of the Metropolitan Board of Works & beyond the line of building as provided for by the sect., & which sect. points out the remedy for such violation by summary proceedings before a justice:—*Held*: the remedy for such offence was by summary proceeding only, & an indictment would not lie.—*It. v. LOVIBOND* (1871), 21 L. T. 357; 36 J. P. 20; 19 W. R. 753.

**2137. Against whom proceedings taken.]—**(1) A summons under Metropolitan Management (Amendment) Act, 1862 (c. 102), for building beyond the general line of buildings in a street, is only good against the builder if it is issued whilst the building complained of is in course of erection. After the completion of the work, the summons should be against the owner or occupier.

(2) The six months limited by sect. 107 for the commencement of any proceedings for penalties under the Act begins to run from the time when

**2146.** —————.]—The proviso in sect. 6 of Metropolis Management & Building Acts Amendment Act, 1878 (c. 32), saving the application of the sect. under certain circumstances, applies only where the street in which buildings are being constructed was actually existing for the purposes of building before or at the date of the passing of the Act, where at that date the street

*Sect. 1.—Metropolitan: Sub-sects. 8 & 9.]*

was merely a country road, & not formed or laid out for building, the proviso has no application; & its protection cannot be invoked upon the ground that it was then a highway, & therefore a "street" by sect. 250 of Metropolitan Management Act, 1855 (c. 120).—*LONDON COUNTY COUNCIL v. MITCHELL* (1894), 63 L. J. M. C. 104; 10 R. 308, D. C.

**2147. — Consent of local authority.—Consent applied for after erection.]—***Mandamus* will not lie to the London County Council to compel them to hear & determine an application for their consent to the erection of a building at less than the prescribed distance from the centre of the roadway of a street, being a highway, when such application has not been made until after the building has been erected at less than the prescribed distance without such consent.—*R. v. LONDON COUNTY COUNCIL* (1897), 66 L. J. Q. B. 516; 76 L. T. 472; 13 T. L. R. 391; 41 Sol. Jo. 509; *sub nom. R. v. LONDON COUNTY COUNCIL. Ex p. WEBSTER*, 61 J. P. 439; 45 W. R. 605, D. C.

*Annotation:—* *Exld. A.-G. v. Denby*, [1925] Ch. 596.

**2148. — Rebuilding on old site.—What plans must be certified.]—**By sect. 43 of London Building Act, 1894 (c. cxxiii), a person who is desirous of building a domestic building on the site of a domestic building existing at the passing of the Act may submit to the district surveyor for certification "plans showing the extent of the previously existing domestic building in its several parts," & on getting a certificate of the accuracy of the plans may build without regard to the restrictions imposed by the Act upon the erection of new buildings, provided he does not deviate in any respect from the certified plans:—*Held*: the plans which he must get certified under that sect. as a condition of the right of so building are not confined to ground-plans, but include plans showing sects. & elevations & the areas of the several floors.—*PAYNTER v. WATSON*, [1898] 2 Q. B. 31; 67 L. J. Q. B. 610; 62 J. P. 467; 46 W. R. 655; 14 T. L. R. 397; 42 Sol. Jo. 490, D. C.

**2149. — Working men's dwellings.]—**(1) *Resp. D.* erected eleven houses & shops on the site of ten old houses; when completed the entire house was let to one tenant, who, while himself inhabiting the shop & hiring rooms behind it, let each floor to artisans & their families. The plans had been duly certified by the district surveyor:—*Held*: such buildings were a "re-erection," & it was not "to be inhabited or adapted to be inhabited by persons of the working class" within London Building Act, 1894 (c. cxxiii), s. 13 (5).

(2) *Resps., R. H., Ltd.*, had erected on the site of thirteen old cottages & gardens a large building adapted to provide lodging for single men by the night or week, with recreation rooms & conveniences for the use of the inhabitants & sleeping accommodation for about eight hundred men:—*Held*: this was not a building "to be inhabited or adapted to be inhabited by persons of the working class" under London Building Act, 1894 (c. cxxiii), s. 13 (5).—*LONDON COUNTY COUNCIL v. DAVIS, LONDON COUNTY COUNCIL v. ROWTON HOUSE CO.* (1897), 77 L. T. 693; 62 J. P. 68; 14 T. L. R. 113; 42 Sol. Jo. 115, D. C.

*Annotations:—* *As to (1) Consd. L. C. v. Patman & Fotheringham* (1903), 1 L. G. R. 519. *As to (2) Consd. Crow v. Davis* (1904), 91 L. T. 88. *Refd. Woodthorp v. Spencer & Husbands* (1899), 63 J. P. 246.

**2150. — Factory.]—***Resps.* were erecting two new buildings to be used as factories on a site recently occupied by six small dwelling-houses, the yards & out-buildings thereof. The height of the

said dwelling-houses was 28 feet, & the proposed factories about 52 feet. The factories were to be erected so that their external walls were in the same line as the external walls of the old dwellings, but were 9 feet or 10 feet less than the prescribed distance from the centre of the roadway, but no more land was occupied by the factories than by the old dwelling-houses:—*Held*: *resps.* were entitled to erected the factories as coming within the proviso to sect. 13 (5) of London Building Act, 1894 (c. cxxiii).—*LONDON COUNTY COUNCIL v. PATMAN & FOTHERINGHAM* (1903), 67 J. P. 285; 1 L. G. R. 519, D. C.

**2151. — New building erected on land.—Power to set back old boundary wall.—***London Building Act, 1894 (c. cxxiii), s. 14.]—*The above sect. does not empower the London County Council to give notice requiring the owner or occupier of land, upon part of which he has erected a new building, to set back an old boundary wall, forming the boundary of a space left between the new building & a street, so that the wall shall not be at less than the prescribed distance from the centre of the roadway of the street.—*LONDON COUNTY COUNCIL v. AYLESBURY DAIRY CO.*, [1898] 1 Q. B. 106; 67 L. J. Q. B. 24; 77 L. T. 440; 61 J. P. 759, D. C.

*Annotations:—* *Refd. Rea v. L. C. C.*, [1911] 1 K. B. 740. *Mentd. R. v. Norman*, [1924] 2 K. B. 315.

**2152. — London Building Act (1894) Amendment Act, 1898 (c. cxxxvii), s. 3.]—**The above sect. does not empower the London County Council to give notice requiring the owner or occupier of land upon which he has erected a new building to set back an old boundary wall, forming the boundary of a space left between the new building & a street, so that the wall shall not be less than the prescribed distance from the centre of the roadway of the street.—*REA v. LONDON COUNTY COUNCIL*, [1911] 1 K. B. 740; 80 L. J. K. B. 704; 104 L. T. 501; 75 J. P. 261; 9 L. G. R. 299, D. C.

**2153. — Building erected under special Act.]—**A gas co. erecting a building upon lands specified in a schedule to their private Act, which entitled them to erect such gasworks "as they think fit" upon such land, are nevertheless subject to the provisions of London Building Act, 1894 (c. cxxiii), relating to the position of new buildings in a street.—*LONDON COUNTY COUNCIL v. WANDSWORTH & PUTNEY GAS CO.* (1900), 82 L. T. 562; 64 J. P. 500; 44 Sol. Jo. 362, D. C.

*Annotation:—* *Refd. Whitechapel Board of Works v. Crow* (1901), 84 L. T. 595.

#### SUB-SECT. 9.—FORMATION, ADAPTATION AND ALTERATION OF STREETS.

*See* London Building Act, 1894 (c. cxxiii), ss. 7–11, 18, 200 (1).

**2154. "Commence to form & lay out"—Question of fact.]—**By Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 95, no existing road or way being of less width than 40 feet shall (after 1862) be formed or laid out for building as a street for the purposes of carriage traffic, unless it be widened to the full width of 40 feet, the measurement to be taken half on either side from the centre of the roadway to the external wall or front of the houses; but when forecourts are intended to be left in front of the houses, the width shall be measured from the fence dividing the forecourts from the public way. By sect. 107, no person is to be liable to penalties unless complaint be made within six months after the commission

or discovery of the offence. In 1864, several plots of land abutting on one side of a lane were sold for building purposes; the lane was an ancient carriage way, & had buildings at intervals on both sides erected before 1862; the lane varied in width from 41 feet to 28 feet, which was the width opposite the plots, & on the other side of the road was a permanent inclosure belonging to a church, & other buildings erected before 1862. In July, 1865, A. bought the plots, houses having been built on two of them, the front walls of the houses being 27 feet from the old wooden boundary fence of the lane. On Sept. 26, 1865, A. began to remove this fence, which had been left untouched, & to substitute a permanent wall & railing, & the work was completed on Oct. 14. On Oct. 6 the Board of Works were informed of what A. was doing, & in Mar. 1866, they laid an information against him to recover penalties for contravening the statute. At the hearing, the magistrate found that A., by taking down the old fence & erecting the permanent fence, did begin to form & lay out the road for building as a street on Sept. 26, & completed such forming on Oct. 14; that the road was not required by sect. 98 to be widened to 40 feet from the opposite fence, but only to the width of 20 feet from the centre of the roadway to the boundary fence of A.'s ground; & he convicted A. in certain penalties:—*Held*: the conviction was right.

It is . . . a question of fact for the magistrate to decide whether deft. has begun to lay out the street.—*TAYLOR v. METROPOLITAN BOARD OF WORKS* (1867), L. R. 2 Q. B. 213; 36 L. J. M. C. 53; 31 J. P. 581; 15 W. R. 765.

*Annotations*:—*Consd.* Metropolitan Board of Works v. Clever (1868), L. R. 3 C. P. 531; A.-G. v. Dorin, [1912] 1 Ch. 369.

**2155.** — *What amounts to—London Building Act, 1894 (c. cxxiii), ss. 7, 8, 200 (1).*—A row of houses having been erected along the side of a street forming part of a building estate, resp. erected a shop on land purchased from the freeholder of the estate on the same side of the street & fronting to it, but separated from the end house of the row by an intervening vacant space of the width of 40 feet, which is the statutory width of a street intended for carriage traffic. There was a side door leading from the shop into the vacant space. At the back of the shop he also erected a stable, the only access to which for carriages & horses was along the vacant space. This space, which was the property of the freeholder of the estate, was marked on the estate plan as a proposed street, but at the time of the erection of the shop & stable it had not been in fact laid out by the freeholder as a street; &, although resp. expected that it would be laid out as a street, there was no contract by the freeholder that it should be so laid out:—*Held*: as resp. had no control over the soil of the vacant space, he did not by erecting the shop & stable commence to form a street within the meaning of sect. 8 of the above Act.—*LONDON COUNTY COUNCIL v. DIXON*, [1899] 1 Q. B. 496; 68 L. J. Q. B. 526; 80 L. T. 232; 63 J. P. 390; 47 W. R. 521; 15 T. L. R. 206; 43 Sol. Jo. 279, D. C.

*Annotation*:—*Reid*. L. C. C. v. Heathman (1905), 69 J. P. 222.

**2158.** — — — — —.]—A. was the freeholder of a triangular piece of ground, bounded by two loops of a railway, the only access to which was through a tunnel under one of the loops. A rough road with clinkers led through this tunnel to a factory on the ground & to a place used for the deposit of rubbish, stopping abruptly in the middle

of the said piece of ground. An 18 inch sewer was laid along this road as far as the factory. A. submitted for the approval of the London County Council the plan of a proposed new street to run through the said tunnel (to be widened to 40 feet), over the line of the said rough road, & onwards right across the said piece of ground, & over the railway loop on the other side of the ground by a bridge, to be built, thus connecting two roads on the outer sides of the two loops. This plan was sanctioned by the Council on the conditions that the roadway of the new street should be clearly defined & thrown open as a highway within a certain time, & that no new building should be commenced to be erected "upon either side of such roadway or upon a site abutting on such roadway," unless the roadway should have been made up in a certain way, & other provisions complied with. A. agreed to lease a plot of his ground, which was fenced off, the nearest corner of which was 187 feet from the existing road, with a right of way over the intervening strip of about an acre in extent, & over the road through the tunnel, & also over the roadway of the new street, if it should afterwards be erected. A. also placed fresh clinkers from time to time on the road, & lengthened the sewer along the road to serve two new buildings which he commenced to erect on the plot he had agreed to lease. The road was not continued across A.'s ground, the tunnel was not widened, & the bridge was not built. A summons under sect. 200 (1) (a) of the above Act against A. for commencing to form & lay out a street not in accordance with the said conditions of the council was dismissed by the magistrate, who found that A. had commenced to form & lay out a part of the proposed new street, but that he had not commenced to erect new buildings "upon either side of such roadway or upon a site abutting on such roadway":—*Held*: (1) A. had not commenced to form & lay out the proposed new street; (2) A. had not commenced to erect new buildings "upon either side of such roadway or upon a site abutting on such roadway" within the second condition of the Council's sanction.—*LONDON COUNTY COUNCIL v. COLLINS* (1905), 93 L. T. 510; 69 J. P. 401; 3 L. G. R. 1103, D. C.

*Annotation*:—*As to* (2) *Consd.* R. v. S. E. Ry. (1910), 74 J. P. 137.

**2157.** — — — — —.]—At the end of the year 1903, resp. bought a plot of land adjoining a private road laid out & sewered in 1870, the soil of which was not vested in him. On this plot he built a house 50 yards from the private road. To facilitate the entrance of building materials he took down a post & rail fence along the front of the plot, afterwards replacing it by a permanent oak fence pursuant to an undertaking by him in the conveyance of the plot, by which he had a right of way along the private road to his plot. The private road extended about 1,200 feet & afforded access to some four or five residences built shortly after the road was laid out. In 1904 it appeared from notices placed in the vicinity that land adjoining the private road was for sale & that resp. was erecting or would erect other residences:—*Held*: resp., by building his house & by erecting a permanent oak fence along the front of his plot, had not commenced to form & lay out a street within sect. 7, or to adapt a way for carriage traffic within sect. 10 of the above Act.—*LONDON COUNTY COUNCIL v. KING* (1905), 69 J. P. 406; 3 L. G. R. 1046, D. C.

**2158.** — — — — —.]—Resp. was the owner of land on which was a private way over which a



Sect. 1.—Metropolitan: Sub-sects. 9 & 10.]

few other persons had a right to go to premises abutting on the way. It was paved with granite & had gates at the end. Resp. enlarged a building in his possession by extending it backwards along one side of the way, but he had no intention of commencing to form or lay out a street. He had done nothing to the way itself, which he had widened by 4 feet of additional land not paved or made up, to alter or adapt it for carriage traffic:—*Held*: on the facts, resp. could not be convicted under sect. 7 of the above Act of commencing to lay out or form a new street, or under sect. 10 of altering & adapting a street.—*LONDON COUNTY COUNCIL v. HEATHMAN* (1905), 69 J. P. 222; 3 L. G. R. 1016, D. C.

**2159. "Altering & adapting"—What amounts to—London Building Act, 1894 (c. cxxiii), s. 10.]—***LONDON COUNTY COUNCIL v. KING*, No. 2157, *ante*.

**2160. ————**—*LONDON COUNTY COUNCIL v. HEATHMAN*, No. 2158, *ante*.

**2161. Requirements—Width of 40 feet—Rear of premises abutting on road.]—***Metropolis Management (Amendment) Act, 1862 (c. 102), s. 98*, provides that "no existing road, passage, or way being of a less width than 40 feet shall be hereafter formed or laid out for building as a street for the purposes of carriage traffic, unless such road, passage, or way be widened to the full width of 40 feet," the measurement to be taken half on either side from the centre or crown of the roadway to the external wall or front of the house, or to the fence or boundary of the forecourt, if any:—*Held*: this provision did not apply where the buildings abutted in the rear upon an old lane of less width 10 feet.—*METROPOLITAN BOARD OF*

(5), 19 C. B. N. S. 445; 141 E. R. 860.

*Annotation*:—**Appld.** *Metropolitan Board of Works v. Clever* (1868), L. R. 3 C. P. 531.

**2162. ————**—*Resp.* was the owner of land upon which he had in 1866 erected some houses, the gardens in the rear of which abutted upon an ancient lane, & some of the owners of land adjoining this lane had in 1867 begun to form it into a street for carriage traffic, within sect. 98 of *Metropolis Management (Amendment) Act, 1862 (c. 102)*. Resp. himself had done no act towards forming or laying out the lane as a street for the purposes of carriage traffic, otherwise than by the removal in 1866 of an old bank & thorn fence, & the substitution of an oak fence 3 feet within his own land, nor had he any intention of doing any such act, or of putting up any building fronting towards the lane:—*Held*: he had not committed any offence against the Act, & was not bound to set back his oak fence, so as to leave a space of 20 feet between it & the centre of the lane.—*METROPOLITAN BOARD OF WORKS v. CLEVER* (1868), L. R. 3 C. P. 531; 37 L. J. M. C. 126; 18 L. T. 723; 16 W. R. 1016.

**2163. ————**—*How measured.]—TAYLOR v. METROPOLITAN BOARD OF WORKS*, No. 2151, *ante*.

**2164. ————**—*Application to newly formed streets.]—Metropolis Management (Amendment) Act, 1862 (c. 102), s. 98*, applies to newly formed roads as well as to roads in existence at the time of the passing of the Act.—*R. v. BAKER* (1870), 31 J. P. 822.

**2165. ————**—*& open at both ends.]—By Metropolis Management (Amendment) Act, 1862 (c. 102), s. 98*, no road being of less width than 40 feet shall hereafter be formed or laid out for building as a street for the purposes of carriage traffic unless such road be widened to the full width of 40 feet, or for the purposes of foot traffic only

unless such road be widened to the full width of 20 feet, "or" unless such streets respectively shall be open at both ends:—*Held*: such street must be of the width prescribed & be also open at both ends.—*METROPOLITAN BOARD OF WORKS v. STEED BROTHERS* (1881), 8 Q. B. D. 445; 51 L. J. M. C. 22; 45 L. T. 611; 46 J. P. 199; 30 W. R. 891, D. C.

*Annotation*:—**Expld.** *Daw v. L. C. C.* (1890), 59 L. J. M. C. 112.

**2166. ————**—*Open at both ends—Private road.]—*Applts., being owners of a plot of land abutting on the thoroughfare in the Metropolis, laid out a road for building as a new street for carriage traffic, & erected, at the junction thereof with the thoroughfare, certain piers, with the intention of hanging gates thereon for the purpose of excluding the public, without the consent of the Metropolitan Board of Works or their successors. The road in question had never been dedicated to or used by the public. Applts. were summoned before a magistrate, & convicted for having laid out a new street with an entrance thereto not of the full width of such street nor open from the ground upwards, contrary to *Metropolis Management Act, 1855 (c. 120)*, & a bye-law made thereunder, & to sect. 98 of *Metropolis Management (Amendment) Act, 1862 (c. 102)*. Subsequently, applts. were summoned before a magistrate & convicted for permitting the said road to be continued, formed, & laid out for a certain number of days, not being open at both ends from the ground upwards as directed by the said statute & bye-law:—*Held*: this conviction was right.—*DAW & SON v. LONDON COUNTY COUNCIL* (1890), 59 L. J. M. C. 112; 62 L. T. 937; 51 J. P. 502; 6 T. L. R. 289, D. C.

**2167. ————**—*Direct communication—London County Council General Powers Act, 1890 (c. cxxiii), s. 35.]—*Under the above Act, no road, which will not directly communicate at both ends with a public carriage way, shall be formed without consent of the council who may prescribe conditions. E. made a new road leading out of a street, the other end being intended to go round & then eventually come back into the same street:—*Held*: the Council was not entitled to insist that the new road should be continued till it reached some other street.—*LONDON COUNTY COUNCIL v. EDMONDSON & SONS* (1892), 66 L. T. 200; 56 J. P. 313; 8 T. L. R. 267, D. C.

**2168. ————**—*London Building Act, 1894 (c. cxxiii), s. 9 (4).]*—The above sub-sect. gives power to the County Council to refuse their sanction to the formation of a new street where such street would not afford "direct communication" between two existing streets:—*Held*: the question whether a proposed new street did or did not afford such direct communication was a question of fact, with the decision of which the ct. would not interfere.—*WOODHAM v. LONDON COUNTY COUNCIL*, [1898] 1 Q. B. 863; 67 L. J. Q. B. 707; 78 L. T. 553; 62 J. P. 342, D. C.

**2169. ————**—*Leading directly into another street.]—London County Council Improvement Act, 1899 (c. cclxvi), s. 55 (6).]*—Under the above sub-sect. a local authority was required, as part of certain alterations, to maintain a public street "leading into" another street. The authority proposed to do this by making two rectangular turns in the street before it arrived at the other street:—*Held*: the proposed street did not "lead into" the other street within the meaning of the Act but must be taken, allowing for slight curvatures, straight into the other street.—



**METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. LONDON COUNTY COUNCIL** (1904), 68 J. P. 501; 2 L. G. R. 1286.

**2170. Notice of intention to lay out—Notice to district surveyor—Time within which action must be brought.**—L. was summoned by the Metropolitan Board of Works for laying out a new street of less than the required width, contrary to Metropolis Management (Amendment) Act, 1862 (c. 102), s. 98. L. gave notice of his intended building in May, 1883, to the district surveyor, & paid his fees, but no notice was given by the surveyor to the Board till Nov. 1883. The complaint was made in Mar. 1884:—*Held*: notice to the district surveyor was the date of the discovery by the Board, & therefore, the complaint was too late, being more than six months after the discovery, & so contrary to sect. 107 of the Act.—**METROPOLITAN BOARD OF WORKS v. LATHEY** (1881), 49 J. P. 215, D. C.

#### SUB-SECT. 10.—PROJECTIONS.

**2171. Metropolis Paving Act, 1817 (c. xxix), s. 72—Confined to projections over public ways.**—The power of comrs. under the above Act to remove objects affixed to houses without making compensation, is limited to such things as project over the public ways.—**BOUVIERIE v. MILES** (1830), 1 B. & Ad. 38; 8 L. J. O. S. K. B. 338; 109 E. R. 701.

**2172. — Whether repealed by Metropolitan Building Act, 1855 (c. 122), s. 26.**—By Metropolis Paving Act, 1817 (c. xxix), s. 72, power is given to the persons having the control of the pavements of streets in the Metropolis to regulate & remove (*inter alia*) all projections from the fronts of houses which in their judgment are inconvenient or incommodious to passengers along the footways; & a penalty is imposed upon any owner or occupier who refuses or neglects to remove any such projection after notice. By sect. 26 of Metropolitan Building Act, 1855 (c. 122), "The following rules shall be observed as to projections . . . (2) In any street or alley of a greater width than 30 feet any shop front may project ten inches & no more. (5) Except in so far as is permitted by this sect. in the case of shop fronts, & with the exception of . . . window dressings, & other like architectural decorations, no projection from any building shall extend beyond the general line of fronts in any street, except with the permission of the Metropolitan Board of Works. . . ." Resp. built upon one side of a public street four houses or shops upon four plots of ground of which he was lessee, & erected against the fronts of them five stone pilasters, forming parts of shop fronts, the bases of which pilasters encroached upon the public footway to the extent of 6 inches in depth. Appls., having passed a resolution declaring the pilasters to be inconvenient & incommodious to passengers along the footway, served resp. with a notice to remove them, & upon his default took out a summons against him under sect. 72 of Metropolis Paving Act, 1817, for not removing them. The magistrate dismissed the summons:—*Held*: sect. 26 of Metropolitan Building Act, 1855 (c. 122), did not amount to a repeal *pro tanto* of sect. 72 of the Paving Act; that it only authorised projections in cases where but for a statutory prohibition they would be lawful, & did not authorise projections which would interfere with the user by the public of a public foot-

way; & the decision of the magistrate was wrong.—**ST. MARY, ISLINGTON, VESTRY v. GOODMAN** (1889), 23 Q. B. D. 154; 58 L. J. M. C. 122; 61 L. T. 44; 54 J. P. 52, D. C.

*Annotations*:—**Consd.** **Fortescue v. St. Matthew, Bethnal Green, Vestry**, [1891] 2 Q. B. 170. **Dtd.** **Summers v. Holborn District Board of Works** (1893), 68 L. T. 226. **St. Mary, Islington, Vestry v. Goodman** has been reversed in terms, & the view I there took has been held to be correct (LORD COLERIDGE, C.J.).

**2173. —**—**F. built shops on the side of a public street more than 30 feet wide, & erected pilasters projecting more than 9 inches beyond the building line on to the footway. For this he was convicted under sect. 72 of Metropolis Paving Act, 1817:—Held: the conviction must be quashed (1) because the above sect. is impliedly repealed by Metropolis Management Act, 1855 (c. 120), s. 119; (2) because the projections complained of were authorised by sect. 26 of Metropolitan Building Act, 1855 (c. 122).**—**FORTESCUE v. ST. MATTHEW, BETHNAL GREEN, VESTRY**, [1891] 2 Q. B. 170; 60 L. J. M. C. 172; 65 L. T. 256; 55 J. P. 758, D. C.

*Annotations*:—As to (1) **Consd.** **Summers v. Holborn District Board of Works**, [1893] 1 Q. B. 612. **Refd.** **Keop v. St. Mary's, Newington, Vestry**, **Austin v. St. Mary's, Newington, Vestry**, [1894] 2 Q. B. 524. As to (2) **Refd.** **Hull v. L. C. C.** (1901), 84 L. T. 160. *Generally*, **Mend.** **Kruse v. Johnson**, [1898] 2 Q. B. 91.

**2174. Projecting structures—Lamp iron.**—The statute [Metropolis Management Act, 1855 (c. 120), s. 119] requires something more than a simple projection. It must be an annoyance; but of that the magistrate may be satisfied on his own view (*per* CUR.).—(**GABRIEL v. ST. JAMES'S, WESTMINSTER, VESTRY** (1859), 23 J. P. Jo. 372.

**2175. — Show board.**—A penalty is imposed by Metropolis Police Act, 1839 (c. 47), s. 60 (7), upon every person "who shall set up or continue any . . . projection from any . . . part of any . . . shop . . . so as to cause any . . . obstruction in any thoroughfare." Applt. was summoned before a metropolitan police magistrate for an offence against the foregoing enactment. It was proved that he used affixed to the front of the shop a movable show board, 11½ inches of which projected at a height of 2 feet 3 inches over the footway of the street, which was 36 feet 8 inches wide. Applt. proposed to call witnesses to prove that they were not incommoded by the projection; but the magistrate refused to hear them, & convicted applt.:—*Held*: the magistrate had power to reject the evidence proposed to be adduced as irrelevant, & the conviction must be affirmed.—**READ v. PERRETT** (1870), 1 Ex. D. 319; 41 J. P. 135.

**2176. — Pilasters.**—**ST. MARY, ISLINGTON, VESTRY v. GOODMAN**, No. 2172, *ante*.

**2177. —**—**FORTESCUE v. ST. MATTHEW, BETHNAL GREEN, VESTRY**, No. 2173, *ante*.

**— Beyond building line.**—*See* Sub-sect. 7, C., *ante*.

**2178. Right of adjoining owner to sue.**—The proprietor of a theatre erected a verandah without the permission of the Metropolitan Board of Works. Pltf., who was the owner of the adjoining premises, claimed an injunction on the grounds (a) that such erection without permission was in contravention of Metropolitan Building Act, 1855 (c. 122); (b) that the erection obstructed his light & air. The ct. found that the structure was in contravention of the Act, but that the case as to obstruction failed:—*Held*: pltf. could not sue alone, & the proceedings, if any, must be taken by the A.-G., *ex officio*, or at the relation of the Metropolitan Board of Works.—**BROOKS v. TERRY** (1888), 4 T. L. R. 678.

*Sect. 1.—Metropolitan: Sub-sects. 11, 12, 13, 14 & 15.]*

**SUB-SECT. 11.—DANGEROUS STRUCTURES.**

*See London Building Act, 1894 (c. ccxiii), ss. 106, 107; London Building Act (Amendment) Act, 1898 (c. cxxxvii), s. 5.*

**2179. Removal by county council—Breaking up pavement—Duty to reinstate.]**—Where the London County Council, acting under the powers conferred on them by Part IX. of London Building Act, 1894 (c. ccxiii), have, for the purpose of securing a dangerous structure, erected shores & a hoarding, & have taken up portions of the pavement to allow of the shores & the uprights of the hoarding being fixed in the ground, the duty of replacing the pavement after the shores & hoarding have been removed lies upon the owner of the premises & not upon the County Council.—*CRISP v. LONDON COUNTY COUNCIL*, [1899] 1 Q. B. 720; 68 L. J. Q. B. 499; 80 L. T. 654; 63 J. P. 484.

**2180. Dangerous bridge over canal.]**—By a private Act, which authorised applt. co. to construct a canal, the co. were required, where they cut through a highway, to make & maintain a bridge to carry the highway across the canal, & also to make & maintain bridges for the benefit of adjoining owners. It was further provided that the owners of lands through which the canal was constructed might, with the consent of the co., provide additional bridges at their own expense. In 1819 the co. cut through a public footpath, & erected a bridge to carry such footpath across the canal. This bridge was admitted by the co. to have been their property, & repairable by them. In 1858 a landowner, under an agreement with the co. which had been lost, substituted a larger bridge for the one constructed in 1819. There was no evidence of the contents of the lost agreement. The bridge became dangerous, & the London County Council served a dangerous structure notice on the co. under sect. 106 of London Building Act, 1894 (c. ccxiii), requiring them to take down or secure the bridge. The co. failed to comply with such notice, & the council thereupon applied to a magistrate under sect. 107 of the Act for an order requiring the co. as "owners" of the bridge to take it down or secure it. The magistrate held that the co. were the "owners" of the bridge & made the order asked for, but stated a case for the opinion of the High Ct.:—*Held*: the magistrate was right in holding that the co. were the "owners" of the bridge within sect. 5 of the Act.—*REGENT'S CANAL & DOCK CO. v. LONDON COUNTY COUNCIL* (1909), 73 J. P. 270; 7 L. G. R. 580, C. A.

**SUB-SECT. 12.—CONSTRUCTION OF ARCHES, ETC., BENEATH PUBLIC WAYS.**

*See London Building Act, 1894 (c. ccxiii), ss. 71, 72.*

**2181. "Building structure or work"—Electric street boxes.]**—Appls., being a local authority within Electric Lighting Acts, 1882 (c. 56), & 1888 (c. 12), had in pursuance of those Acts obtained a provisional order confirmed by a statute. Under that order they constructed boxes in the street in connection with the supply of electric light:—*Held*: such boxes were buildings, structures, or works within London Building Act, 1894 (c. ccxiii), s. 145, & notice under that sect. must be served on the district surveyor before the erection of such boxes.—*WHITECHAPEL*

*BOARD OF WORKS v. CROW* (1901), 84 L. T. 595; 65 J. P. 549; 17 T. L. R. 403; 19 Cox, C. C. 700, D. C.

*Annotations:—Folld. Charing Cross & Strand Electricity Supply Corp'n. v. Woodthorpe* (1903), 88 L. T. 772; *County of London Electric Supply Co. v. Perkins* (1908), 98 L. T. 870. *Appld. Moran v. Marsland*, [1909] 1 K. B. 744.

**2182. ———.]**—An electric lighting box of considerable size & substantial construction constructed in a street is a "building, structure, or work" within sect. 145 of London Building Act, 1894 (c. ccxiii), & the circumstance that the electric lighting undertakers by whom the box is constructed are required to give notice of the construction of such boxes to the local authority, & to the Postmaster-General, & to construct the boxes in accordance with plans approved by those authorities, does not relieve them from the obligation of giving notice to the district surveyor under sect. 145 of the Act of 1894.—*CHARING CROSS & STRAND ELECTRICITY SUPPLY CORPN. v. WOODTHORPE* (1903), 88 L. T. 772; 67 J. P. 286; 1 L. G. R. 551, D. C.

*Annotations:—Consd. Surrey Commercial Dock Co. v. Bermondsey Corp'n.*, [1904] 1 K. B. 474. *Folld. County of London Electric Supply Co. v. Perkins* (1908), 98 L. T. 870. *Appld. Moran v. Marsland*, [1909] 1 K. B. 744.

**2183. ———.]**—Appls., who supplied electric light under the powers granted by the County of London (Northern Extensions) Electric Lighting Order, 1897, & the confirming Att., acting under these powers, constructed beneath the footways in L. Lane, for the purpose of repairing & renewing their electric cables, a street box, 27 x 27 inches x 30 inches, with a concrete floor, brick walls, & an iron & concrete lid. Appls., before beginning the work, served the notices required by the above order on the Postmaster-General, the H. borough council & the London County Council, but they did not serve on the district surveyor the building notice required by London Building Act, 1894 (c. ccxiii), s. 145 (a), & the magistrate convicted them of a breach of that sect.:—*Held*: the conviction must be affirmed, as the size of the box was only a circumstance to be taken into consideration by the magistrate in deciding whether the box was a structure, & as the service of the notices required by the order did not dispense with the necessity of serving a building notice as required by sect. 145 (a) of London Building Act, 1894.—*COUNTY OF LONDON ELECTRIC SUPPLY CO., LTD. v. PERKINS* (1908), 98 L. T. 870; 72 J. P. 133; 24 T. L. R. 327; 6 L. G. R. 344, D. C.

*Annotation:—Appld. Moran v. Marsland*, [1909] 1 K. B. 744.

**SUB-SECT. 13.—BUILDINGS ERECTED IN NEW STREETS.**

*See Metropolitan Management (Amendment) Act, 1862 (c. 102), s. 85.*

**2184. House at corner of old & new streets—Fronts of house in old street—Whether erected on "side of new street."]**—By sect. 85 of Metropolitan Management (Amendment) Act, 1862 (c. 102), no building except a church or chapel is to be erected on the side of a new street of a less width than 50 feet, which exceeds in height the distance from the external wall or front of such building to the opposite side of the street, without the consent in writing of the Metropolitan Board of Works, now the London County Council.

*Reps.' house* was built at the corner of an old street & of a new street less than 50 feet wide; the front of the building & the main entrance were

in the old street. The house was, without the written consent of the London County Council, built to a height greater than the width of the new street:—*Held*: although its main frontage was in the old street, the house was nevertheless “erected on the side of a new street” within sect. 85, & an offence had therefore been committed by resps. against that sect.—*LONDON COUNTY COUNCIL v. LAURANCE & SONS*, [1893] 2 Q. B. 228; 62 L. J. M. C. 176; 69 L. T. 344; 57 J. P. 617; 41 W. R. 688; 9 T. L. R. 521; 37 Sol. Jo. 583; 5 R. 494, D. C.

**2185. House erected to prohibited height—Continuing offence—Metropolis Management (Amendment) Act, 1862 (c. 102), s. 107.]**—Sect. 85 of the above Act prohibits the erection of a building on the side of a new street of a less width than 50 feet, which shall exceed in height the distance from the front of the building to the opposite side of the street, without the consent of the London County Council, & imposes penalties for offences against the Act, & in case of a continuing offence, a further penalty for every day during which such offence shall continue after notice from the County Council. By sect. 107, no person is liable to a penalty unless the complaint has been made within six months next after the commission or discovery of such offence. Resp. was owner of a building of a height prohibited by sect. 85. No proceedings were taken against him in respect of the erection of the building. More than six months after the completion of the building the London County Council served a notice, requiring him to comply with the law with respect to the building, subject to the penalties provided by the sect., & afterwards summoned him for penalties for each day after the date of the notice:—*Held*: the continuance at a prohibited height, after notice, of a building already erected was a continuing offence within the Act, & complaint having been made within six months next after the commission or discovery of the offence, resp. was liable.—*LONDON COUNTY COUNCIL v. WORLEY*, [1894] 2 Q. B. 826; 63 L. J. M. C. 218; 71 L. T. 487; 59 J. P. 263; 43 W. R. 11; 10 T. L. R. 652; 18 Cox, C. C. 37; 10 R. 510, D. C. *Annotation*:—*Reid*. *Hull v. L. C. C.* (1901), 84 L. T. 160.

#### SUB-SECT. 14. - BREAKING UP STREETS.

*See* Metropolitan Paving Act, 1817 (c. xxix), ss. 11–23; *Metropolis Management Act, 1855* (c. 120), ss. 109–113; *Metropolis Management (Amendment) Act, 1862* (c. 102), s. 82.

**Supply of electricity.]**—*See* ELECTRIC LIGHTING, Vol. XX., pp. 201, 217, Nos. 18, 108.

**Supply of gas.]**—*See* GAS, Vol. XXV., pp. 471 *et seq.*

**Supply of water.]**—*See* WATER SUPPLY.

**Construction & working of railways.]**—*See* RAILWAYS.

**Construction of sewers & drains.]**—*See* SEWERS & DRAINS.

**Construction of telegraph & telephone lines.]**—*See* TELEGRAPHS & TELEPHONES.

**Construction of tramways & light railways.]**—*See* TRAMWAYS & LIGHT RAILWAYS.

#### SUB-SECT. 15.—LIGHTING STREETS.

*See* *Metropolis Management Act, 1855* (c. 120), s. 130.

**2186. Unfinished road on private property.]**—

An unfinished road, in a parish mentioned in *Metropolis Management Act, 1855* (c. 120), Sched. (A), containing inhabited houses along part of it, communicated, at one end only, with another road containing houses placed singly at long intervals. The soil of such unfinished road was private property; & the road itself had not been dedicated to the public. The vestry of the parish refused to light the road under sect. 130 [of the Act]. On a motion for *mandamus* to compel them to do so, the ct. discharged the rule, on the ground that the vestry were not bound to treat the road as a street under sects. 130, 250.—*R. v. ST. MARY, ISLINGTON, VESTRY* (1858), E. B. & E. 743; 22 J. P. Jo. 383; 120 E. R. 687.

**2187. Accident owing to insufficient lighting—Liability of council for negligence.]**—A vestry having the charge of the lighting of a parish turned out some of the lights before daylight. A jury found that an accident occurred owing to the lights being out. The county ct. judge found that the vestry had lawfully exercised their discretion to turn out the lights under the latter part of sect. 30 of *Metropolis Management Act, 1855* (c. 120), & were not liable for non-feasance. On appeal it was submitted that they were liable for misfeasance in turning out some of the lights that had already been lighted:—*Held*: the county ct. judge was right.—*YOUNG v. ST. MARY'S, ISLINGTON, VESTRY* (1896), 60 J. P. 821, D. C. *Annotations*:—*Consd.* *McClelland v. Manchester Corpn.*, [1912] 1 K. B. 118; *Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132.

**2188. ——— Unlighted street refuge.]**—*Pltf.*, a taxicab driver, was driving his cab at night along a street which was under the control of defts., a borough council, & the cab collided with a refuge & was damaged. The refuge was generally lighted by a lamp controlled by a lighting co., but in an action by *pltf.* against *defts.* for negligence the judge found that though at the time of the accident the light was out there was nothing to show how it came to be extinguished, & that there was no evidence of negligence on the part of *defts.* or of the lighting co.:—*Held*: on the facts there was evidence to justify the judge's finding.—*BROWN v. LAMBETH BOROUGH COUNCIL* (1915), 32 T. L. R. 61, D. C.

**2189. ——— ———.]**—Under *Metropolis Management Act, 1855* (c. 120), s. 130, *defts.* were under a duty to light the streets within their district. Under sect. 108 of the Act they had power to erect street refuges. The light on a refuge erected by *defts.* was erratic because, owing to the restrictions of the lighting system due to war conditions, it was difficult to maintain electric pressure. On Mar. 20, 1917, it was alight at 6.30 p.m., it was not alight at 7.30 p.m., & it was alight at 8.15 p.m. Subsequently *pltf.*'s driver drove his taxicab on to the refuge, the light being then out, & the cab sustained damage. A jury found that *defts.* were negligent in omitting to maintain a danger lamp on the refuge:—*Held*: there was evidence of negligence.—*BALDOCK v. WESTMINSTER CITY COUNCIL* (1918), 88 L. J. K. B. 502; 120 L. T. 470; 83 J. P. 98; 35 T. L. R. 188; 17 L. G. R. 190, C. A.

*Annotations*:—*Consd.* *Carpenter v. Finsbury B. C.*, [1920] 2 K. B. 195. *Reid*. *Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132.

**2190. ——— ———.]**—*Metropolis Management Act, 1855* (c. 120), s. 130, provides that “every vestry & district board shall cause the several streets within their parish or district to be well & sufficiently lighted, & for that purpose shall maintain, or set up & maintain, a sufficient

*Sect. 1.—Metropolitan: Sub-sects. 15, 16, 17, 18, 19, 20, 21 & 22.]*

number of lamps in every such street, & shall cause the same to be lighted with gas or otherwise, & to continue lighted at & during such time as such vestry or board may think fit, necessary, or proper:—*Held*: under this sect. the obligation of the local authority as to any particular street is to ensure that it is well & sufficiently lighted. Where an accident is alleged to have been due to the sufficient light provided for a street it is for the tribunal of fact to determine whether the statutory obligation of the local authority has been complied with; it is not enough for the local authority to say that in their discretion they considered that the lighting actually provided was sufficient. —*CARPENTER v. FINSBURY BOROUGH COUNCIL*, [1920] 2 K. B. 195; 89 L. J. K. B. 554; 123 L. T. 299; 84 J. P. 107; 64 Sol. Jo. 420; 18 L. G. R. 370.

*Annotation:—Reid. Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132.

*By electric light.*—*See* ELECTRIC LIGHTING, Vol. XX., p. 219, Nos. 115, 116.

*By gas.*—*See* GAS, Vol. XXV., pp. 491 *et seq.*

#### SUB-SECT. 16.—POSTS AND RAILS.

*See* Metropolitan Paving Act, 1817 (c. xxix), s. 58; *Metropolis Management Act*, 1855 (c. 120), s. 108.

**2191. Vacant ground—Exposed & dangerous place.**—*Metropolitan Paving Act*, 1817 (c. xxix), s. 58, authorises the comrs. or trustees, etc., having the control of the pavements of the streets & public places in any parochial or other district within the jurisdiction of the Act, to cause posts of wood, stone, or iron, to be set up near or adjoining to the foot pavements in such part, etc., as they should judge necessary. It also authorises them to set up posts & rails near or adjoining to any vacant ground or other exposed & dangerous place abutting upon or adjoining to any of the streets or public places in such parochial or other districts, etc., for the purpose of preventing accidents & casualties. *Deft.*, the clerk to the comrs. of paving, having fixed two posts & an iron rail adjoining to a certain yard or space:—*Held*: he had exceeded the authority given by the statute, inasmuch as the yard or space adjoining to which the posts & rail had been fixed, was not, from what appeared in the case submitted for the opinion of the ct., vacant ground, or an exposed & dangerous place.

*Scmble*: the casualties & accidents, for the prevention of which the authority was given, are such as affect the public, not such as operate as a nuisance to a private individual, & for which the law has provided the party with a remedy.—*PULLER v. TAYLOR* (1837), 6 L. J. C. P. 275.

**2192. Market—Protection of public rights of way—Effect of Metropolitan Management Act, 1855 (c. 120), s. 91.**—A district board of works, under the powers conferred by *Metropolitan Paving Act*, 1817 (c. xxix), s. 58, & *Metropolis Management Act*, 1855 (c. 120), s. 108, threatened to erect posts by the side of public footpaths along the public roads leading into the area of S. market, in order to preserve the rights of the public & to insure the safety of foot passengers. It was proved that this would seriously interfere with the access to the market, which had been recently enlarged by throwing into it the site of houses which had been pulled down belonging to *pltf.*:—

*Held*: such an exercise of the board's powers would be an interference with the "rights & privileges vested in *pltf.* in reference to a market" within the exception contained in *Metropolis Management Act*, 1855 (c. 120), s. 91, & an injunction was granted restraining the proposed action of the board.—*HORNER v. WHITECHAPEL BOARD OF WORKS* (1885), 55 L. J. Ch. 280; 53 L. T. 842, C. A.

#### SUB-SECT. 17.—SANITARY CONVENIENCES.

*See* Public Health (London) Act, 1891 (c. 76), ss. 44, 45; *London County Council (General Powers) Act* (c. cxxx), s. 66; *PUBLIC HEALTH*.

**2193. Public lavatory under road—Vesting of subsoil in sanitary authority.**—A sanitary authority who, under the powers conferred by the *Public Health (London) Act*, 1891 (c. 76), provide & maintain a public lavatory under a road, have, by reason of the vesting in them, by sect. 44 of the Act, of the subsoil of the road, such right of ownership in the lavatory as to render them liable to be charged with land tax in respect of it.—*WESTMINSTER CORPN. v. JOHNSON, WESTMINSTER CORPN. v. FULLER*, [1904] 2 K. B. 737; 73 L. J. K. B. 774; 91 L. T. 334; 68 J. P. 549; 53 W. R. 4; 20 T. L. R. 701; 2 L. G. R. 1378, C. A.

*Annotations:—Apprvd. London Land Tax Comr. v. C. L. Ry.*, [1913] A. C. 364. *Mentd.* *Ystradgynog & Pontypridd Main Sewerage Board v. Bensted*, [1907] 1 K. B. 490; *Associated Newspapers v. London Corpn.*, [1916] 2 A. C. 429.

**2194. — Construction of subway.**—In providing sanitary conveniences under *Public Health (London) Act*, 1891 (c. 76), s. 44, the sanitary authority must use their statutory powers *bonâ fide* & reasonably, & if they so act their discretion as to the mode of acting cannot be interfered with. Where the conveniences are so provided under a street with a subway it is no objection that the public can use the subway as a means of passing from one side of the street to the other.—*WESTMINSTER CORPN. v. LONDON & NORTH WESTERN RY. CO.*, [1905] A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143; 69 J. P. 425; 54 W. R. 129; 21 T. L. R. 686; 3 L. G. R. 1120, H. L.

*Annotations:—Consd. R. v. Brighton Corpn., Ex p. Shoosmith* (1907), 96 L. T. 762. *Mentd.* *Conron v. L. C. C.*, [1922] 2 Ch. 283.

#### SUB-SECT. 18.—HOARDINGS.

*See* Metropolitan Paving Act, 1817 (c. xxix), s. 75; *Metropolis Management Act*, 1855 (c. 120), ss. 121 124; *London County Council (General Powers) Act*, 1890 (c. ccxliii), s. 32.

**2195. What is a hoarding—Not ladder erected against house.**—A surveyor appointed under *Metropolitan Paving Act*, 1817 (c. xxix), has no right, under sect. 75 of the Act, to remove a ladder placed against a house for the purpose of white-washing it, for that sect. applies only to the erection of hoards or scaffoldings, or to the placing of posts, bars, rails, or boards, by which an inclosure is made.—*DAVEY v. WARNE* (1845), 14 M. & W. 199; 15 L. J. Ex. 253; 5 L. T. O. S. 242; 10 J. P. 107; 153 E. R. 448.

*Annotation:—Mentd.* *Denny v. Bennett* (1896), 44 W. R. 333.

**2196. Licence to erect hoarding—For how long granted.**—The Comrs. of Sewers of the City of London have powers under *City of London Sewers Act*, 1848 (c. clxiii), to grant a licence to any

person who is about to build or pull down any house, wall, etc., to erect a hoard or fence, which licence is to state the name of the street in which, & the purpose for which, it is to be made & the time for which it is to be permitted to continue; & for every such licence a fee is to be paid to them according to a scale to be prepared by them, to be regulated with reference to the space of ground to be enclosed, & the length of time for which it is to continue, not in any case exceeding £10.

A., having contracted to erect a large building which would take two years in its erection, applied to the comrs. for a licence to erect a hoarding to enclose the space, which hoarding would run into four streets. The comrs. refused to grant a licence, except upon the terms that there should be a distinct licence for the hoarding in each of the four streets, that it should continue for two months, that a fee of £10 should be paid for each licence, & that no placards or other materials for advertising should be placed against the said hoard:—*Held*: (1) the comrs. ought not to have required four licences for the hoarding, but only one licence; (2) they ought not to have limited the duration of the licence to two months, but should have granted the licence for such a length of time as would be reasonably requisite for the erection of the building; (3) they had no right to impose the condition that no placards, etc., should be placed against the said hoard.—*R. v. LONDON SEWERS COMRS., Ex p. BRASS* (1870), 22 L. T. 582.

#### SUB-SECT. 19. VAULTS UNDER STREETS.

See *Metropolis Management Act, 1855* (c. 120), ss. 101, 102.

**2197. Cellar under street—Roof formed by flagstones—Duty of local authority to repair.**—By *Metropolis Management Act, 1855* (c. 120), s. 96, all pavements are vested in & are under the management & control of the vestry of the parish in which they are situate, & by sect. 102 all vaults, arches, & cellars made either before or after the commencement of this Act under any street, & all openings into the same in any such street, shall be repaired & kept in proper order by the owners & occupiers of the houses to which the same respectively belong.

Applt. was the owner of a house which in front of it had an area & cellars. The cellars were formed of brick walls, one of which was the outer wall of the area, & the other ran parallel with such outer wall at a distance of 11 feet 9 inches. There were also two thin partition walls at right angles to these brick walls, separating the cellars of each house. Extending from the outer wall of the area to the wall which ran parallel with it were large flagstones, the ends of which rested on the walls in question; they formed a covering to the cellars, which without them would have been open at the top. The outer or upper surface of these flagstones had been used by the public as a footway from the time they had been laid down, & had been worn out by the traffic over them:—*Held*: the cellar in front of applt.'s house was not a cellar within the meaning of sect. 102, which applied to cellars which were a complete construction in themselves, arched over & with roofs independent of the pavement; & the vestry of the parish were bound to repair the flagstones as part of the pavement.—*HAMILTON v. ST. GEORGE, HANOVER SQUARE* (1873), L. R. 9 Q. B. 42; 43 L. J. M. C. 41; 29 L. T. 428; 38 J. P. 405; 22 W. R. 86.  
*Annotation*:—*Held*. *White v. Hindley* L. B. (1875), L. R. 10 Q. B. 219.

#### SUB-SECT. 20.—SUBWAYS.

See *Metropolitan Subways Act, 1868* (c. lxxx); *London County Council (Subways) Act, 1893* (c. ccii); *Public Health (London) Act, 1891* (c. 76).

**2198. Pipe subways—What is "water company"**—*London County Council Subways Act, 1893* (c. ccii).—A co., which supplies hydraulic pressure by water mains, is not a water co. within the exemption in sect. 5 of above Act. It is not, therefore, to be charged by the London County Council, for the use of the council's subways on the reduced scale applicable to "a water or gas co. having statutory powers to break up streets."—*LONDON COUNTY COUNCIL v. LONDON HYDRAULIC CO.* (1898), 62 J. P. 220; 14 T. L. R. 301; 42 Sol. Jo. 362, (C. A.).

**Subway for foot passengers.**—See No. 2194, *ante*.

#### SUB-SECT. 21.—NAMING OF STREETS AND ALTERATION OF NUMBERS.

See, *now*, *London Building Act, 1894* (c. ccxiii), ss. 32–38, 200 (11) (j).

**2199. Provisions as to City of London—Metropolis Management Act, 1855** (c. 120), s. 141.—Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. *City of London Sewers Act, 1848* (c. clxiii), s. 145, as to the naming of streets & numbering of houses in the city of London, is repealed by the general provision for that purpose contained in sect. 141 of the above Act.—*DAW v. METROPOLITAN BOARD OF WORKS* (1862), 12 C. B. N. S. 161; 31 L. J. C. P. 223; 6 L. T. 353; 26 J. P. 807; 142 E. R. 1104; *sub nom.* *Dow v. METROPOLITAN BOARD OF WORKS*, 8 Jur. N. S. 1040.

**2200. Alteration of name.**—By *Metropolis Management (Amendment) Act, 1862* (c. 102), s. 87, the Metropolitan Board of Works may alter the name of any street, etc., to any other name; but by sect. 57 of *Metropolis Management Act, 1855* (c. 120), the later Act having to be construed with it, no resolution of such board is to be revoked or altered at any subsequent meeting, unless such subsequent meeting be specially convened for the purpose. The Metropolitan Board of Works having ordered that a certain road should be called by a different name, which was accordingly carried out, they subsequently, but not at any meeting specially convened for the purpose, again altered the name:—*Held*: such second order was invalid.—*SOOBY v. ST. MARY ABBOTS, KENSINGTON, VESTRY* (1871), 35 J. P. 343.

See, *now*, *London Building Act, 1894* (c. ccxiii), ss. 34, 35.

#### SUB-SECT. 22.—EXCAVATION.

See *Metropolis Management (Amendment) Act, 1890* (c. 68), ss. 6–9.

**2201. Conditions as to excavations in new street—Powers of local authority.**—Under *Metropolis Management Amendment Act, 1890* (c. 68), s. 6, where a street has been laid out or is intended to be laid out on land on which no excavation has as yet taken place, the vestry or district board has no power absolutely to prohibit excavation to a greater extent than that allowed by the saving

**Sect. 1.—Metropolitan: Sub-sects. 22, 23 & 24.**  
**Sect. 2: Sub-sects. 1, 2 & 3.]**

clause, but can only impose conditions as to the levelling & making a proper foundation for the street.—**WANDSWORTH DISTRICT BOARD v. BIRD**, [1892] 1 Q. B. 481; 61 L. J. M. C. 97; 60 L. T. 376; 56 J. P. 280; 40 W. R. 464; 8 T. L. R. 276, D. C.

**SUB-SECT. 23.—DEMOLITION OF BUILDINGS.**

See Metropolitan Management Act, 1855 (c. 120), s. 76.

**2202. Failure to give notice of intention to build—Power of local authority to demolish building—Right of owner to be heard.**—Metropolitan Local Management Act, 1855 (c. 120), s. 76, empowers the district board to alter or demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation:—*Held*: this does not empower them to demolish the building, without first giving the party guilty of the omission an opportunity of being heard; & sect. 211, which gives an appeal to the Metropolitan Board of Works, does not prevent the builder or owner of the premises from suing them for so doing.—**COOPER v. WANDSWORTH BOARD OF WORKS** (1863), 14 C. B. N. S. 180; 2 New Rep. 31; 32 L. J. C. P. 185; 8 L. T. 278; 9 Jur. N. S. 1155; 11 W. R. 646; 143 E. R. 414.

*Annotations*:—**Consd.** **Brutton v. St. George's, Hanover Square, Vestry** (1871), L. L. 13 Eq. 339. **Apprvd. & Apld.** **Hopkins v. Smethwick L. B.** (1890), 24 Q. B. D. 712. **Expld.** **St. James & St. John, Clerkenwell, Vestry v. Peary** (1890), 24 Q. B. D. 703. **Consd.** **A. G. v. Hooper**, [1893] 3 Ch. 483; **Consd.** **U. D. C. v. Crawford** (1903), 67 J. P. 309. **Retd.** **Re Brook, Delcomyn & Badart** (1864), 16 C. B. N. S. 403; **Cheetham v. Manchester Corp.** (1875), L. R. 10 C. P. 249; **L. & S. W. Ry. v. Flower** (1875), 1 C. P. D. 77; **Masters v. Pontypool L. G. Board** (1878), 9 Ch. D. 677; **Smith v. R.** (1878), 3 App. Cas. 614; **R. v. Asphall** (1885), 1 T. L. R. 605; **Robinson v. Sunderland Corp.**, [1899] 1 Q. B. 751. **Mentd.** **Thorburn v. Barnes** (1867), L. R. 2 C. P. 384; **R. v. L. G. Board & Taylor** (1882), 52 L. J. M. C. 4; **Fisher v. Jackson**, [1891] 2 Ch. 84; **St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co.**, [1899] 1 Ch. 474.

**SUB-SECT. 24 — RECOVERY OF EXPENSES BY LOCAL AUTHORITY.**

**2203. Time within which proceedings must be brought—Recovery of expenses of removing dangerous structure—Metropolitan Building Act, 1855 (c. 122), s. 73—Summary jurisdiction Act, 1848 (c. 43), s. 11.]—Sect. 73 of Metropolitan Building Act, 1855 (c. 122), authorises the comrs. under that Act, in certain cases, to take down, repair, or otherwise secure, dangerous structures; & enacts that the expenses incurred by them shall be paid by the owner of the structure. No time for making complaint in respect of the expense is limited by this Act. Sect. 97 (6) enacts that these expenses may be recovered in a summary**

manner; & sect. 103 enacts that expenses directed to be recovered in a summary manner may be recovered in manner directed by Summary Jurisdiction Act, 1848 (c. 43). Sect. 11 of the latter Act, enacts that, where no time is limited for making a complaint by the particular Act under which the matter of complaint arises, the complaint shall be made "within six calendar months from the time when the matter of such complaint arose. The comrs. [under the Building Act] having incurred expense under sect. 73, demanded payment of the owner of the structure, who refused to pay:—*Held*: the six months were to be reckoned from the demand & refusal, not from the incurring of the expense.—**LABALMONDIERE v. ADDISON** (1858), 1 R. & E. 41; 28 L. J. M. C. 25; 23 J. P. 261; 5 Jur. N. S. 431; 120 E. R. 823.

*Annotations*:—**Consd.** **White v. Colson** (1881), 46 J. P. 565. **Expld.** **Pool & Forden Highway Board v. Gunning** (1882), 51 L. J. M. C. 49; **Corbett v. Badger**, [1901] 2 K. B. 278. **Retd.** **Eddleston v. Francis** (1860), 7 C. B. N. S. 568; **Greco v. Hunt** (1877), 2 Q. B. D. 389; **Elliott v. Russell**, [1902] 2 K. B. 748.

**2204. — Recovery of surveyor's fees—London Building Act, 1894 (c. ccxiii), s. 157—Summary Jurisdiction Act, 1848 (c. 43), s. 11.]—By sect. 157 of London Building Act, 1894 (c. ccxiii), it is enacted that at the expiration of fourteen days after the roof of any building surveyed by a district surveyor has been covered in, he shall be entitled to receive the fees due to him from the builder or from the owner or occupier of the building, & if any such builder, owner, or occupier refuses to pay the fees, they may be recovered in a summary manner on its being shown to the satisfaction of the ct. that a proper bill specifying the amount of the fees was delivered to him:—*Held*: the period of limitation fixed in such a case for taking proceedings by sect. 11 of Summary Jurisdiction Act, 1848 (c. 43), does not begin to run until the bill has been delivered to the party from whom the fees are sought to be recovered in a summary manner.—**CORBETT v. BADGER**, [1901] 2 K. B. 278; 70 L. J. K. B. 640; 84 L. T. 602; 65 J. P. 552; 49 W. R. 539; 17 T. L. R. 474; 45 Sol. Jo. 485, D. C.**

**SECT. 2.—EXTRA METROPOLITAN.**

**SUB-SECT. 1.—VESTING AND CONTROL OF STREETS.**

See Town Improvement Clauses Act, 1847 (c. 34), ss. 47, 51, 53, 55, 56; Public Health Act, 1875 (c. 55), ss. 149, 153, 160, 179, 180, 308; Public Health Acts Amendment Act, 1907 (c. 53), ss. 19, 20, 28.

**2205. Wilfully taking up pavement—Towns Improvement Clauses Act, 1847 (c. 34), s. 56.]—F.** being bound by covenant in his lease to lay down pavement, ordered his pavier to lay down Rowley ragstone, being under the impression he was bound to use that material. W. informed F. that he was not bound to use Rowley ragstone, & recommended

**PART XIII. SECT. 2, SUB-SECT. 1.**

**b. Control conferred by statute—Effect on ownership of soil.**—Melbourne Corporation Act, 1850, confers on the corp'n. a limited control over private streets, courts, or alleys within the city, but does not alter or affect the ownership of such street, court, or alley, or create any rights over the same.—**MURRAY, ROWAN & HICKS v. DREW** (1898), 62 L. J. P. C. 81.—**AUS.**

**c. — To what roads applicable.]—The right vested in a municipal**

corp'n. by 46 Vict. c. 18 to convert into a public highway a road laid out by a private person on his property, can be exercised only in respect to private roads, to the use of which the owners of property abutting thereon were entitled.—**GOODERHAM v. TORONTO (CITY) CORPN.** (1895), 25 S. C. R. 246.—**CAN.**

**d. — Purchase of road from company.]—A co. formed under the Joint-Stock Road Cos. Act in several townships, including defts., subse-**

quently mtgd. their road to the counties of Lincoln & Welland, which counties at a later date took an absolute conveyance, & by bye-law assumed it as a county road; they afterwards passed a bye-law requiring the respective townships, defts. being one of them, through which the road passed, to keep the same in repair:—*Held*: the road never vested in or became a county road within the statute, but was one acquired & held by the county as assignee of & with all the duties & obligations of the road co.

blue brick, & undertook to indemnify F. against the consequences of taking up the former & substituting the latter, which F. agreed to on Monday. The first pavement was, in pursuance of the original order, laid down on Tuesday morning, & approved of by the borough surveyor (the control of the pavement being vested in the town council), but it required to lie two days to consolidate. On Wednesday morning W. took it up, & substituted blue brick:—*Held*: W. having obtained authority to replace the first pavement before it was laid down, the justices properly refused to convict W. of the offence of wilfully taking up pavement within above sect.—*TILL v. WALKER* (1860), 24 J. P. 774.

#### SUB-SECT. 2.—WIDENING AND IMPROVEMENT.

See Public Health Act, 1875 (c. 55), s. 154; Public Health Act, 1925 (c. 71), ss. 33–35.

**2206. Purchase for widening & improvement.—Power to sell or exchange portion of existing highway.]**—Before a high road, which is not a street within Towns Improvement Clauses Act, 1847 (c. 34), & Public Health Act, 1875 (c. 55), can be obliterated & dealt with as no longer a highway, it is necessary to obtain a decision & order of a ct. of quarter sessions to that effect. The highway comrs. for B. diverted, altered, & widened a high road named P. lane, but did not obtain a decision & order of quarter sessions obliterating & altering the status of the old road condemned by them. This high road was not a street with continuous rows of houses on either side, but was in a suburb of a town with detached mansions at irregular intervals, & on one side there ran a garden wall. The comrs. gave in exchange to P., deft., a considerable portion of the old road, & allowed him to advance & erect his garden wall over it, so that for some distance it bordered upon & touched one side of the new road. C., prosecutor, complained that this wall lessened the value of his property by damaging his frontage, & alleged that the comrs. were not legally authorised to sell or exchange to deft. the portion of the old road, & the latter was not entitled to build the wall, but was infringing the rights of the public. C. not succeeding in his complaint indicted P. for unlawfully & injuriously obstructing the highway. A formal verdict of guilty against P. was entered for the Crown, & the question of law involved was reserved for the consideration of the full ct.:—*Held*: the verdict was right, & as the *locus in quo* was not a street within the meaning of the

Acts of 1847 & 1875, the comrs. not having applied to the ct. of quarter sessions for an order obliterating the highway were not empowered to exchange or sell to deft. such portion of the highway, & deft. was not legally authorised to erect the wall in question.—*R. v. PLATTS* (1880), 49 L. J. Q. B. 848; 43 L. T. 159; 44 J. P. 765; 28 W. R. 915, D. C.

**2207. Discretion of local authority.—Method of paving road.]**—The ct. refused to order a writ of *certiorari* to issue to bring up & quash certain resolutions of the corpn. of B. for the payment of two sums of money for paving a road with tarmac, the corpn. having *bond fide* arrived at the conclusion that the work would improve the highway for use by the inhabitants of, & visitors to, the borough, although the occasion of the work was to enable the Automobile Club to hold their meeting for motor car speed trials at B.—*R. v. BRIGHTON CORPN., Ex p. SHOOSMITH* (1907), 96 L. T. 762; 71 J. P. 265; 23 T. L. R. 440; 51 Sol. Jo. 409; 5 L. G. R. 584, C. A.

**Acquisition of consecrated burial ground.—To whom faculty granted.]**—See ECCLESIASTICAL LAW, Vol. XIX., p. 355, N. 127.

**Whether allowed.]**—See BURIALS, Vol. VII., pp. 555–557, Nos. 324–333.

#### SUB-SECT. 3.—MAKING UP AND REPAIR OF STREETS.

**2208. Paving under Town Improvement Clauses Act, 1847 (c. 34), s. 53.—“Theretofore” made good.]**—The word “theretofore” in above sect. is to be construed in its ordinary grammatical sense, & refers to streets which have at any time been well & sufficiently paved & flagged, or otherwise made good to the satisfaction of the comrs., & not to the state of such streets at the time of the passing of the special Act, incorporated with the general Act. Therefore, where a street, which was a public highway, had once been put in good repair, but which, at the time of the passing of the special Act, was out of repair:—*Held*: the comrs. had no power, under sect. 53 of the general Act, to do the necessary repairs, & charge the expenses on the adjoining occupiers.—*GREAT WESTERN RY. CO. v. WEST BROMWICH IMPROVEMENT COMRS.* (1859), 1 E. & B. 806; 5 Jur. N. S. 1054; 120 E. R. 1113; *sub nom. R. v. GREAT WESTERN RY. CO.*, 28 L. J. M. C. 246; 7 W. R. 432.

**2209.** ————*J.*—In 1857 a local Act was passed which incorporated Town Improvement Clauses Act, 1847 (c. 34), s. 53. In 1874 applts.,

which constructed it, & the county could not throw the duty of repairing on the defts.—*R. v. LOUTH CORPN.* (1863), 13 C. P. 615.—*CAN.*

**e.** ————*Right of municipality to transfer control.]*—A township corpn. on which has devolved a portion of a public road situate within its territorial limits, relinquished by the minister of public works under 31 Vict. c. 12 (D.), s. 52, cannot authorise another township corpn. to assume control of & keep in repair such portion of the road, nor can the latter township assume the road.—*SMITH v. ANCASTER TOWNSHIP CORPN.* (1896), 27 O. R. 276; 23 A. R. 596.—*CAN.*

**f.** ————*The right of a city council, under Highway Improvement Act, R. S. O., 1914, c. 40, to assume highways for the purposes of the Act, is not confined to highways in townships.*—*MERRITTON VILLAGE v. LINCOLN COUNTY* (1918), 41 O. L. R. 6.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 2.

**2207 i. Discretion of local authority.—Method of paving road.]**—The corpn. having, with the consent of the property owners interested, passed a bye-law for the improvement of a thoroughfare by specified methods, departed from those methods & proceeded to construct the thoroughfare in another manner. The property owners to be assessed brought action to compel the corpn. to carry on the work in accordance with the bye-law:—*Held*: the corpn. having passed a bye-law for the construction of a certain class of road, they were contravening the provisions of that bye-law by constructing a different kind of road, & the property owners to be assessed had a right to object.—*ARBUTHNOT v. VICTORIA (CITY) CORPN.* (1910), 15 B. C. R. 209.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 3.

**g. Who must repair.]**—A road,

which ran through W. was part of a macadamised road made by the Govt. before 13 & 14 Vict. c. 14, & afterwards transferred to plltf.—*Held*: under 13 & 14 Vict. c. 14 & 15, the corpn. of the town were bound to repair that portion of it within their limits.—*PORR WHITEY, SCUGOG, SIMCOE, & HURON ROAD CO. v. WHITBY TOWN* (1859), 18 U. C. R. 40.—*CAN.*

**b.** ————*J.*—*IRWIN v. BRADFORD VILLAGE* (1872), 22 C. P. 18, 421.—*CAN.*

**k.** ————*J.*—Upon a road, not a regular road allowance, but formed of land given by the owners thereof for their general convenience, statute labour had been performed for some time under the regular pathmaster, & the public funds expended:—*Held*: the road must be considered to be under the charge of the municipality, so as to render them liable for its state of repair.—*GILCHRIST v. CARDEN TOWNSHIP* (1876), 26 C. P. 1.—*CAN.*

**l.** ————*J.*—Defts. purchased a road



*Sect. 2.—Extra metropolitan: Sub-sects. 3 & 4, A.  
(a), (b) & (c).]*

in their capacity as the corpn. of P., bought some land of resps. abutting upon a country high road within the district to which the local Act applied, & in pursuance of an agreement then made with resps., at their own expense widened & improved the road & laid out a footpath along the side, & gravelled, channelled, & kerbed the footpath. In 1879 appts., in their capacity as the urban authority, paved & flagged the footpath & sought to recover the expense of so doing from resps. as adjoining owners under the powers of sect. 53. The jury found that before the paving & flagging in 1879 the road was not a street in the popular sense of the term, & that the footpath had been "made good" within sect. 53:—*Held*: resps. were not liable, upon the ground that the footpath had been "theretofore made good" within sect. 53, but without deciding whether the road was a "street" within that sect.

The word "theretofore" in sect. 53 refers to the period before the work is done by the comrs., not to the period before the passing of the special Act.—*PORTSMOUTH CORPN. v. SMITH* (1885), 10 App. Cas. 364; 54 L. J. Q. B. 473; 53 L. T. 394; 49 J. P. 676, H. L.; *affg.* (1883), 13 Q. B. D. 184, C. A.

*Annotations*:—*Reid. It. v. Burnup* (1886), 50 J. P. 598; *Jowett v. Idle L. B.* (1887), 57 L. T. 928; *Richards v. Kessick* (1888), 57 L. J. M. C. 48; *Fenwick v. Croydon R. S. A.*, [1891] 2 Q. B. 216; *Derby Corpn. v. Grudgings*, [1894] 2 Q. B. 496; *Barry & Cadovox L. B. v. Parry*, [1895] 2 Q. B. 110; *Crumph v. Chorley Corpn.* (1908), 72 J. P. 334.

**2210. — Highway repairable by inhabitants at large.**—The words "public highway" in above sect. include a public highway whether it is repairable by the inhabitants at large or not.—*CRUMP v. CHORLEY CORPN.* (1908), 98 L. T. 805; 72 J. P. 334; 6 L. G. R. 782, 1 C.

**SUB-SECT. 4.—MAKING UP AND PAVING  
PRIVATE STREETS.**

**A. Under Public Health Acts.**

**(a) Powers of Rural Authority.**

See Public Health Act, 1875 (c. 55), ss. 150, 276; Public Health Act, 1925 (c. 71).

**2211. Order of Local Government Board.—Whether road or street—How far conclusive.**—Applt. owned premises fronting upon a road, 900 feet long, which had several houses in it on the south side but none on the north. By an order of the Local Government Board, Public Health Act, 1875 (c. 55), s. 150, was declared to be in force in the district in which the road was situated, & the road was declared to be a "street." The road was a public highway, but there was no evidence of its formal dedication. There was some evidence of its user prior to 1835, but none inconsistent with its having been a mere occupation road or a footpath. Applt. was summoned for non-payment of expenses incurred by the rural authority in sewerage, levelling, & paving the road. The justices decided that the order of the Local Govern-

ment Board declaring the road to be a street was conclusive, although in their opinion it was not a street according to the common use & simple ordinary meaning of the word; they also decided that it was a street by virtue of the definition in sect. 4 of the Act of 1875, & subject to a case stated for the opinion of the ct., held applt. liable to pay the amounts claimed:—*Held*: the order of the Local Government Board was not conclusive with reference to the application of sect. 150 to the road in question; but the road was within the definition "street" in sect. 4, & was, therefore, a street within sect. 150.—*FENWICK v. CROYDON RURAL SANITARY AUTHORITY*, [1891] 2 Q. B. 216; 60 L. J. M. C. 161; 65 L. T. 645; 55 J. P. 470; 40 W. R. 124; 7 T. L. R. 594, D. C.

*Annotations*:—*Reid. Hill v. Wallasey L. B.*, [1894] 1 Ch. 133; *Cababé v. Walton-upon-Thames District Council*, [1913] 1 K. B. 481.

**(b) Street or Part of Street Repairable by Inhabitants at Large.**

See Public Health Act, 1875 (c. 55), s. 150.

**2212. Liability of frontagers—Street made by local authority.**—Public Health Act, 1848 (c. 63), s. 69, applies only to existing streets that are not highways, & the local board cannot make a private improvement rate upon the owners of adjoining land for the sewerage, levelling, paving, flagging, or channelling of a new street or road made by the local board, or where they make a carriageway & road where there was formerly merely a public footpath repairable by the parish.—*HULL LOCAL BOARD OF HEALTH v. JONES* (1856), 1 H. & N. 489; 26 L. J. Ex. 33; 28 L. T. O. S. 125; 21 J. P. 37; 2 Jur. N. S. 1193; 5 W. R. 161; 156 E. R. 1294.

*Annotations*:—*Reid. Hesketh v. Atherton L. B.* (1873), 1 L. T. 9 Q. B. 4; *St. Mary, Islington, Vestry v. Barrett* (1874), L. R. 9 Q. B. 278; *Ex p. Wake* (1883), 11 Q. B. D. 291.

**2213. — Public footway over road.**—*MONTAGU v. GOOLF LOCAL BOARD* (1888), 52 J. P. Jo. 84.

**2214. — Public footway by side of highway.**—R. was adjoining owner of a strip of land, about 3 feet wide, which was dedicated as a footway to the public, alongside a highway, & R.'s & other houses were built in a line behind & facing such strip. The urban authority, finding the condition of the footpath unsatisfactory, gave notice to R. & other adjoining owners to level & pave this new street:—*Held*: the justices were right in holding that such strip, irrespective of the old highway, together with the houses adjoining were a new street within Public Health Act, 1875 (c. 55), s. 150, & so R. was liable for the expense of paving, etc.—*RICHARDS v. KESSICK* (1888), 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756, D. C.

*Annotations*:—*Consd. White v. Fulham Vestry* (1896), 74 L. T. 425. *Appl. Property Exchange v. Wandsworth Board of Works*, [1902] 2 K. B. 61. *Reid. Evans v. Newport Urban S. A.* (1889), 61 L. T. 684; *St. James & St. John, Clerkenwell, Vestry v. Edmondson* (1902), 66 J. P. 321.

**2215. — — — — —]**—*DERBY CORPN v. GRUDGINGS*, No. 2341, *post*.

**2216. — Public footway widened.**—In proceedings under Public Health Act, 1875 (c. 55), s. 150, it appeared that the street was formed by an

from the Govt. & with their permission, express or implied, the city put down a sidewalk upon it:—*Held*: defts. were liable for the state of the road & sidewalk.—*BENNETT v. YORK COUNTY CORPN.* (1878), 43 U. C. R. 542—CAN.

m. — — — — —]

*WALKER* (1885), Cass. Dig. 98.—CAN.

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otherwise assumed for public use by the corpn., the acts required to work such an assumption must be clear & unequivocal & such as clearly & unequivocally indicate the intention of the corpn. to assume the road.—*JONES v. SWINT CURRENT TOWN* (1915), 31 W. L. R. 899; 23 D. L. R. 11; 8 Sask. L. R. 310.—CAN.

old footpath & strips of land alongside which had been recently added to widen it. The old footpath was repairable by the inhabitants at large. The justices found that the road was in part an ancient footpath or highway, but that it had been altered, widened, & added to, & houses having been built abutting thereon it was a street within sects. 4 & 150; that the frontagers were liable to contribute to the expenses of improving it; & an order was accordingly made for the payment by the frontagers of such expenses:—*Held*: having regard to the terms of sect. 150, the frontagers were chargeable with the expenses of improving the whole street & not merely such part of it as had been added to the ancient highway, & the order was valid.—*EVANS v. NEWPORT URBAN SANITARY AUTHORITY* (1889), 24 Q. B. D. 264; 59 L. J. M. C. 8; 61 L. T. 684; 54 J. P. 374; 38 W. R. 400, D. C.

*Annotations*:—*Folld.* Portsmouth Corp'n. v. Hall (1907), 97 L. T. 43. *Refd.* Property Exchange (No. 1) v. Wandsworth Board of Works (1901), 84 L. T. 689; Chorley Corp'n. v. Nightingale, [1906] 2 K. B. 612.

2217. — *Ditch added to highway.*—Where there has been a dedication including [a ditch running alongside a road between the road & the fence], & such ditch has been filled up, so that it can be used for passage, the road ought not to be treated as a road or street which consists partly of a highway & partly of added roadway so as to constitute a road or street of which only a part is repairable by the inhabitants at large within Public Health Act, 1875 (c. 55), s. 150, & therefore a street or road in respect of which frontagers are liable for paying expenses under that sect.—*CHORLEY CORPN. v. NIGHTINGALE*, [1907] 2 K. B. 637; 76 L. J. K. B. 1003; 97 L. T. 465; 71 J. P. 441; 23 T. L. R. 651; 51 Sol. Jo. 625; 5 L. G. R. 1114, C. A.

*Annotation*:—*Refd.* Chippendale v. Pontefract R. D. C. (1907), 71 J. P. 231.

2218. — *Agreement between local authority & frontagers—Road to be repaired & adopted—No formal adoption.*—*BROMLEY LOCAL BOARD v. LANSBURY* (1894), *Times*, Dec. 5, D. C.

*Annotation*:—*Refd.* Folkestone Corp'n. v. Marsh (1905), 94 L. T. 511.

2219. — *Widened road to be repairable by inhabitants at large—Good consideration.*—By an agreement between a local authority & a landowner, in order to settle disputes as to the user of a road, which was a highway repairable by the inhabitants at large, & which was bounded on each side by the land belonging to the landowner, it was agreed that as soon as any portion of the land abutting on the road should be laid out for building the landowner would add a piece of land to the road so as to increase its width. Accordingly as & when any part of the land on both sides of the road was laid out for building a piece of land on each side of the road was added to the road, but the widened road had never been adopted by any resolution of the local authority. The local authority paved the road & apportioned the expenses of so doing on the frontagers under Public Health Act, 1875 (c. 55), s. 150:—*Held*: the additions to the old road were made as part of a bargain for good consideration with the local authority, & they must be taken to be accretions to the old road, so that the whole was subject to the same incidents of repair; & the frontagers were therefore not liable to pay the apportioned expenses.—*PORTSMOUTH CORPN. v. HALL* (1907), 98 L. T. 513; 71 J. P. 564; 24 T. L. R. 76; 6 L. G. R. 16, C. A.

*Annotation*:—*Refd.* Andrews v. Aberlillery U. C. (1911), 80 L. J. Ch. 724.

### (c) Preparation of Plans and Estimates.

See Public Health Act, 1875 (c. 55), s. 150.

2220. *Whether deposit of plans & estimate a condition precedent—Local Government Amendment Act, 1861 (c. 61), s. 16.*—A local board of health gave notice, under Public Health Act, 1848 (c. 63), s. 69, to the owners of premises fronting two streets to level, pave, etc., & the owners having made default, the board did the work themselves. An apportionment was made by the surveyor of the board, & a notice was served on applt., an owner of premises in one of the streets, that his proportion was £20 2s. Applt. did not pay, & a complaint against applt. was heard before justices, when it was objected by applt. that the apportionment was bad, on the ground that the expenses of the two streets had been lumped together, & the aggregate amount divided amongst the owners in the two streets; & the justices dismissed the complaint on that ground. The surveyor then made a fresh apportionment, & a notice was served on applt. that his proportion was £19 11s. He gave notice that he disputed the apportionment, & a summons was taken out before two justices to settle the apportionment under 21 & 22 Vict. c. 98, s. 64. It was objected before the justices that the surveyor, having made one apportionment, could not make another apportionment; that plans had not been deposited at the office of the board before giving the notice to do the work, as required by Local Government Amendment Act, 1861 (c. 61), s. 16, but only at the office of the surveyor; that the works required by the notice differed from the works shown on the plans, & that the works done by the board differed from both. These objections the justices overruled; they also refused to go into the question whether the money had been in point of fact expended; & after calculation they made an order that the proportion payable by applt. was £19 11s., & they went on to adjudge that applt. do pay the same, & that in default of payment a distress warrant should issue. On a case under Summary Jurisdiction Act, 1857 (c. 43):—*Held*: (1) the first apportionment was a nullity, & the surveyor, therefore, was not *functus officio*, & was right in making a fresh apportionment; (2) the deposit of plans was not a condition precedent to the validity of all subsequent proceedings; (3) whether the justices were acting as arbitrators as to the apportionment, or as justices to enforce the payment, they had no jurisdiction to inquire into the question whether the amount alleged had been actually expended; & if applt. was aggrieved by the alleged overcharge, or by the alleged variances, his remedy was by memorial to the Secretary of State, under Public Health Act, 1848 (c. 63), s. 120, & 21 & 22 Vict. c. 98, s. 65.

(4) *Seem*: the justices, when acting as arbitrators under 21 & 22 Vict. c. 98, s. 64, had no jurisdiction to order payment, etc.—*COOK v. IPSWICH LOCAL BOARD* (1871), L. R. 6 Q. B. 451; 40 L. J. M. C. 169; 24 L. T. 579; 35 J. P. 565; 19 W. R. 1079.

*Annotations*:—*As to* (1) *Expld.* Shanklin L. B. v. Millar (1880), 5 C. P. D. 272. *Consd.* Derby Corp'n. v. Grudgings, [1894] 2 Q. B. 496. *Distd.* Wirral Highway Board v. Newell, [1895] 1 Q. B. 827. *Refd.* Tottenham L. B. of Health v. Rowell (1880), 15 Ch. D. 378; Property Exchange (No. 1) v. Wandsworth Board of Works (1901), 84 L. T. 689. *As to* (2) *Folld.* Shanklin L. B. v. Millar (1880), 5 C. P. D. 272. *Refd.* Manchester Corp'n. v. Hampson (1886), 35 W. R. 334. *As to* (3) *Consd.* Hayles v. Sandown U. C., [1903] 1 K. B. 169. *Refd.* Wake v. Sheffield Corp'n. (1883), 12 Q. B. D. 142; Walthamstow L. B. v. Staines, [1891] 2 Ch. 606. *Generally, Refd.* Bishop v. Wandsworth Board of Works (1900), 82 L. T. 766.

2221. — *Public Health Act, 1875 (c. 55),*

*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (c), (d) & (e) i., ii., iii. & iv., & (f) i.]*

s. 150.]—SHANKLIN LOCAL BOARD v. MILLAR, No. 2286, *post*.

2222. ——— Reference to deposited plans in notice.]—STOURBRIDGE URBAN COUNCIL v. BUTLER & GROVE, No. 2252, *post*.

(d) Premises "*Fronting, Adjoining or Abutting.*"

See Public Health Act, 1875 (c. 55), s. 150.

2223. Premises without access to street—Fence intervening.]—R. v. NEWPORT LOCAL BOARD OF HEALTH, No. 2281, *post*.

2224. ——— In *cul de sac*.]—A. was the owner of three houses fronting a street called Y. Place, & adjoining or abutting at the rear upon a footpath at the end of a street called S. Street, which formed a *cul de sac*. The ground at the back of these houses was 5 feet above the level of S. Street, & the wall, which was the property of A., was about 12 feet high on the outside. There was no access from A.'s premises to S. Street:—*Held*: his premises "adjoined or abutted on" S. Street within the Act, & he was chargeable with his proportion of the expenses of paving, etc., that street, under Public Health Act, 1875 (c. 55), s. 150.—NEWPORT URBAN SANITARY AUTHORITY v. GRAHAM (1882), 9 Q. B. D. 183; 47 L. T. 98; 47 J. P. 133; 31 W. R. 121, D. C.

*Annotation*:—*Consd.* Lightbound v. Bebbington L. B. (1885), 14 Q. B. D. 819.

2225. ———.]—A passage forming a *cul de sac* & not dedicated as a highway may be a "street" within Public Health Act, 1875 (c. 55), s. 150, & the owner of premises abutting thereon will in such case be liable to pay his apportioned share of the costs incurred by the local authority in making it up, notwithstanding that he has no right of access to it.—WALTHAMSTOW URBAN DISTRICT COUNCIL v. SANDELL (1904), 68 J. P. 509; 2 L. G. R. 835.

2226. Premises not in contact with street—Narrow stream crossed by bridges.]—Resps.' premises were divided from D. Street by a small stream, but by two bridges over the stream their premises were connected with it; by means of gates they could effectually close all communications. One of the bridges had been removed & reinstated by resps. The principal outlet from their premises led into W. Street:—*Held*: resps. premises fronted & abutted upon D. Street within Public Health Act, 1848 (c. 63), s. 69.—WAKEFIELD LOCAL BOARD v. LEE (1876), 1 Ex. D. 336; 35 L. T. 481; 41 J. P. 54, D. C.

*Annotations*:—*Consd.* Lightbound v. Higher Bebbington L. B. (1885), 16 Q. B. D. 577. *Refd.* L. C. C. v. Collins (1905), 93 L. T. 540; R. v. S. E. Ry. (1910), 74 J. P. 137.

2227. ——— Wall belonging to third party.]—L. owned two plots of land separated from a street in respect of which expenses had been incurred by the local board under Public Health Act, 1875 (c. 55), s. 150, by a wall which belonged to a third party. In order to obtain access from the property to the street in question, it was necessary either to get into the street by means of a public footpath which communicated with the street, or to go to the end of the wall, & so gain access to it:—*Held*: the property in question did not front, adjoin, or abut on the street within above sect.—LIGHTBOUND v. HIGHER BEBBINGTON LOCAL

BOARD (1885), 16 Q. B. D. 577; 55 L. J. M. C. 94; 53 L. T. 812; 50 J. P. 500; 34 W. R. 219, C. A.

*Annotations*:—*Refd.* L. C. C. v. Collins (1905), 93 L. T. 540; R. v. S. E. Ry. (1910), 74 J. P. 137. *Montd.* Cave v. Horsell, [1912] 3 K. B. 532; Smeed, Dean v. Port of London Authority, [1913] 1 K. B. 226.

2228. Premises above level of street.]—NEWPORT URBAN SANITARY AUTHORITY v. GRAHAM, No. 2224, *ante*.

2229. Premises outside boundary of local authority.]—A local authority has no jurisdiction under Public Health Act, 1875 (c. 55), s. 150, to charge a proportion of the expenses of making up a street on the owners or occupiers of premises which, though fronting, adjoining, or abutting on the street, are outside the boundary of the local authority.—HORNSEY CORPN. v. BIRKBECK FREEHOLD LAND SOCIETY, [1906] 1 K. B. 521; 75 L. J. K. B. 348; 94 L. T. 700; 70 J. P. 140; 54 W. R. 528; 22 T. L. R. 346; 50 Sol. Jo. 326; 4 L. G. R. 581, D. C.

*Annotation*:—*Foll.* Bishop Auckland U. C. v. Alderson, [1913] 2 K. B. 324

(e) *Exempted Premises.*

i. *Crown Property.*

2230. Land acquired for military purposes.]—The Crown, not being named in Public Health Act, 1875 (c. 55), s. 150, is not bound by its provisions, & is not liable under that sect. to pay in respect of property owned & occupied for the purposes of the Crown any expenses of paving, etc., a street on which that property abuts.

Land acquired & occupied by a volunteer corps for military purposes, & held under & subject to Volunteer Act, 1863 (c. 65), & Military Lands Act, 1892 (c. 43), & vested in the commanding officer for the time being of the corps, is land owned & occupied for the purposes of the Crown. The commanding officer, therefore, is not liable in respect of it for any expenses incurred by a local authority under the sect.—HORNSEY URBAN COUNCIL v. HENNEL, [1902] 2 K. B. 73; 71 L. J. K. B. 479; 86 L. T. 423; 66 J. P. 613; 50 W. R. 521; 18 T. L. R. 512; 46 Sol. Jo. 452, D. C.

*Annotations*:—*Refd.* Cooper v. Hawkins, [1904] 2 K. B. 164; Lewis v. Durham Union (1904), 2 L. G. R. 533; Chare v. Hart (1918), 120 L. T. 443.

ii. *Agreement with Local Authority, etc.*

2231. Agreement between local authority & frontagers—Road to be repaired & adopted.]—BROMLEY LOCAL BOARD v. LANSBURY (1894), *Times*, Dec. 5, D. C.

*Annotation*:—*Refd.* Folkestone Corpn. v. Marsh (1905), 94 L. T. 511.

2232. ——— Widening existing road.]—PORTSMOUTH CORPN. v. HALL, No. 2219, *ante*.

iii. *Churches, Chapels and Schools.*

See Public Health Act, 1875 (c. 55), s. 151.

2233. Dissenting chapel—Building partly used for secular purposes.]—A local authority served notices on the trustees of premises fronting two streets in their district, requiring them to sewer, level, pave, metal, flag, channel, & make good such streets within a certain time. The trustees having made default the local board executed the works themselves, & on the completion thereof the same persons were trustees of the premises,

#### PART XIII. SECT. 2, SUB-SECT. 4.—

A. (d).

2227-1. Premises not in contact with street—Wall belonging to third party.]—Where a house was separated from a

private street by the remains of an old wall the site of which did not belong to the owner of the house:—*Held*: he was not liable to be assessed under General Police & Improvement (Scot-

land) Act, 1862, s. 151, as an owner of premises "abutting on a street."—LEITH MAGISTRATES & TOWN COUNCIL v. GIBBS (1882), 9 R. (Ct. of Sess.) 627—SCOT.

but had no beneficial interest in them. The premises consisted of two floors, of which the upper floor was used as a chapel, & exclusively appropriated to public religious worship, but the lower was used for the purposes of a Sunday school & for a young people's institute in connection with the chapel, & for lectures, concerts, a bazaar, & similar entertainments in connection therewith. On the refusal of the trustees to pay the sum claimed, the local board preferred a complaint against them, upon which the justices made an order for the payment of the sum:—*Held*: as the trustees were "owners" of the premises at the time when the works were completed, they were liable for the amount claimed, & were not exempted from liability by Public Health Act, 1875 (c. 55), s. 151, as they were not the "incumbent or minister" of the chapel, & the whole of the premises was not appropriated to religious purposes.—*HORNSEY LOCAL BOARD v. BREWIS* (1890), 60 L. J. M. C. 48; 7 T. L. R. 27; *sub nom. BREWIS v. HORNSEY LOCAL BOARD*, 64 L. T. 288; 55 J. P. 389, D. C.

**2234. School.**—Appl. was one of three trustees to whom land had been conveyed under School Sites Act, 1841 (c. 38), s. 2, for the purposes of the Act, & to permit the premises & all buildings erected thereon to be for ever used as a school for the education of poor children, & for the residence of the master & mistress, & for no other purpose whatsoever. The school, etc., was built & used according to the trust, no rent whatever being received by the trustees. The local board gave the proper notices, for paving the street along which the school etc., fronted, to applt. & the owners of other premises fronting the street, under Public Health Act, 1848 (c. 63), s. 69; & they charged applt., as "owner" of the school, the proportion according to the frontage of the school:—*Held*: applt. was "owner" within sect. 2, which enacts that "owner" "shall mean the person for the time being receiving the rack rent of the lands or premises, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent:" & applt. was liable to pay the proportion of the expenses.—*BOWDITCH v. WAKEFIELD LOCAL BOARD* (1871), L. R. 6 Q. B. 567; 40 L. J. M. C. 214; 25 L. T. 88; 30 J. P. 197.

*Annotations*.—*Consd.* Wright v. Ingle (1888), 16 Q. B. D. 379; Truman, Hanbury, Buxton v. Kerslake, [1894] 2 Q. B. 774. *Fold.* *Re* Christchurch Inclosure Act, Meyrick v. A.-G., [1894] 3 Ch. 209. *Consd.* St. Mary, Islington Vestry v. Cobbett, [1895] 1 Q. B. 369. *Fold.* Hornsey District Council v. Smith, [1897] 1 Ch. 843. *Refd.* Pound v. Plumstead Board of Works (1871), L. R. 7 Q. B. 183; Plumstead Board of Works v. British Land Co. (1874), L. R. 10 Q. B. 16; Hackney Corp'n. v. Lee Conservancy Board, [1904] 2 K. B. 541; Hampstead Corp'n. v. Mid. Ry., [1905] 1 K. B. 538.

**2235.** —]—Under School Sites Act, 1841 (c. 38), s. 6, a piece of land was conveyed in the form given in sect. 10 to trustees for ever for the purposes of the Act as a site for a national school " & for no other purpose whatever " & a national school was afterwards erected upon it. The local authority under Public Health Act, 1875 (c. 55), s. 150, made up a street on part of which the school premises abutted & served the trustees with notice under that Act to pay the apportioned expenses:—*Held*: (1) the trustees were liable for those expenses as "owners" within the Public Health Act, 1875 (c. 55), & the expenses were, until recovery thereof, a "charge" upon the premises

under sect. 257; (2) the local authority could not enforce the charge by an order for sale of the school premises since such an order would be in contravention of School Sites Act, 1841 (c. 38).—*HORNSEY DISTRICT COUNCIL v. SMITH*, [1897] 1 Ch. 843; 66 L. J. Ch. 476; 76 L. T. 431; 45 W. R. 581; 13 T. L. R. 322; 41 Sol. Jo. 423, C. A.

*Annotations*.—*As to* (1) *Consd.* L. C. C. v. Waudsworth B. C., [1903] 1 K. B. 797; Hackney Corp'n. v. Lee Conservancy Board, [1904] 2 K. B. 541. *Refd.* Hampstead Corp'n. v. Mid. Ry. (1905), 92 L. T. 252.

#### iv. Other Cases.

**2236. Inclosed common land**—Subject to charitable trust.]—By an Inclosure Act & an award made thereunder, the soil of a common was vested in the lord of a manor, subject to certain rights of turbary in favour of certain cottages, which rights had been held by the ct. to constitute a charitable trust:—*Held*: notwithstanding the lord of the manor was prevented by the Inclosure Act from letting the common at a rack rent, he was "owner" thereof within Public Health Act, 1875 (c. 55), s. 4, & therefore liable under sect. 150 to contribute to the expenses incurred by the local authority in making a road upon which the common abutted.—*Re* CHRISTCHURCH INCLOSURE ACT, MEYRICK v. A.-G., [1894] 3 Ch. 209; 63 L. J. Ch. 657; 71 L. T. 122; 58 J. P. 556; 42 W. R. 614; 10 T. L. R. 555; 38 Sol. Jo. 580; 8 R. 480.

*Annotations*.—*Refd.* St. Mary, Islington, Vestry v. Cobbett, (1894), 64 L. J. M. C. 36. Hornsey District Council v. Smith, [1897] 1 Ch. 843.

**2237. Land acquired compulsorily**—Railway Clauses Consolidation Act, 1845 (c. 20), s. 68.]—

(1) Where a roadway runs over land previously acquired by a railway co. under its compulsory powers, & the application to such roadway of Public Health Act, 1875 (c. 55), s. 150, would be inconsistent with the appropriation of the land to the objects of the co., sect. 150 cannot (*semble*) be put into operation: *scus*, where the making & dedication of such roadway, so far from being inconsistent with the co.'s objects, must have been contemplated by the framers of its special Act.

(2) The rule laid down in *Robertson v. Bristol Corp'n.*, No. 2259, *post*, applies only where the relative proportions of roadway & footway have been intentionally determined by the owner of the soil.

(3) The owner of the soil of a cross street is not liable for paving expenses as a frontager in respect of the width of such cross street if he has dedicated it to the public irrevocably.—*STRETFORD URBAN DISTRICT COUNCIL v. MANCHESTER SOUTH JUNCTION & ALTRINCHAM RY. CO.* (1903), 68 J. P. 59; 19 T. L. R. 546; 1 L. G. R. 683, C. A.

**2238. Cross street.**—*STRETFORD URBAN DISTRICT COUNCIL v. MANCHESTER SOUTH JUNCTION & ALTRINCHAM RY. CO.*, No. 2237, *ante*.

**2239. Premises not let at rack rent.**—*BOWDITCH v. WAKEFIELD LOCAL BOARD*, No. 2234, *ante*.

**2240.** —]—*Re* CHRISTCHURCH INCLOSURE ACT, MEYRICK v. A.-G., No. 2236, *ante*.

#### (f) Paving Notice.

##### i. Service.

See Public Health Act, 1875 (c. 55), ss. 150, 267.

**2241. Necessity for.**—On an information against K. for not paying certain expenses apportioned upon him as owner of premises in a street

*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (f) i. & ii.]*

upon which work had been done by applt., under Public Health Act, 1848 (s. 63), s. 69, it was proved that the work had been done, & an apportionment of the expenses made, & notice of it served upon resp., who had not given notice within three months that he disputed it, under 21 & 22 Vict. c. 98, s. 63, but no evidence was given of any notice having been served under Public Health Act, 1848 (c. 63), s. 69, previous to applt. doing the work:—*Held*: the justices could not make an order unless the preliminary notice were proved to have been given.—*JARROW LOCAL BOARD v. KENNEDY* (1870), L. R. 6 Q. B. 128; 35 J. P. 248; 19 W. R. 275.

**2242. — Service on several frontagers—Default by one—No necessity for further notice.]**—Applt. & five others were the owners of premises within the district of resps., an urban authority under Public Health Act, 1875 (c. 55). These premises abutted upon a street (not being a highway), which street was not sewered, levelled, paved, flagged, & channelled to the satisfaction of resps. Resps. gave a separate notice to each of such owners requiring them to sewer, level, pave, flag, & channel the parts of the street in front of their premises, within a specified time. Five of the owners executed the works in front of their premises, but applt. made default. Resps. thereupon executed the works required to be done in front of her premises, & their surveyor having made his apportionment, gave her a notice stating that the expenses had been apportioned by their surveyor, who had settled that £213 13s. 6d. was payable by her according to the frontage of her premises, & that they required payment of that sum:—*Held*: (1) Resps. were not bound before executing such works to give applt. a fresh notice specifying the particular works which remained to be done by her; (2) applt. not having given notice to dispute the apportionment, it became binding on her within the three months limited by sect. 257 of the Act, & that summary proceedings might be taken under that sect. for the recovery of the amount due from her; (3) in such summary proceedings it was no objection to the validity of a summons that it was issued more than a year after the complaint upon which it was founded; (1) the notice of apportionment, which concluded with a demand of payment of the amount apportioned, was not a "notice of demand" within sect. 257, & the six months within which, under sect. 252, summary proceedings must be taken, were not to be reckoned from it but from a subsequent notice of demand.—*SIMCOX v. HANDSWORTH LOCAL BOARD* (1881), 8 Q. B. D. 39; 51 L. J. Q. B. 168; 46 J. P. 260; 30 W. R. 273, D. C.

*Annotation:—As to (4) Refd. R. v. L. G. Board & Taylor* (1882), 51 L. J. M. C. 121.

**2243. —**—[Pltfs. incurred expenses in paving a street without having served on defts., who were frontagers, a notice under Public Health Act, 1848 (c. 63), s. 69, (to which Public Health Act, 1875 (c. 55), s. 150, now corresponds) requiring them to do the work themselves. Pltfs. claimed in an action a declaration that the expenses were a charge on defts.' property, under 21 & 22 Vict. c. 98, s. 62, (to which Public Health Act, 1875 (c. 55), s. 257, corresponds). It was proved that B. a predecessor in title of defts. had taken from

pltfs. a receipt for a payment in respect of the same expenses:—*Held*: (1) pltfs. were not entitled, inasmuch as the service of the notice under Public Health Act, 1848 (c. 63), s. 69, was a condition precedent to liability on the part of defts. in respect of the expenses; (2) the payment by B. could not operate as a waiver of the omission to give the notice.—*FARNWORTH LOCAL BOARD v. COMPTON* (1886), 34 W. R. 334; 2 T. L. R. 292, C. A.

*Annotation:—As to (2) Expld. Bristol Corpn. v. Sinnott*, [1917] 2 Ch. 340.

**2244. — Necessity for service on all frontagers.]**—*HANDSWORTH DISTRICT COUNCIL v. DERRINGTON*, No. 2268, *post*.

**2245. —**—[*LEEDS CORPN. v. ARMITAGE* (1899), 43 Sol. Jo. 263, D. C.

**2246. What amounts to good service on owner—Receiver of rack rent.]**—Certain premises requiring to be sewered, etc., resps. inquired of the occupier who the landlord was, & who received the rent of the premises; the occupier said, as the fact was, that it was F. Due notice to F., on May 15, 1861, was accordingly given to sewer, etc.; he neglected to sewer, & the local board completed it on Mar. 13, 1862. F. received the rent up to Feb. 2, 1862. It afterwards appeared that applt. was the real owner on & subsequent to Oct. 31, 1860, but had never really interfered with either M., the land rent, or occupier. The expenses of resps. were £115:—*Held*: as F. received, for the time being, the rack rent of the premises, & was *bond fide* treated by the occupier as his landlord, the service of the notice to sewer, etc., by resps. on F. was a sufficient service on the "owner" within Public Health Act, 1848 (c. 63), & 21 & 22 Vict. c. 98, & applt. was liable for the expenses incurred by resps.—*PREK v. WATERLOO BOARD OF HEALTH* (1863), 2 H. & C. 709; 3 New Rep. 131; 33 L. J. M. C. 11; 9 L. T. 338; 27 J. P. 807; 9 Jur. N. S. 1344; 12 W. R. 252; 159 E. R. 293.

**2247. — Previous owner.]**—In Jan. 1883, a local board passed a resolution for the paving & sewerage of a certain street, & on May 11, 1883, notice was served on P. & Co. requiring them to pave & sewer the street. P. & Co. had been the owners of the land abutting on the street, but, by a conveyance of Apr. 27, 1883, had conveyed their estate to resp.; the local board, however, had no notice of this conveyance. In an action by the local board to recover the paving expenses from the resp.:—*Held*: P. & Co. were not at the time of the services of the notice either "owners or occupiers" of the premises, & as the proper steps prescribed by Public Health Act, 1875 (c. 55), s. 150, had not been taken, resp. was not liable.—*WALLSEND LOCAL BOARD v. MURPHY* (1889), 61 L. T. 777; 6 T. J. R. 29, D. C.

*Annotation:—Refd. Wirral R. C. v. Carter*, [1903] 1 K. B. 646.

**2248. — Receiver appointed by court.]**—The term "owner," as defined in Public Health Act, 1875 (c. 55), s. 4, does not include a receiver of rents & profits appointed by the ct., & service on him of a notice under sect. 150 of the Act is invalid.—*BACUP CORPN. v. SMITH* (1890), 44 Ch. D. 395; 59 L. J. Ch. 518; 63 L. T. 195; 38 W. R. 697.

*Annotation:—Refd. De Grelle, Houdret v. Bull* (1894), 1 Mans. 118.

**2249. — Notice posted on land.]**—Resp. was the owner of a strip of uninclosed land, about 190 feet long & 1 foot wide, adjoining a new street

Police & Improvement (Scotland) Act, 1862 (c. 101), s. 397:—*Held*: a notice under sect. 394 was insufficient.—*CAMPBELL v. LEITH POLICE COMRS.* (1870), L. R. 2 Sc. & Div. 1. —*SCOT*.

which the local authority resolved should be made up. The local authority prepared the usual notice under Public Health Act, 1875 (c. 55), s. 150, requiring the street to be sewerred, levelled, paved, etc., addressed it to "the owner," & affixed it in a conspicuous place on the strip of land pursuant to sect. 267 of the Act. The owner did not do the work. The local authority thereupon did the work & apportioned the expenses on the owner. The owner did not pay. In proceedings to recover the amount before the justices, they found that the owner & his place of residence were known to the surveyor & the assistant surveyor of the local authority, but not to the clerk who drew & posted the notice, & that the notice did not come to the knowledge of the owner. The justices held that the notice was not properly served, & dismissed the complaint:—*Held*: the justices were wrong, & the notice was properly served under sect. 267.—*SHARPLEY v. BEAR* (1903), 67 J. P. 442, D. C.

**2250.** ———.]—Two strips of deft.'s land, of about 41 feet frontage, abutted on a private street, being separated from each other by a strip of land of about 20 feet frontage, belonging to another frontager, which had been reserved on the original sale of deft.'s land as an approach to a cemetery. Pltfs., in proceedings under Private Street Works Act, 1892 (c. 57), relating to the said street, purported to serve on deft. a copy of the resolution approving a provisional apportionment, etc., by placing the copy on a post 4 inches thick planted partly (2 inches) on the intervening strip & partly (2 inches) on one of deft.'s strips of land. In an action brought by pltfs. to enforce a charge on deft.'s land, a county ct. judge found that the notice was not posted on a "conspicuous" part of deft.'s land within Public Health Act, 1875 (c. 55), s. 267, & he therefore gave judgment for deft. On appeal:—*Held*: the county ct. judge had only decided a question of fact, & the ct. would not interfere with his decision.—*WEST HAM CORPN. v. THOMAS* (1908), 73 J. P. 65; 6 L. G. R. 1043, D. C.

## ii. Form and Contents.

See Public Health Act, 1875 (c. 55), s. 150, Sched. IV., Form G.

**2251. Works to be executed—Reference to deposited plans.**—(1) A notice [under Public Health Act, 1848 (c. 63), s. 69] informing the owners that the street was not "sewerred, levelled, paved, flagged, & channelled, metalled, & made good to the satisfaction of the board," & requiring the parties within one month to sewer, level, etc., the same, & intimating that in default the works would be executed by the board:—*Held*: sufficient, without going on to specify the breadth, level, or any other particulars,—the notice containing a note at the foot,—"Particulars of the necessary works may be obtained from the borough surveyor, Office, No. 3 Town Hall," where plans & specifications were lodged.

(2) The power of the arbitrator under sect. 123 of the Act, is limited to an inquiry into the apportionment of the expenses amongst the several owners of property liable to contribute; & he is not entitled to inquire whether the gross amount of the expenditure was reasonable or necessary.

The local board, on Apr. 8, 1861, gave notice to the owners of certain property under sect. 69, & on default being made, executed the works themselves, & by their surveyor apportioned the expenses amongst the several owners, & on Mar. 11, 1862, demanded payment. The land-

owners on June 10, gave notice to the board that they disputed the proportion settled by the surveyor to be due from them in respect of the works executed by the board, "on the ground that the cost of the said works was excessive & unfair." The board, treating this notice as a nullity, issued summonses against the owners, which summonses were on Oct. 11, dismissed. On Oct. 14, the landowners gave notice to the board that they abandoned their notice of June 10, & that they did not dispute the proportions of the expenses incurred by the board. Notwithstanding this, the board afterwards, on Oct. 18, gave notice of arbn., & appointed an arbitrator, who on Dec. 31, made his award, slightly reducing the demand:—*Held*: there being no longer any matter in dispute, the appointment of the arbitrator was void, & his award consequently incapable of being enforced.—*BAXLEY v. WILKINSON* (1864), 16 C. B. N. S. 161; 33 L. J. M. C. 161; 10 L. T. 543; 10 Jur. N. S. 726; 12 W. R. 797; 143 E. R. 1086.

*Annotations*:—As to (2) *Folld. Cook v. Ipswich L. B.* (1871), L. R. 6 Q. B. 451. *Consd. Walthamstow L. B. v. Staines*, [1891] 2 Ch. 606. *Folld. Cawston v. Bromley U. D. C.* (1900), 17 T. L. R. 25. *Consd. Re Stoker v. Morpeth Corp'n.* (1914), 84 L. J. K. B. 1169. *Generally, Mendt. R. v. Lincoln Corp'n.* (1894), 10 R. 294, n.

**2252.** ———.]—A notice by a local authority under Public Health Act, 1875 (c. 55), s. 150, to the frontagers of a new street, not repairable by the inhabitants at large, requiring them to metal & make good the same, should substantially follow Form G. in Sched. IV. to the Act, & must specifically refer to the deposited plans & sections of the work required to be done & state that such plans & sections are open to their inspection at the office of the local authority.

A notice which merely refers in general terms to the provisions of above sect. is insufficient & bad.

Frontagers when served by a local authority with a notice under above sect., referring in general terms to the sect. & requiring them to metal & make good a new street, did nothing. The local authority then executed the required works, & the expenses incurred by them in so doing were apportioned by their surveyor amongst the frontagers in proportion to their respective frontages. The frontagers when served with notice of the apportionment did not dispute it & did not pay the amount of the proportion alleged to be due from them. In proceedings by the local authority under sect. 257 of the Act to enforce payment of the alleged proportion:—*Held*: the frontagers were entitled at the hearing to object that the notice under sect. 150 was insufficient & bad.—*STOURBRIDGE URBAN COUNCIL v. BUTLER & GROVE*, [1909] 1 Ch. 87; 25 T. L. R. 21; *sub nom. STOURBRIDGE URBAN COUNCIL v. BUTLER & GROVE, STOURBRIDGE URBAN COUNCIL v. HIGLEY*, 78 L. J. Ch. 59; 99 L. T. 912; 73 J. P. 3; 7 L. G. R. 183.

**2253. Time for execution.**—Where a statute provides that an authority may serve a notice requiring work to be done within a time therein specified, the notice must specify a time within which the work can reasonably be completed, having regard to the nature of the work & all the circumstances. The least time that can be fairly & reasonably allotted for the completion of the work, being ascertained, is the least time to be inserted in the notice; there is a discretion to allow further time for the completion of the work, but not to fix any shorter time.

A local authority served a notice under Public Health Act, 1875 (c. 55), s. 150, on frontagers requiring them to execute certain works "within



*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (f) ii. & iii., & (g).*

one calendar month from the date of the service hereof" without having exercised any discretion whatever in considering what was a reasonable time to allow for the execution of the works. The frontagers did not commence the works nor object to the validity of the notice, & after three months the local authority, without the consent of the frontagers, began the works & completed them within four months, & served on the frontagers the usual demand for payment. The frontagers thereupon presented a memorial to the Local Government Board under sect. 268 of the Act appealing against the apportionment on the ground (*inter alia*) that the notice requiring them to execute the works within one month was unreasonable & bad, having regard to the fact that the local authority were unable to do the work themselves under four months. The board held an inquiry & eventually intimated that they were prepared to make an order confirming the apportionment. Thereupon the frontagers withdrew their memorial with the approval of the Board. In an action by the local authority to recover payment from the frontagers of the expenses incurred in doing the works:—*Held*: (1) the notice was bad in not specifying a reasonable time for the execution of the works, & the local authority could not recover the expenses from the frontagers; (2) the frontagers, in standing by & doing nothing, had not waived their rights under sect. 150, nor estopped themselves from objecting that the notice was bad; (3) the frontagers were not estopped by their proceedings before the Local Government Board under sect. 268 of the Act from raising the point as to the validity of the notice, inasmuch as, although the Board had intimated that they proposed to decide it against them, no order had in fact been made & the appeal had been withdrawn with the sanction of the Board. — *BRISTOL CORPN. v. SINNOTT*, [1918] 1 Ch. 62; 87 L. J. Ch. 30; 117 L. T. 644; 82 J. P. 9; 62 Sol. Jo. 53; 15 L. G. R. 871, C. A.

*Annotation*:—*As to (1) Consd. Macclesfield Corpn. v. Macclesfield Grammar School*, [1921] 2 Ch. 189.

**2254. — Reasonable time.**—In July, 1912, a corp. gave notice under Public Health Act, 1875 (c. 55), s. 150, to defts. as frontagers in two streets in the borough requiring them to make up those parts of these streets on which their premises abutted within three calendar months. The notices were not complied with, & the corp. did the work. Defts. having failed to pay their proportion of the cost of making up the roads, the corp. now claimed a declaration that defts. respective premises were charged under sect. 257 of the Act with the amounts. Defts. contended that the notices were invalid, because the period of three calendar months had not been affixed after consideration by the corp., & the time specified was not reasonably sufficient. The evidence was that at a meeting of the highway committee to the borough council on Apr. 25, 1921, it was resolved that the town clerk be instructed to serve notice under sect. 150 on the respective frontagers in the two streets. The resolution was approved & confirmed by the borough council on May 1, 1912. No time within which the work was to be executed having been determined by these resolutions, the town clerk sent the borough surveyor the notices with the time left blank. The borough surveyor then consulted the highway committee, who, after an informal discussion, decided on three calendar months as a reasonably sufficient time.

The notices were then issued with this time specified, without any reference of the matter to the council. Evidence was also adduced on the question whether the time allowed was reasonably sufficient:—*Held*: (1) as the effect of the resolution of May 1 was that the corp. sanctioned the issue of notices mentioning a reasonable time, there was no objection to the corp. leaving it to a competent person to fix that time; (2) if a reasonably sufficient time was named in the notices directed to be issued, the manner in which the specification of that time was determined was immaterial; (3) in considering whether the period allowed was reasonable, regard should be had to the work to be done by the particular frontagers & not to the whole work to be done in the road, but that on either view the time allowed was reasonably sufficient.—*MACCLESFIELD CORPN. v. MACCLESFIELD GRAMMAR SCHOOL*, [1921] 2 Ch. 189; 90 L. J. Ch. 477; 126 L. T. 15; 65 Sol. Jo. 663.

**2255. Validity of notice—Partly good & partly bad.**—A notice given to the owner of premises under Public Health Act, 1848 (c. 63), s. 69, containing directions, some of which are *ultra vires*, will be good, & may be enforced in respect of such directions as are legal.

A local board acting under above sect. gave resp. notice to sewer, level, pave, flag, & channel certain premises, including the gardens in front of the houses:—*Held*: although that part of the notice applicable to the gardens was invalid, the rest was lawful, & the notice could be enforced *pro tanto*.—*HALL v. POTTER* (1869), 39 L. J. M. C. 1; 21 L. T. 454; 34 J. P. 515.

**2256. —**—An urban sanitary authority, acting under Public Health Act, 1875 (c. 55), s. 150, served deft. & other frontagers of a new street with notices requiring them to execute certain works, including a particular work which could not legally be included in such notices. The notices not being complied with, the urban authority did the works, & apportioned the expenses incurred by them in so doing on the frontagers. A summons to recover from deft. the sum of £650, the amount charged to him under the apportionment, having been dismissed by the magistrates, the urban authority made a second apportionment, deducting the expense of the work which had been wrongly included, the amount charged to deft. therein being £579. They then brought an action under sect. 257 of the Act, to establish a charge on deft.'s premises for £579, or, in the alternative, for £650:—*Held*: the urban authority had power to make a second apportionment; & notwithstanding the dismissal of the summons, they were entitled to a charge on the premises for £579.—*MANCHESTER CORPN. v. HAMPSON* (1880), 35 W. R. 331; 3 T. L. R. 466, D. C.; *on appeal* (1887), 35 W. R. 591, C. A.

*Annotations*:—*Apld. Derby Corpn. v. Grudgings*, [1894] 2 Q. B. 496. *Refd. Bishop v. Wandsworth Board of Works* (1900), 82 L. T. 766.

**2257. — No objection taken—Waiver or estoppel.**—*BRISTOL CORPN. v. SINNOTT*, No. 2253, *ante*.

**2258. Notice binding on authority—Notice declaring expenses to be private improvement expenses.**—A notice by a local board of health requiring an owner to execute certain repairs, & that in default of such execution by the owner the board will proceed itself to execute such repairs, & that the expenses thereby incurred as private improvement expenses binds the board on such default by the owner to treat the expenses



as private improvement expenses, & precludes them from recovering such expenses by summary process.

The local board of B. served in Mar. 1875, a notice upon H. requiring him to execute certain repairs upon his property in B., & stating that in default of his executing the works the local board would do the repairs themselves & charge the owner with the expenses of such repairs. H. took no steps to comply with the notice, & died in Aug. 1875; appts. were the exors. The local board proceeded to execute the works mentioned in the notice. In Feb. 1876 the local board served another notice on appts. requiring them to execute further & other repairs, & that in default of their executing them, the local board would proceed to execute & charge appts. with the expenses of the works as private improvement expenses. Appts. took no steps to comply with this notice, & the local board proceeded to do the necessary repairs. The proportion of the amount for the two sets of repairs payable by appts. was settled, & sought to be recovered summarily before the justices, who decided in favour of resps. Appts. objected that resps. must be taken to have executed the works on the footing of charging them as private improvement expenses, & could not therefore summarily recover the amount for such works. The justices overruled this objection:—*Held*: as the local board had elected in their notice to appts. to treat the expenses incurred in the execution of the works as private improvement expenses, they were bound by their election, & could not recover the amount for such works by summary proceedings before the justices, whose decision was wrong & must be reversed.—*GOULD v. BACUP LOCAL BOARD* (1881), 50 L. J. M. C. 44; 44 L. T. 103; 45 J. P. 325; 29 W. R. 471, D. C.

### iii. Deviation from Notice.

**Right of authority to deviate from works required by notice.]**—*See* No. 2256, *ante*, Nos. 2276, 2277, 2279, *post*.

**Alteration of widths of carriageway & footway.]**  
—*See* Sub-sect. 4, A. (g), *post*.

#### (g) Width of Carriageway and Footway.

*See, now*, Public Health Act, 1925 (c. 71), s. 35.

**2259. Power of local authority to vary widths.]**—An urban authority, when paving & making good a street, not being a highway repairable by the inhabitants at large, under Public Health Act, 1875 (c. 55), s. 150, has no power to alter the respective widths of the carriageway & footway of the street.—*ROBERTSON v. BRISTOL CORPN.*, [1900] 2 Q. B. 198; 69 L. J. Q. B. 590; 82 L. T. 516; 64 J. P. 389; 48 W. R. 498; 16 T. L. R. 359; 44 Sol. Jo. 426, C. A.

*Annotations*:—*Appl.* Wandsworth B. C. v. Golds, [1911] 1 K. B. 60. *Refd.* Stretford U. D. C. v. Manchester South Junction & Altrincham Ry. (1903), 68 J. P. 59.

**2260. Relative proportions intentionally determined by owner of soil.]**—*STRETFORD URBAN DISTRICT COUNCIL v. MANCHESTER SOUTH JUNCTION & ALTRINCHAM RY. CO.*, No. 2237, *ante*.

#### (h) Paving and Levelling.

*See* Public Health Act, 1875 (c. 55), s. 150; Public Health Acts Amendment Act, 1890 (c. 59), s. 11 (2).

**2261. Levelling—Raising to level of neighbouring street.]**—Under Public Health Act, 1848 (c. 63), s. 69, the board have no power to call upon owners & occupiers in a street to raise same to the level of the neighbouring streets; but for the purposes

of levelling each street is to be considered as apart & isolated from the others.—*CARY v. KINGSTON-UPON-HULL LOCAL BOARD OF HEALTH* (1864), 34 L. J. M. C. 7; 11 Jur. N. S. 171.

*Annotation*:—*Mentd.* Acton U. D. C. v. Watts (1903), 1 L. G. R. 594.

#### **2262. Paving—Discretion of local authority.]**

(1) In order that a local authority may declare a street, not repairable by the inhabitants at large of their district, to be a highway so that it may become repairable by such inhabitants, it is necessary that each of the works specified in Public Health Act, 1875 (c. 55), s. 152, shall, at the time of declaration, have been executed upon the street to the satisfaction of such authority.

(2) Local authorities have not, under the sect., any discretion as to which of the works mentioned in the sect. they will require to be executed. Their discretion is limited to their being satisfied with the efficiency of each description of work when done.

(3) *Semble*: kerbing a road does not answer the requirement in the sect. that the road must be flagged, “flagged” meaning paved with flagged stones; (4) wooden paving does not come within any of the requirements of the sect.—*A.-G. v. BIDDER* (1881), 47 J. P. 263.

*Annotation*:—*As to* (1) *Refd.* Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496.

*See, now*, Public Health Acts Amendment Act, 1890 (c. 59), s. 11 (2).

#### (i) Sewering.

Sewers generally, *see* SEWERS & DRAINS.

**2263. Acceptance of previous sewer by local authority—Inferred after reasonable time—Sewer laid by building owners.]**—A street having been laid out by the owners of a building estate, a sewer was made by them for the drainage of the houses in the street. Subsequently, in the year 1868, a local board was formed whose district included such street. The sewer, which discharged into the Thames, was sufficient for the purposes of the drainage of the street, assuming that draining into the Thames could be continued. In 1884 the local board, having received notice from the Thames Conservators to discontinue the discharge of sewage into the Thames, gave notice under Public Health Act, 1875 (c. 55), s. 150, to the frontagers in the street to make a new sewer, & on their default themselves constructed such sewer & sought to charge the expenses upon the frontagers:—*Held*: (1) the original sewer was not a sewer made by the owners for their own profit & therefore had vested in the board under the Act; (2) the board, not having taken any steps to compel the frontagers to sewer the street within a reasonable time after the sewer became vested in them, must be taken to have been satisfied with the sewer, & could not afterwards proceed against the frontagers under sect. 150, but were bound themselves to keep the sewer in repair under sect. 15 of the Act, & if it became necessary, to enlarge or alter it under sect. 18; & consequently the expenses of constructing the new sewer were chargeable not on the frontagers but on the general district rate.—*BONFILLA v. TWICKENHAM LOCAL BOARD OF HEALTH, HOLMES v. TWICKENHAM LOCAL BOARD OF HEALTH* (1887), 20 Q. B. D. 63; 57 L. J. M. C. 1; 58 L. T. 299; 52 J. P. 356; 36 W. R. 50; 4 T. L. R. 51, C. A.

*Annotations*:—*As to* (1) *Fold.* Ferrand v. Hallas Land & Building Co., [1893] 2 Q. B. 135. *Distd.* Minchew L. B. v. Luttrell, [1894] 2 Ch. 178. *Refd.* Croydale v. Sunbury-on-Thames U. C. (1898), 67 L. J. Ch. 685; Sykes v. Sowerby U. C., [1900] 1 Q. B. 584; Yorkshire (W. R.) Rivers Board v. Anthwaite U. C. (1901), 70 J. P. 498.

Sect. 2.—*Extra metropolitana: Sub-sect. 4, A. (i),*

K. B. 1610. *As to* (2) **Consd.** Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496. **Distd.** Barry & Cadoxton L. B. v. Parry (1895), 59 J. P. 421; Handsworth District Council v. Derrington, [1897] 2 Ch. 438; Simmonds v. Fulham Vestry, [1900] 2 Q. B. 188. **Appl.** Wilmslow U. D. C. v. Sidebottom (1906), 70 J. P. 537. **Distd.** Bloor v. Beckenham U. C., [1908] 2 K. B. 671. **Refd.** Walthamstow L. B. v. Staines, [1891] 2 Ch. 606; Hornsey L. B. v. Davis, [1893] 1 Q. B. 756; Idshton v. Haalingden Corpn., [1898] 1 Q. B. 294. *Generally, Mentd.* St. James Hall Co. v. L. C. C., [1901] 2 K. B. 250.

**2264.** ————.]—The owners of a building estate, who were the predecessors in title of deft., deposited plans, which were approved by the local authority, showing a road running down the slope of a hill & crossing the New River at the foot, with a sewer running the whole length of the road & crossing the New River to join another sewer on the farther side. An agreement was made by the New River Co. with the estate owners to divert the New River so as to enable the sewer to be laid across the old bed of the stream. In 1885 the sewer was made as far as the New River where it stopped, the river not having then been diverted; it had no outfall, & was never, in fact, used as a sewer; but the work was from time to time inspected by a servant of the local authority, who authorised the covering in of the various sections, & made reports to the local authority, who never expressed dissatisfaction with the work. Nothing more was done to the sewer which became out of repair & ruinous; & in 1890 the local authority gave to the frontagers in the road notice, under Public Health Act, 1875 (c. 55), s. 150, to sewer the road down to the New River; on their default the local authority themselves constructed a new sewer, which they carried across the bed of the New River & connected with the sewer on the other side, the diversion of the river having been completed during the execution of the works by the local authority. The local authority having sought to charge the frontagers with the expenses of making the new sewer, the question of the amount to be paid by deft. was referred to arbn., & in an action on the award, the jury found that the local authority had accepted the old sewer as a satisfactory sewer:—*Held*: (1) the local authority had power to accept the original sewer, although it had no outfall, & was at the time of acceptance incapable of being used as a sewer; (2) the road having once been sewered to the satisfaction of the local authority, the expenses of constructing the new sewer were not chargeable on the frontagers.—**HORNSEY LOCAL BOARD v. DAVIS**, [1893] 1 Q. B. 756; 62 L. J. Q. B. 427; 68 L. T. 503; 57 J. P. 612; 4 R. 322, C. A.

*Annotations:—As to* (2) **Distd.** Barry & Cadoxton L. B. v. Parry (1895), 59 J. P. 421. **Consd.** Re Hanwell U. D. C. & Smith (1901), 68 J. P. 496. *Generally, Mentd.* St. James Hall Co. v. L. C. C., [1901] 2 K. B. 250.

**2265.** ————.]—A road having been made by the owners of a building estate about 1859, a 12-inch pipe was laid by them along it from end to end. Houses were built from time to time in the neighbourhood of the road, & some of their owners connected their drains with the 12-inch pipe; but certain of the houses which were first built had a separate system of drainage into cesspools in a wood at the back of their premises. Drainage into the 12-inch pipe commenced at least as early as 1876. The 12-inch pipe discharged into a culvert, & thence into a river. Pltfs.' predecessors, the W. Local Board of Health, were constituted in 1878, & could in that year have put into operation Public Health Act, 1875

(c. 55), s. 150. There was evidence that in 1882 their surveyor knew of at least one connection of drains with this pipe, & that complaint having been made in 1892 or 1893 as to the outfall of the pipe's contents into the river, the local authority subsequently proposed a scheme of drainage by which the drainage was to be diverted from the 12-inch pipe & carried into septic tanks:—*Held*: (1) the pipe was a sewer within Public Health Act, 1875 (c. 55), s. 4, & had vested in pltfs.; (2) on the evidence as a finding of fact, the local authority must be taken to have been satisfied with the sewer, & could not now re-sewer the road & proceed against frontagers under Public Health Act, 1875 (c. 55), s. 150.

(3) *Semble*: when a sewer has thus existed for a long period of years, it must be inferred that the sewer has been accepted by the local authority as a sewer laid to their satisfaction.—**WILMSLOW URBAN DISTRICT COUNCIL v. SIDEBOTTOM** (1900), 70 J. P. 537; 5 L. G. R. 80.

**2266.** ————.]—The owner of a building estate deposited plans in accordance with the bye-laws of a local authority, made under Public Health Act, 1875 (c. 55), s. 157, showing the course of an intended new sewer to be constructed of 9-inch pipes along a certain new road. After the plans were approved, the line of pipes or sewer was constructed under the inspection of the local authority, & when completed was passed & authorised to be covered in. No houses were built on the land fronting the new sewer, & it was not in use:—*Held*: the line of pipes, immediately after it was approved & authorised to be covered in, was a sewer which vested in the local authority under sect. 13 of the Act, & they had power under sect. 16 to connect it with their other sewers.—**TURNER v. HANDSWORTH URBAN COUNCIL**, [1909] 1 Ch. 381; 78 L. J. Ch. 202; 100 L. T. 194; 73 J. P. 95; 7 L. G. R. 255.

**2267.** What is a sufficient sewer—Sewer without outfall.—**HORNSEY LOCAL BOARD v. DAVIS**, No. 2264, *ante*.

**2268.** — Independent sewers—Allowed by local authority.]—(1) A private street, or part thereof, is not "sewered" within Public Health Act, 1875 (c. 55), s. 150, when the houses in it are served either singly or in groups by private drains or sewers constructed by the several owners of the houses, but not forming one system of sewerage. Accordingly, the local authority may, although these private sewers are vested in them under sect. 13, require the frontagers, under sect. 150, to sewer the street, unless the local authority have, either expressly or by inference from circumstances, determined that it is already sewered to their satisfaction within that sect.; in which case their powers under that sect. are no longer exercisable, & any required new sewers must be provided at their own expense under sects. 15 & 18.

(2) The notice under sect. 150 to frontagers to sewer a street must be served upon every frontager.

(3) If the proportion of sewerage expenses payable by any frontager under sect. 150 is referred to arbn. under sect. 180, all objections to the validity of the proceedings of the local authority on the ground of insufficient notice, such as neglecting to serve every frontager, or otherwise, must be raised, if at all, before the arbitrators; & it is too late to raise them by action or other proceeding after the award, which is by sub-sect. 15 of that sect. made "final & binding" on the parties.—**HANDSWORTH DISTRICT COUNCIL v. DERRINGTON**, [1897] 2 Ch. 438; 66 L. J. Ch.

691; 77 L. T. 73; 61 J. P. 518; 46 W. R. 168; 13 T. L. R. 505; 41 Sol. Jo. 640.

*Annotation*:—*As to* (3) *Distd.* *Stourbridge U. C. v. Butler & Grove*, [1909] 1 Ch. 87.

**2269. — Sewer laid by local authority.**—In a road which was a street within Public Health Act, 1875 (c. 55), s. 150, but which was not a highway repairable by the inhabitants at large, an urban authority in 1881, at the cost of the rates, constructed a sewer for soil only, the surface water from the road & the adjoining houses, both before & after 1881, being carried away by channels at the side of the road. In 1904, there having been no change since 1881 in the number or character of the adjoining houses, the urban authority gave notice under sect. 150 to the frontagers in the road to construct a sewer in the road for the purpose of carrying away the surface water. The frontagers, contending that the road was not a street not sewered to the satisfaction of the urban authority within sect. 150, did not comply with the notice, & on their default the urban authority themselves constructed the sewer & sought to charge the expenses on the frontagers:—*Held*: it was a question of fact for the justices whether the road was a street not sewered to the satisfaction of the urban authority, & the fact that the urban authority had themselves constructed a sewer in the road in 1881, & had done nothing further with regard to the drainage of the road until 1904, did not as a matter of law preclude the justices from finding as a fact on the evidence that in 1904 the road was not sewered to the satisfaction of the urban authority.—*BLOOR v. BECKENHAM URBAN DISTRICT COUNCIL*, [1908] 2 K. B. 671; 77 L. J. K. B. 864; 99 L. T. 299; 72 J. P. 325; 6 L. G. R. 876, D. C.

(j) *Recurring Liability.*

**2270. Re-sewering—No liability on frontagers after acceptance of sewer.**—*BONELLA v. TWICKENHAM LOCAL BOARD OF HEALTH, HOLMES v. TWICKENHAM LOCAL BOARD OF HEALTH*, No. 2263, *ante*.

**2271. — — —**—*HORNSEY LOCAL BOARD v. DAVIS*, No. 2264, *ante*.

**2272. — — —**—*WILMSLOW URBAN DISTRICT COUNCIL v. SIDEBOTTOM*, No. 2265, *ante*.

**2273. — — —**—*BLOOR v. BECKENHAM URBAN DISTRICT COUNCIL*, No. 2269, *ante*.

**2274. Re-paving — Liability of frontagers.**—Under Public Health Act, 1875 (c. 55), s. 150, an urban sanitary authority has power to require the owner of premises fronting on a street, not being a highway repairable by the inhabitants at large, to pave & channel such street, notwithstanding that it has already been paved & channelled to the satisfaction of such authority.—*BARRY & CADOXTON LOCAL BOARD v. PARRY*, [1895] 2 Q. B. 110; 64 L. J. Q. B. 512; 72 L. T. 692; 59 J. P. 421; 43 W. R. 504; 39 Sol. Jo. 507; 15 R. 430, D. C.

(k) *Execution of Work by Local Authority on Default of Frontager.*

See Public Health Act, 1875 (c. 55), s. 150.

**2275. Right of contractor to recover expense from authority.**—A local board of health for a non-corporate district, acting under Public Health Act, 1848 (c. 63), gave notice to the owners of the premises fronting, adjoining, or abutting on certain streets, requiring them to "sewer, level, pave, flag, & channel" same, according to the provisions of sect. 69 of that Act. These notices not being complied with within the specified time,

the board entered the contracts with a third person for the performance thereof, which contained provisions that the contractor was to be paid for the work when the money was collected from the owners of the adjacent properties. The work was done accordingly, but the owners having refused payment, the justices of the peace before whom they were summoned for non-payment dismissed the summonses:—*Held*: on a case in which the ct. was empowered to draw inferences of fact, the contractor was entitled to sue the board of health for the work done by him under the contracts.—*WORTHINGTON v. SUDLOW* (1862), 2 B. & S. 508; 31 L. J. Q. B. 131; 6 L. T. 283; 26 J. P. 453; 8 Jur. N. S. 668; 10 W. R. 621; 121 E. R. 1162.

*Annotation*:—*Mentd.* *Worthington v. Hulton* (1865), L. R. 1 Q. B. 63.

**2276. Power of authority to deviate from terms of notice—Use of cheaper material.**—Under Public Health Act, 1875 (c. 55), s. 150, an urban sanitary authority gave notice to the owner of premises to pave part of a street upon which his premises abutted, specifying the materials & mode & (*inter alia*) requiring him to lay down concrete. The owner having failed to comply, the sanitary authority did the work themselves, but finding that the concrete would be an unnecessary expense, omitted it:—*Held*: the omission to follow strictly the terms of their own notice did not prevent the sanitary authority from recovering from the owner his proportion of the expenses incurred.—*ACTON LOCAL BOARD v. LEWSEY* (1886), 11 App. Cas. 93; 55 L. J. Q. B. 401; 51 L. T. 657; 50 J. P. 708; 34 W. R. 745, 11 L.

**2277. — — —**—The urban sanitary authority gave notice to K., an owner of land adjoining a new street, to sewer the road, & lay an 18-inch pipe. K. having neglected, the authority in course of carrying out the work found a 12-inch pipe sufficient, & used it, & it saved expenses to K. on the apportionment:—*Held*: the magistrate was right in holding that the apportioned expenses of the altered work were recoverable under Public Health Act, 1875 (c. 55), s. 150, the alteration being not a material matter, nor invalidating the notice.—*KENSHAW v. SHEFFIELD CORPN.* (1887), 51 J. P. 759, D. C.

**2278. — — —**—**Execution of more extensive works — Frontager charged with proportionate amount.**—*MANCHESTER CORPN. v. HAMPSON*, No. 2256, *ante*.

**2279. — — —**—An urban authority under Public Health Act, 1875 (c. 55), s. 150, served notices on the frontagers of a street requiring them to sewer the street as therein specified. On default the local authority carried out more extensive sewage works, but including the work necessary for drainage of the street itself, & apportioned on the frontagers part of the cost of the more extensive works, being the amount which it would have cost to sewer the street in accordance with the notices:—*Held*: the amount so apportioned was recoverable by the local authority.—*ACTON URBAN DISTRICT COUNCIL v. WATTS* (1903), 67 J. P. 400; 1 L. G. R. 594.

**2280. Bonâ fide endeavour by frontager to execute work.**—*Pltf.*, the owner of property abutting on a street known as C. Gardens, received on Nov. 17, 1911, a notice from the local authority under Public Health Act, 1875 (c. 55), s. 150, requiring him to make up his portion of the road, & amongst other things, make connections with the sewer, within six weeks of the date of the notice. At that time contractors were at work making up another road, the only access to which was by way of C. Gardens, & accordingly *pltf.*, after informing

*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (k) & (l) i., ii. & iii.]*

the local authority of that fact, & that he proposed, with the consent of the other frontagers, to make up the whole of the road himself, waited until the works in the other road were finished. In Mar. 1912, the works being finished, pltf. began the work in C. Gardens, but the local authority refused to supply the levels, or to co-operate unless pltf. signed an agreement as to the making up of the street which it was alleged by the council pltf. had agreed to enter into after the six weeks specified in the notice had run out. On May 1 the works were ready for the connections with the sewers to be made, but upon pltf. requesting the authority to make the same, they refused to do so, or to allow him to do so, on the ground that the works were not being done under the notice & that the agreement had not yet been signed. Pltf. then made a connection, which the council caused to be disconnected. Pltf. then issued a writ against the council for an injunction, & subsequently an arrangement was come to by which the council made the connections at pltf.'s expense:—*Held*: pltf. had *bond fide* endeavoured to comply with the notice; there had been no unreasonable delay on his part; he was entitled to have the connections made when he called upon the council to make them, & defts. must pay the costs of the action.—*DENMAN v. FINCHLEY URBAN DISTRICT COUNCIL* (1912), 76 J. P. 405; 10 L. G. R. 697.

*Annotation*.—*Consd.* Bristol Corpn. v. Sinnott (1917), 117 L. T. 614.

(l) *Apportionment of Expenses.*

i. *In General.*

See Public Health Act, 1875 (c. 55), s. 150.

**2281. Principles of apportionment—In proportion to linear frontage.**—(1) Under Public Health Act, 1848 (c. 63), s. 69, the expense of sewerage & paving a street must be apportioned among the owners or occupiers of all premises fronting, adjoining, or abutting on the street, whether the premises have direct access to the street or not, & in proportion to the linear frontage of the premises to the street, & irrespective of the width of the street.

(2) Under that enactment a railway & canal co., whose premises abut on a street, but with a fence between them & the street, is liable to be charged.—*R. v. NEWPORT LOCAL BOARD OF HEALTH* (1863), 3 B. & S. 311; 32 L. J. M. C. 97; 9 Jur. N. S. 746; 11 W. R. 263; 122 E. R. 129.

*Annotations*.—*As to* (1) *Apld.* Newport Urban S. A. v. Graham (1882), 9 Q. B. D. 183. *Refd.* Waketield L. B. v. Lee (1876), 1 Ex. D. 336.

**2282. — One side of street paved.**—An urban authority, acting under Public Health Act, 1875 (c. 55), s. 150, repaired the footway on the south side of a street & apportioned the whole cost among the owners & occupiers of premises on the south side only:—*Held*: the apportionment was right.—*WAKEFIELD SANITARY AUTHORITY v. MANDER* (1880), 5 C. P. D. 248; 44 J. P. 522; 28 W. R. 922, D. C.

*Annotations*.—*Distd.* Clacton L. B. v. Young, [1895] 1 Q. B. 395. *Refd.* Paddington Vestry v. North Metropolitan Ry. & Canal Co. (1893), 42 W. R. 223.

**2283. First apportionment invalid—Power to make second apportionment.**—*COOK v. IPSWICH LOCAL BOARD*, No. 2220, *ante*.

**2284. —**—*S.*, an adjoining owner, having made default in executing certain paving, etc., the local board executed the same, & sent a notice with an apportionment of expenses. By inadvertence the apportionment was signed by B.,

who was not then surveyor, having been superseded previously. On discovering this mistake the board issued a fresh notice & apportionment signed by their actual surveyor, treating the former notice as a nullity:—*Held*: the board acted properly, & the time of limitation for recovery of the sum apportioned ran not from the first but from the second apportionment.—*SYKES v. HUDDERSFIELD CORPN.* (1871), 35 J. P. 614.

**2285. — After failure to enforce first apportionment.**—*MANCHESTER CORPN. v. HAMPSON*, No. 2256, *ante*.

ii. *Notice to Dispute Apportionment.*

See Public Health Act, 1875 (c. 55), ss. 150, 257.

**2286. Time for giving notice.**—(1) An apportionment of expenses duly incurred by a local board under Public Health Act, 1875 (c. 55), s. 150, in the paving, etc., of streets was served on the owner of premises fronting the same. The apportionment mixed up the expenses of more than one street, but the owner not having objected within the three months provided by sect. 257:—*Held*: it was too late to raise an objection to the apportionment, which thenceforward became valid & binding.

(2) The deposit of plans & estimate of the works intended to be executed under sect. 150, & by that sect. directed to be made for the inspection of all persons interested, is not a condition precedent to the validity of all subsequent proceedings.—*SHANKLIN LOCAL BOARD v. MILLAR* (1880), 5 C. P. D. 272; 49 L. J. Q. B. 512; 42 L. T. 738; 44 J. P. 635; 29 W. R. 63, D. C.

*Annotations*.—*As to* (1) *Refd.* Manchester Corpn. v. Hampson (1886), 35 W. R. 344; Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496; Bishop v. Wandsworth Board of Works (1900), 82 L. T. 766.

**2287. —**—*SIMCOX v. HANDSWORTH LOCAL BOARD*, No. 2242, *ante*.

**2288. What amounts to notice.**—*FOLKESTONE CORPN. v. BROOKS*, *FOLKESTONE CORPN. v. LADD*, No. 2294, *post*.

**2289. Right to withdraw notice.**—*Re STOKER & MORPETH CORPN.*, No. 2301, *post*.

**2290. Whether notice necessary—Where preliminary paving notice not served.**—*JARROW LOCAL BOARD v. KENNEDY*, No. 2241, *ante*.

**2291. Effect of want of notice—Estoppel of frontager.**—*MIDLAND RY. CO. v. WATTON*, No. 2325, *post*.

**2292. —**—*DERBY CORPN. v. GRUDGINGS*, No. 2341, *post*.

iii. *Proceedings before Arbitrator.*

See Public Health Act, 1875 (c. 55), ss. 150, 179–181, 257.

**2293. Necessity for proceedings—If apportionment disputed—Condition precedent to recovery of expenses.**—Where an urban authority gives notice to the owners & occupiers of premises fronting, adjoining or abutting on a street, that requires to be sewered or otherwise dealt with under Public Health Act, 1875 (c. 55), s. 150, & in default executes the work, & the expense is apportioned by the surveyor, any dispute arising on the apportionment, whether as to amount or otherwise, must be dealt with by arbitration in the manner provided by the Act, & the urban authority cannot proceed to recover the amount apportioned from any owner who has given notice that he disputes the apportionment.—*SANDGATE DISTRICT LOCAL BOARD OF HEALTH v. KEENE*, [1892] 1 Q. B. 831; 61 L. J. Q. B. 775; 66 L. T. 741; 56 J. P. 484; 8 T. L. R. 432, C. A.

*Annotations*.—*Distd.* Folkestone Corpn. v. Brooks, *Same v. Ladd*, [1893] 3 Ch. 22. *Consd.* West Hartlepool Corpn.

*v. Robinson* (1897), 77 L. T. 387; *Cawston v. Bromley U. D. C.* (1900), 17 T. L. R. 25. *Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169. *Re West Willesden L. B. & Wright* [1898] 2 Q. B. 412.

**2294.** ———.—(1) A defaulting owner, on receiving notice of apportionment [under Public Health Act, 1875 (c. 55), s. 150], sent to the authority a letter which appeared to be rather an objection to the prime cost of the work than to the mode in which that prime cost was apportioned. The ct. below held that a dispute as to the prime cost was not a dispute as to the apportionment within the sect., & that the urban authority were not bound to go to arbitration before commencing an action to recover the apportioned amount. On appeal:—*Held*: the letter might have been treated by the urban authority as not being a notice disputing the apportionment but as they had in letters to the owner, & by resolution passed at their own meeting, treated the letter as a good notice, it must be treated as such, & an action brought by them before proceeding to arbitration must be dismissed.

(2) Another owner disputed the claim of the urban authority in general terms:—*Held*: this was a dispute as to the apportionment & the urban authority could not sue without first going to arbitration.—*FOLKESTONE CORPN. v. BROOKS, FOLKESTONE CORPN. v. LADD*, [1893] 3 Ch. 22; 62 L. J. Ch. 863; 69 L. T. 403; 58 J. P. 53; 9 T. L. R. 504, C. A.

*Annotations*:—As to (1) *Appld. Cawston v. Bromley U. D. C.* (1900), 17 T. L. R. 25. *Consd. Bolton Corpn. v. Scott* (1913), 108 L. T. 406; *Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169. *Re West Hartlepool Corpn. v. Robinson* (1897), 77 L. T. 387; *Southampton Corpn. v. Lord* (1903), 67 J. P. 189. *Generally, Mentd. Crossfield v. Manchester Ship Canal Co.*, [1901] 2 Ch. 123.

**2295. Objections to be raised before arbitrator.]**—*HANDSWORTH DISTRICT COUNCIL v. DERRINGTON*, No. 2268, *ante*.

**2296. Jurisdiction of arbitrator—Whether expenditure reasonable or necessary.]**—*BAYLEY v. WILKINSON*, No. 2251, *ante*.

**2297. — As to cost of works.]**—*SANDGATE DISTRICT LOCAL BOARD OF HEALTH v. KEENE*, No. 2293, *ante*.

**2298. — As to liability for expenses.]**—*FOLKESTONE CORPN. v. BROOKS, FOLKESTONE CORPN. v. LADD*, No. 2294, *ante*.

**2299. ———.]**—Where a local authority executes paving & other works in a street under Public Health Act, 1875 (c. 55), s. 150, & the surveyor apportions the expense, & the apportionment is disputed, the arbitrators appointed to settle the dispute have no jurisdiction to inquire into the items of the total amount certified by the surveyor.—*Re CAWSTON & BROMLEY URBAN DISTRICT COUNCIL* (1900), 64 J. P. 760; *sub nom. CAWSTON v. BROMLEY URBAN DISTRICT COUNCIL*, 17 T. L. R. 25, D. C.

*Annotation*:—*Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169.

**2300. ———.]**—(1) The only power which an arbitrator appointed to apportion paving expenses under Public Health Act, 1875 (c. 55), s. 150, has is to divide up the total sum which the local authority have decided to be the cost of the work. He has no jurisdiction to entertain objections to the total cost of the work as given to him by the local authority.

(2) In proceedings against a frontager under sect. 257 of the Act for the recovery of paving expenses the justices have power to entertain objections which offer an answer to the whole of the frontager's liability, but have no power to

entertain objections as to the amount of his liability.

(3) The only method in which a frontager can take objection to the decision of the local authority as to the works to be carried out under sect. 150 of the Act is by appeal to the Local Government Board under sect. 268.—*Re HANWELL URBAN DISTRICT COUNCIL & SMITH* (1904), 68 J. P. 496; 2 L. G. R. 1350, D. C.

*Annotation*:—*Consd. Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169.

**2301. ———.]**—An urban authority under Public Health Act, 1875 (c. 55), s. 150, paved & made up a place as being a "street" within the Act, & their surveyor apportioned the expenses among the frontagers. One of the frontagers gave notice of objection to the apportionment upon him upon the ground that the greater part of the place paved & made up was private property & not a "street," & that only a small part of his premises fronted on a "street." The urban authority thereupon appointed an arbitrator under sect. 180 of the Act, & the frontager, who had not appointed an arbitrator before the expiration of fourteen days after service upon him of notice of the appointment of the arbitrator by the urban authority, gave notice to the urban authority that he withdrew the notice disputing the apportionment upon the ground that the sole question was one of law as to whether the whole of the place paved & made up was a "street" which the arbitrator could not determine. The urban authority refused to accept the notice of withdrawal, & the arbitrator appointed by them proceeded with the arbitration as sole arbitrator, & made an award against the frontager for the sum apportioned in respect of his premises, stating in his award that he found as facts that the place was a "street" within the Act, & that it was not repairable by the inhabitants at large. Upon a motion by the frontager to set aside the award:—*Held*: (1) the frontager, not having appointed an arbitrator to act for him, was entitled to withdraw his notice disputing the apportionment within the fourteen days; having done so there was no submission by him to arbitration; & therefore the arbitrator had no power to act as sole arbitrator, & the award was a nullity & must be set aside; (2) even if the arbitrator had jurisdiction to make an award, he had exceeded his jurisdiction in determining that the place was a "street" within the Act & was not repairable by the inhabitants at large, & upon this ground also the award must be set aside.—*Re STOKER & MORPETH CORPN.*, [1915] 2 K. B. 511; 84 L. J. Ch. 1169; 112 L. T. 753; 79 J. P. 201; 13 L. G. R. 233, C. A.

**2302. ———.]**—Notices to sewer & pave roads having been in 1872 served by a board of health on an owner he took no notice during his lifetime & the works having been executed by the board notices to pay apportionments were on July 30, 1875, served on the tenant for life under the will of the owner, & on the exors., who within the statutory three months served counter notices on the board, disputing the amount of the apportionments & alleging that the roads were public roads. The board then commenced proceedings by arbn. which the owners refused to attend, & in their absence an award was made in favour of the board on Aug. 9, 1877. On Jan. 19, 1878, the award was made a rule of the Q. B. Div. On Feb. 12, notices of demand were served by the board on the owners, & on July 9, 1878, proceedings in the Q. B. Div. to enforce the award were commenced & subsequently abandoned. On

*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (l) iii., & (m) i., ii. & iii.]*

Aug. 1, 1878, proceedings were taken in the Q. B. with reference to the costs of the award & these on Jan. 23, 1879, were transferred to the Ch. Div., in which an administration action was pending:—*Held*: (1) where a notice served by a board of health upon an owner calling upon him to pay an apportionment of expenses incurred in the sewerage & paving of roads is met by a counter notice disputing the amount alone such demand may be the subject of arbn.; but where the counter notice disputes the liability to pay, such a demand must be tried by justices, who, if the counter notice also disputes the amount may exercise their jurisdiction as to the amount also; (2) a summons by the board for leave to prove in the administration action for the amount awarded must be refused, on the ground that the remedy of the board was by a summary proceeding before justices & had become barred by the operation of Summary Jurisdiction Act, 1848 (c. 43), s. 11.—*WEST v. DOWNMAN* (1880), 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6, C. A.

*Annotations:—As to (1) Consd. Re Willesden L. B. & Wright, [1896] 2 Q. B. 412. Re Lca v. Aberavenny Improvement Comrs. (1885), 16 Q. B. D. 18. Re Bettsworth & Richer (1888), 37 Ch. D. 535. Millard v. Balby-with-Hexthorpe U. D. C. (1904), 90 L. T. 489. As to (2) Consd. Sandgate District L. B. of Health v. Keene, [1892] 1 Q. B. 831; Re Willesden L. B. & Wright, [1896] 2 Q. B. 412. Re Boor, Boor v. Hopkins (1889), 40 Ch. D. 572; Hornsey L. B. v. Monarch Investment Bldg. Soc. (1889), 23 Q. B. D. 149.*

**2303.** ———.]—An award under Public Health Act, 1875 (c. 55), s. 150, as to the proportion of the expenses, incurred by an urban authority in sewerage & otherwise making good a street, to be borne by a person to whom notice has been given requiring him to sewer & otherwise make good a portion of the street, cannot be enforced under Arbitration Act, 1889 (c. 49), s. 12.

The arbn. clause in the sect. [Public Health Act, 1875 (c. 55), s. 150] does not give power to go to arbn. to fix the liability but only the amount (LORD ESTER, M.R.).—*Re WILLESDEN LOCAL BOARD & WRIGHT*, [1896] 2 Q. B. 412; 65 L. J. Q. B. 567; *sub nom. WILLESDEN LOCAL BOARD v. WRIGHT*, 75 L. T. 13; 60 J. P. 708; 44 W. R. 676; 12 T. L. R. 539, C. A.

*Annotation:—Consd. Re Stoker & Morpeth Corpn. (1914), 84 L. J. K. B. 1169.*

**2304.** ———.]—*To apportion against frontager not appealing.*—An award in an arbn. under Public Health Act, 1875 (c. 55), between one of several frontagers called upon to pay the expense of paving a street & an urban authority, by which the arbitrator has altered not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is not binding upon any frontager not a party to the arbitration so as to entitle the urban authority to recover from him the sum which would be due from him on the footing of the altered assessment.—*TUNBRIDGE WELLS LOCAL BOARD v. AKROYD* (1880), 5 Ex. D. 199; 49 L. J. Q. B. 403; 42 L. T. 640; 44 J. P. 504; 28 W. R. 450, C. A.

*Annotation:—Re L. v. L. G. Board (1882), 10 Q. B. D. 309.*

**2305.** ———.]—*Whether limited to apportionment of expenses.*—*BAYLEY v. WILKINSON*, No. 2251, *ante*.

**2306.** ———.]—*WEST v. DOWNMAN*, No. 2302, *ante*.

**2307.** ———.]—*SANDGATE DISTRICT LOCAL BOARD OF HEALTH v. KEENE*, No. 2293, *ante*.

**2308.** ———.]—*FOLKESTONE CORPN. v. BROOKS, FOLKESTONE CORPN. v. LADD*, No. 2294, *ante*.

**2309.** ———.]—*Re WILLESDEN LOCAL BOARD & WRIGHT*, No. 2303, *ante*.

**2310.** ———.]—*Re HANWELL URBAN DISTRICT COUNCIL & SMITH*, No. 2300, *ante*.

**2311.** ———.]—*Re STOKER & MORPETH CORPN.*, No. 2301, *ante*.

**2312.** ———.]—*To reduce apportionment—Faulty notice & apportionment.*—The owner of two properties which adjoined each other & abutted on a street, received a notice to execute certain private street improvement works under Public Health Act, 1875 (c. 55), s. 150. The notice referred only to one of the two properties. The owner did not comply with the notice, & the local authority executed the works in the street adjoining both properties. The apportionment of the expenses incurred served upon the owner also only referred to the one property, though the owner's share of the expenses was calculated on the frontage of both. The owner disputed the apportionment & the matter was referred to arbn. The arbitrator adjudged that the apportionment was bad, & that the owner's share should be reduced to a sum proportionate to the frontage of the one property to which the notice & the apportionment had referred:—*Held*: the arbitrator had jurisdiction to make this award.—*THOMAS v. HENDON RURAL DISTRICT COUNCIL* (1910), 75 J. P. 161; 9 L. G. R. 234, D. C.

**2313.** ———.]—*To determine that place a "street."*—*Re STOKER & MORPETH CORPN.*, No. 2301, *ante*. See, also, Sub-sect. 4, A. (m) iii., *post*.

**2314.** Finality of award—*Public Health Act, 1875 (c. 55), s. 180 (15).*—*HANDSWORTH DISTRICT COUNCIL v. DERRINGTON*, No. 2268, *ante*.

**2315.** Enforcement of arbitrator's award—*Arbitration Act, 1889 (c. 49), s. 12.*—*Re WILLESDEN LOCAL BOARD & WRIGHT*, No. 2303, *ante*.

### (m) Recovery of Expenses.

#### i. Demand for Payment.

See Public Health Act, 1875 (c. 55), ss. 150, 257.

**2316.** Necessity for demand—*Notice of apportionment not a demand.*—Where works are executed by a local authority for the improvement of a street under Public Health Act, 1848 (c. 63), s. 69, & 21 & 22 Vict. c. 98, s. 63, & the expenses charged upon the owners of the premises fronting the street, it is necessary before summary proceedings can be taken for the recovery of the amount apportioned upon any such owner, that a demand of payment of the sum so apportioned should be served upon him, & the six months within which the summary proceedings must be taken under Summary Jurisdiction Act, 1848 (c. 43), s. 11, are to be reckoned from such notice of demand, & not from the notice of apportionment, which is not a sufficient demand.—*GREGE v. HUNT* (1877), 2 Q. B. D. 389; 46 L. J. M. C. 202; 36 L. T. 404; 41 J. P. 356; 25 W. R. 543, D. C.

*Annotations:—Re L. v. L. G. Board of Works (1880), 44 J. P. 424; SIMCOX v. HANDSWORTH L. B. (1881), 8 Q. B. D. 39; Pool & Porder Highway Board v. Gunning (1882), 51 L. J. M. C. 49; R. v. L. G. Board (1882), 9 Q. B. D. 600; Hornsey L. B. v. Monarch Investment Bldg Soc. (1889), 24 Q. B. D. 1; Sandgate L. B. v. Keene (1891), 8 T. L. R. 27.*

**2317.** ———.]—*SIMCOX v. HANDSWORTH LOCAL BOARD*, No. 2242, *ante*.

**2318.** ———.]—Under Public Health Act, 1875 (c. 55), s. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it, & on his default the authority executed the work, & their surveyor gave him notice of apportionment of the expenses for which the owner was liable, & demand was



made upon him for the amount. Under sect. 268 he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the Local Government Board, stating the grounds of his complaint. On a rule for prohibition to the Local Government Board:—*Held*: an appeal lay by the memorial to the Local Government Board, & no prohibition ought to be granted.

The necessary inference is that the notice of demand must be given by the local board, & that until they have given that notice of demand they are not in a position to recover anything by way of summary process (*BRETT, L.J.*).—*R. v. LOCAL GOVERNMENT BOARD* (1882), 10 Q. B. D. 309; 52 L. J. M. C. 4; 43 L. T. 173; 47 J. P. 228; 31 W. R. 72, C. A.

*Annotations*:—*Appl. R. v. L. G. Board, Ex p. Thorp* (1914), 84 L. J. K. B. 1184. *Refd. R. v. Sheffield Recorder* (1883), 52 L. J. M. C. 78; *Ex p. Wake* (1883), 11 Q. B. D. 291; *Eccles v. Wirral R. S. A.* (1886), 17 Q. B. D. 107; *Walthamstow L. B. v. Staines* (1891), 60 L. J. Ch. 738; *Peobles v. Oswaltwistle U. D. C.* (1896), 75 L. T. 689; *R. v. L. G. Board, Ex p. Street* (1907), 96 L. T. 650. *Mentd. R. Grosvenor & West-end Ry. Terminus Hotel Co.* (1897), 76 L. T. 337; *R. v. Kensington Income Tax Comrs., Ex p. Aramayo* (1915), 6 Tax Cas. 613; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570; *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), [1924] 1 K. B. 171; *R. v. Powell, Ex p. Camden*, [1925] 1 K. B. 611.

## ii. "Owner in Default."

See Public Health Act, 1875 (c. 55), ss. 150, 257.

2319. Who is "owner in default"—Owner at time of completion of works.]—Under Public Health Act, 1875 (c. 55), s. 150, which enables the urban authority to give notice to the owners of premises abutting upon a street (not being a highway repairable by the inhabitants at large), to sewer, level, & pave it, & upon default to execute the works & recover the expenses from the owners in default, according to the frontage of their respective premises, such expenses cannot be recovered from any one who, though the owner of premises when notice was first given by the urban authority, has ceased to be owner before the completion of the works.—*R. v. SWINDON LOCAL BOARD* (1879), 4 Q. B. D. 305; 48 L. J. M. C. 119; 40 L. T. 424; 43 J. P. 431; 27 W. R. 732, D. C.; on appeal (1880), 40 L. J. Q. B. 522, C. A.

*Annotations*:—*Distd. Illingworth v. Bulmer East Highway Board* (1884), 53 L. J. M. C. 60. *Consd. Millard v. Balby-with-Hexthorpe U. C.*, [1905] 1 K. B. 60. *Refd. R. v. St. Marylebone Vestry* (1887), 20 Q. B. D. 415; *Tottenham L. B. v. Williamson* (1893), 62 L. J. Q. B. 322; *West Hartlepool Corp. v. Robinson* (1897), 77 L. T. 387; *East Ham District Council v. Aylett* (1905), 74 L. J. K. B. 471. *Mentd. R. Bettessworth & Richer* (1888), 37 Ch. D. 535; *Re Allen & Driscoll's Contract*, [1904] 1 Ch. 493.

2320. ———.]—*R. v. LONDON LOCAL BOARD* (1879), 43 J. P. Jo. 236, D. C.

2321. ———.]—When a street has been made up by the local authority under Public Health Act, 1875 (c. 55), s. 150, a person who is the owner of premises fronting the street at the date of the completion of the works is liable, under sect. 257 of the Act, to pay an apportioned part of the expenses of the works, although he was not the owner of the premises when the notice requiring the works to be executed was served under sect. 150.—*EAST HAM URBAN COUNCIL v. AYLETT*, [1905] 2 K. B. 22; 74 L. J. K. B. 471; 92 L. T. 420; 69 J. P. 205; 53 W. R. 492; 21 T. L. R. 406; 3 L. G. R. 541; *sub nom. AYLETT v. EAST HAM URBAN DISTRICT COUNCIL*, 49 Sol. Jo. 446, D. C.

*Annotation*:—*Refd. Wealdstone U. D. C. v. Evershed* (1905), 3 L. G. R. 722.

2322. ———.]—Notice was given by a local authority to the owners of premises in a street, requiring them to execute works, under Public

Health Act, 1875 (c. 55), s. 150, & the owners not complying with the notice, the works were executed by the local authority. Subsequently, the expenses of the work were duly apportioned, & the proportionate sums due from the owners respectively were demanded. One of the owners to whom the notice had been given sold his premises after the completion of the work, but before the apportionment of the expenses & the demand of the sum apportioned in respect of the premises:—*Held*: he was liable to pay that sum under sect. 257 of the Act, as having been the owner of the premises when the works were completed.—*MILLARD v. BALBY-WITH-HEXTHORPE URBAN COUNCIL*, [1905] 1 K. B. 60; 74 L. J. K. B. 45; 91 L. T. 730; 69 J. P. 13; 53 W. R. 165; 21 T. L. R. 8; 49 Sol. Jo. 13; 2 L. G. R. 1248, C. A.

*Annotation*:—*Appl. East Ham U. C. v. Aylett*, [1905] 2 K. B. 22.

— *Estoppel by representation.*]—See *ESTOPPEL*, Vol. XXI., p. 299, No. 1078.

## iii. Summary Proceedings.

See Summary Jurisdiction Act, 1879 (c. 49), ss. 6, 35; Public Health Act, 1875 (c. 55), ss. 150, 257; Public Health Acts Amendment Act, 1907 (c. 53), s. 19.

2323. Jurisdiction of Justices — Preliminary paving notice not served.]—*JARROW LOCAL BOARD v. KENNEDY*, No. 2211, *ante*.

2324. ———.]—Notice of objection to apportionment not given.]—A local board having duly proceeded under Public Health Act, 1848 (c. 63), & sewered, etc., a street, & no notice having been given by an owner that he disputed the apportionment, the board sought to enforce before justices the payment of the proportion charged:—*Held*: it was still open to the owner to dispute his liability, & to show that the street was a highway repairable by the inhabitants at large.—*HESKETH v. ATHERTON LOCAL BOARD* (1873), L. R. 9 Q. B. 4; 43 L. J. M. C. 37; 29 L. T. 530; 38 J. P. 149; 22 W. R. 58.

*Annotations*:—*Consd. R. v. L. G. Board* (1882), 9 Q. B. D. 600. *Refd. Ex p. Wake* (1883), 11 Q. B. D. 291; *Bournemouth Comrs. v. Watts* (1884), 14 Q. B. D. 87; *Eccles v. Wirral R. S. A.* (1886), 17 Q. B. D. 107.

2325. ———.]—(1) Where the apportionment of street improvement expenses by the surveyor under Public Health Act, 1875 (c. 55), s. 150, has not been disputed by a frontager in the manner pointed out by sect. 257 of the Act, such apportionment is conclusive, & the frontager cannot set up, as a defence to proceedings for the recovery of the sum apportioned, that he has been charged in respect of a greater extent of frontage than he possesses.

(2) If [frontagers] dispute the amount of frontage upon which they are liable to contribute, their proper & only course is, within three months of service of the notice, to dispute the apportionment, & either to go to arbitration or to appeal to the Local Government Board, under sect. 179 or sect. 268 of the Act.—*MIDLAND RY. Co. v. WATTON* (1886), 17 Q. B. D. 30; 55 L. J. M. C. 99; 51 L. T. 482; 50 J. P. 405; 34 W. R. 524, D. C.

*Annotations*:—*As to* (1) *Refd. Derby Corp. v. Grudgings*, [1894] 2 Q. B. 496. *As to* (2) *Refd. Evans v. Newport Urban S. A.* (1889), 61 L. T. 684; *Sandgate L. B. v. Keene* (1891), 8 T. L. R. 27. *Generally, Refd. Eccles v. Wirral R. S. A.* (1886), 17 Q. B. D. 107; *West Ham Corp. v. Grant* (1888), 40 Ch. D. 331; *Baird v. Tunbridge Wells Corp.*, [1894] 2 Q. B. 867; *Hill v. Wallasey L. B.*, [1894] 1 Ch. 133; *White v. Fulham Vestry* (1896), 74 L. T. 425; *West Hartlepool Corp. v. Robinson* (1897), 75 L. T. 677.

2326. ———.]—Effect of want of jurisdiction on subsequent proceedings.]—An application to



*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (m) iii., iv. & v., & (n).]*

justices by a local board under Public Health Act, 1875 (c. 55), for the recovery of a proportion of the expenses of sewerage of a street from the owner of premises abutting thereon, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, & a stipendiary magistrate made an order for the payment of such expenses:—*Held*: the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, & such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, & the magistrate might make the order which he made for their payment.—*R. v. HUTCHINGS* (1881), 6 Q. B. D. 300; 50 L. J. M. C. 35; 44 L. T. 364; 45 J. P. 504; 29 W. R. 724, C. A.

*Annotations*:—*Consd.* N. E. Ry. v. Dalton Overseers, [1898] 2 Q. B. 66. *Follid.* Scott v. Lowe (1902), 86 L. T. 421. *Apprvd. & Distd.* Wakefield Corpn. v. Cooke, [1904] A. C. 31. *Refd.* Manchester Corpn. v. Hampson (1886), 3 T. L. R. 466. *Mentd.* Priestman v. Thomas (1884), 9 P. D. 210; *Re* Allsop & Joy's Contract (1889), 61 L. T. 213; *Re* v. Ollis, [1900] 2 Q. B. 758; Poulton v. Adjustable Cover & Bolter Block Co., [1908] 2 Ch. 430; Bedford v. Cowtan, [1916] 1 K. B. 980; *Ord v. Ord*, [1923] 2 K. B. 432.

2327. — *Liability of frontager.*—*WAKE v. SHEFFIELD CORPN.*, No. 2370, *post*.

2328. — ——. *Re* HANWELL URBAN DISTRICT COUNCIL & SMITH, No. 2300, *ante*.

2329. — *Appeal to Local Government Board on some points—Jurisdiction to decide points not appealed.*—*SEABROOKE v. GRAYS THURROCK LOCAL BOARD* (1891), 8 T. L. R. 19.

Appeals to Local Government Board, *see* Sub-sect. 4, A. (g), *post*.

2330. *What defences available—That local authority acting ultra vires.*—An owner of premises abutting on a street having received from the urban authority notice under Public Health Act, 1875 (c. 55), s. 150, to pave, etc., such street, indorsed on the notice an authority to the urban sanitary authority to execute the works, & an undertaking to repay the costs on completion. On default of payment after demand made, the urban sanitary authority proceeded to "recover the expenses in a summary manner" before justices:—*Held*: the owner having by the submission indorsed on the notice admitted the right of the sanitary authority to issue the notice, could not require proof to be given before the justices of the fulfilment of the conditions precedent to the existence of such right. The owner could not by such submission give jurisdiction to the sanitary authority if in fact they had none, but he did thereby waive the proof by them of the preliminaries to the notice, & made it incumbent on himself to disprove their original authority, if he wished to dispute it.—*LEWIS v. CARDIFF URBAN SANITARY AUTHORITY* (1878), 47 L. J. M. C. 101, D. C.

2331. — *Overcharge—Deviation from plans.*—*COOK v. IPSWICH LOCAL BOARD*, No. 2220, *ante*.

2332. — ——. *In proceedings before justices under Public Health Acts Amendment Act, 1907 (c. 53), s. 19, to recover from an adjoining*

landowner his proportion of expenses incurred by the local authority in the repair of an accommodation road necessary to obviate or remove danger to passengers or vehicles, the landowner may, although he has failed to appeal against the local authority's notice specifying the repairs, & has stood by whilst they were executed, dispute his liability by showing that the works executed were unauthorised by the sect., in that they involved the obliteration of the old track & substitution therefor of a new road of different character with new curves at new levels & of a largely increased width.—*SHOEBURYNNESS URBAN DISTRICT COUNCIL v. BURGESS* (1924), 22 L. G. R. 684.

2333. — *As to interest charged on instalments.*—*NORTH BRITISH RY. CO. v. HOLME CULTRAM LOCAL BOARD*, No. 2356, *post*.

2334. — *Street repairable by inhabitants at large.*—*HESKETH v. ATHERTON LOCAL BOARD*, No. 2324, *ante*.

2335. — ——. *R. v. HUTCHINGS*, No. 2326, *ante*.

2336. — ——. *In proceedings before justices under the Public Health Act, 1875 (c. 55), s. 150, to recover from an owner of premises fronting a road his proportion of expenses incurred by the local authority in sewerage, levelling, & paving it, the owner may dispute his liability by showing that the road is not a "street," or that it is a "highway repairable by the inhabitants at large."*—*ECCLES v. WIRRAL RURAL SANITARY AUTHORITY* (1886), 17 Q. B. D. 107; 55 L. J. M. C. 106; 50 J. P. 590; 34 W. R. 412; 2 T. L. R. 416, D. C.

*Annotations*:—*Apld.* Shoeburyness U. D. C. v. Burgess (1924), 22 L. G. R. 684. *Refd.* *Re* Hanwell U. D. C. & Smith (1904), 2 L. G. R. 1350.

2337. — *Road not a "street."*—*ECCLES v. WIRRAL RURAL SANITARY AUTHORITY*, No. 2336, *ante*.

2338. — ——. (1) Public Health Act, 1875 (c. 55), s. 150, applies only to streets which are in the ordinary & popular sense of the word "streets" & the word "street" in sect. 150 does not necessarily include every meaning given to it by sect. 4 of the Act.

(2) In summary proceedings to recover expenses under sect. 150, it is for the justices, having regard to the surrounding circumstances, & to whether there is any intention of building along a road so as to convert it into a street, to find as a fact whether one road in question is a street in the ordinary & popular sense of the word; & it makes no difference that the sect. has been applied or may apply to a portion of the road other than that in question. Where the justices find a road, or a portion of a road, is not a street in the ordinary & popular sense, they will be right in holding that the sect. is not applicable to the road or portion.—*R. (ON THE PROSECUTION OF CLECKHEATON LOCAL BOARD OF HEALTH) v. BURNUP* (1886), 50 J. P. 598.

*Annotations*:—*As to* (1) *N.F.* Jowett v. Idle L. B. (1887), 57 L. T. 928; *Fenwick v. Croydon R. S. A.*, [1891] 2 Q. B. 216. *Refd.* *Richards v. Kessick* (1888), 52 J. P. 756.

2339. — *Works treated as private improvement expenses.*—*GOULD v. BACUP LOCAL BOARD*, No. 2258, *ante*.

Private improvement expenses, *see* Sub-sect. 4, A. (n), *post*.

2340. — *That work not done under sealed contract.*—The B. urban authority, after notice, did the work of paving a new street, partly by their own workmen & partly by a contractor, who had no contract under seal, but whose work amounted to £75, & who was paid by the B.

authority that sum:—*Held*: W., a frontager, when sued for his apportioned part of the expense, could not set up the defence that the contractor had no contract under seal, & was wrongfully paid.—**BOURNEMOUTH COMRS. v. WATTS** (1884), 14 Q. B. D. 87; 54 L. J. Q. B. 93; 51 L. T. 823; 49 J. P. 102; 33 W. R. 280; 1 T. L. R. 142, D. C.

*Annotations*:—*Reid*. Derby (Mayor) v. Grudgings (1894), 10 R. 565; Brooks, Jenkins v. Torquay Corp., [1902] 1 K. B. 601.

**2341. — Where notice against apportionment not given.**—The owner of premises fronting on a street having failed to comply with a notice, under Public Health Act, 1875 (c. 55), s. 150, to sewer, etc., the street according to his frontage, the urban authority did the work themselves, & took proceedings before justices to recover the sum apportioned on him by their surveyor. The owner had given no notice, under sect. 257 of the Act, disputing the apportionment within the specified time. At the hearing of the complaint it was shown that the carriageway of the street was a highway repairable by the inhabitants at large, but that the footway on which the owner's premises fronted was not:—*Held*: the urban authority had jurisdiction to give the notice & make the apportionment in respect of the footway, & the owner having failed to dispute the apportionment under sect. 257, it was conclusive against him, & he could not at the hearing before the justices dispute his liability to pay any part of the apportioned sum.—**DERBY CORPN. v. GRUDGINGS**, [1894] 2 Q. B. 490; 63 L. J. M. C. 170; 72 L. T. 594; 58 J. P. 685; 43 W. R. 74; 10 T. L. R. 455; 10 R. 565, D. C.

*Annotations*:—*Consd.* Re Hanwell U. D. C. & Smith (1904), 68 J. P. 196. *Reid*. Folkestone Corp. v. Marsh (1905), 94 L. T. 511.

**2342. Local authority empowered to execute works by frontager—Effect of admission.**—**LEWIS v. CARDIFF URBAN SANITARY AUTHORITY**, No. 2330, *ante*.

Time for commencing proceedings, *see* Sub-sect. 4, A. (m) v., *post*.

#### iv. Proceedings in County Court.

*See* Public Health Act, 1875 (c. 55), s. 261.

County Courts generally, *see* COUNTY COURTS, Vol. XIII., pp. 441 *et seq*.

**2343. Action must be brought within six months.**—Proceedings under 24 & 25 Vict. c. 61, s. 24, are barred by a six months' limitation in the same way as if they were taken in a summary manner.—**WEST HAM LOCAL BOARD v. MADDAMS** (1876), 1 Ex. D. 516, n.; 33 L. T. 809; 35 L. T. 887, n.; 40 J. P. 470, D. C.

*Annotations*:—*Apprvd.* Tottenham L. B. of Health v. Rowell (1876), 1 Ex. D. 514. *Expld.* Leeds Corp. v. Robshaw (1887), 51 J. P. 441; Blackburn Corp. v. Sanderson, [1902] 1 K. B. 794. *Reid*. Tottenham L. B. of Health v. Rowell (1880), 15 Ch. D. 378; Metropolitan Water Board v. Bunn, [1913] 3 K. B. 181.

**2344. —**—*Ptfs.*, under Public Health Act, 1848 (c. 63), s. 69, incurred expenses in sewerage & paving a street, upon which premises belonging to R. abutted; his proportion of the expenses amounted to £13 5s. 5d. On Feb. 18, 1873, notice was served by ptfs. on R. that the foregoing amount was apportioned upon him, & that the same would become payable by him, unless within three months he disputed it. R. did not dispute the apportionment. The money not having been paid, on June 8, 1875, a plaint was issued by ptfs. in a county ct. to recover it from deft., as R.'s exor.:—*Held*: the limitation of time mentioned in Summary Jurisdiction Act, 1848 (c. 43), s. 11,

applied as well to proceedings in county cts. as to proceedings before justices, & the action could not be sustained, it having been brought more than six months after the expiration of the three months allowed for disputing the amount apportioned upon R.—**TOTTENHAM LOCAL BOARD v. ROWELL** (1876), 1 Ex. D. 514; 46 L. J. Q. B. 432; 35 L. T. 887; 25 W. R. 135, C. A.; *subsequent proceedings* (1880), 15 Ch. D. 378, C. A.

*Annotations*:—*Expld.* Leeds Corp. v. Robshaw (1887), 51 J. P. 441; *Re* Willesden L. B. & Wright, [1896] 2 Q. B. 412. *Appld.* Hammersmith Vestry v. Lowenfeld, [1896] 2 Q. B. 278. *Consd.* Blackburn Corp. v. Sanderson, [1902] 1 K. B. 791. *Distd.* Metropolitan Water Board v. Bunn, [1913] 3 K. B. 181. *Reid*. West v. Downman (1880), 14 Ch. D. 111; Westbury-on-Tyvern Sanitary Authority v. Meredith (1885), 52 L. T. 839; North Darley U. D. C. v. Morton (1906), 70 J. P. Jo. 209.

*See, also*, Sub-sect. 4, A. (m) v., *post*.

#### v. Limitation of Time.

*See* Public Health Act, 1875 (c. 55), s. 257; Summary Jurisdiction Act, 1848 (c. 43), s. 11; & generally, LIMITATION OF ACTIONS.

**2345. Proceedings before magistrates—Within six months from demand for payment.**—A street being out of repair, the local board of health gave notice to the owners of the adjoining houses to repair it; & on this not being complied with, executed the works, & gave notice of the expenses & apportionment to each of the owners. The owners gave no notice of disputing the apportionment, & at the end of the three months limited by 21 & 22 Vict. c. 98, s. 63, the board made a demand of the amount. The owners having refused to pay, & the expenses not having been declared to be private improvement expenses:—*Held*: the board had six months from the expiration of the three months during which the apportionment might have been disputed to take proceedings before justices of the peace for the recovery of the amount.—**JACOMB v. DODGSON** (1863), 3 B. & S. 461; 32 L. J. M. C. 113; 7 L. T. 674; 27 J. P. 518; 9 Jur. N. S. 848; 11 W. R. 308; 122 E. R. 174.

*Annotation*:—*Consd.* Greece v. Hunt (1877), 2 Q. B. D. 389.

**2346. — — —**—*Greece v. Hunt*, No. 2316, *ante*.

**2347. — — —**—*SIMCOX v. HANDSWORTH LOCAL BOARD*, No. 2242, *ante*.

**2348. — — —**—*WEST v. DOWNMAN*, No. 2302, *ante*.

**2349. — Second apportionment in place of invalid apportionment—Time runs from second apportionment.**—*SYKES v. HUDDERSFIELD CORPN.*, No. 2284, *ante*.

**Proceedings in county court.**—*See* Sub-sect. 4, A. (m) *iv. ante*.

**2350. Recovery of charge on premises.**—**TOTTENHAM LOCAL BOARD OF HEALTH v. ROWELL**, No. 2353, *post*.

**2351. — Real Property Limitation Act, 1874 (c. 57), s. 8.**—**HORNSEY LOCAL BOARD v. MONARCH INVESTMENT BUILDING SOCIETY**, No. 2360, *post*.

#### (n) Private Improvement Expenses.

*See* Public Health Act, 1875 (c. 55), ss. 213–215, 232, 240, 241.

**2352. Power to recover amount under improvement rate—After demand in full on frontager.**—*Resps.*, a local board of health, under Public Health Act, 1848 (c. 63), s. 69, executed certain works, & apportioned the costs among the owners, of whom the applt. was one. The works were completed in Nov. 1860; & in Jan. 1861, *resps.*

*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (n),  
(o) & (p).]*

demanding from the applt. payment of his proportion of the costs. This amount not having been paid, on Aug. 25, 1870, resps. resolved that it should be deemed private improvement expenses. In Sept. 1870, resps. declared these expenses should be paid by annual instalments. A demand having been made on applt. he refused to pay, & was summoned before justices:—*Held*: as resps. had in Jan. 1861, demanded from applt. payment of his proportion of the costs, they had elected to treat the amount due as a debt from him as owner; & they could not afterwards, in Sept. 1870, declare them to be private improvement expenses.—*WILSON v. BOLTON CORPN.* (1871), 1 L. R. 7 Q. B. 105; 41 L. J. M. C. 4; 25 L. T. 597; 36 J. P. 405; 20 W. R. 246.

*Annotations*:—*Distd.* Tottenham L. B. of Health v. Rowell (1880), 15 Ch. D. 378. *Consd.* Salford Corpn. v. Hale, [1925] 1 K. B. 503. *Refd.* R. v. L. G. Board (1882), 9 Q. B. D. 600.

**2353. Power to revoke resolution declaring amount improvement expenses—Recovery of charges.**—A local board, in the year 1864, determined to do certain works in a street adjoining deft.'s house, for the expenses of which deft., among others, was made liable under Public Health Act, 1848 (c. 63), s. 60, & for which, consequently, there was a charge on the property under 21 & 22 Vict. c. 98, s. 62. Before the works were done they resolved that the expenses were private improvement expenses under Public Health Act, 1848 (c. 63), s. 90, & should be recovered from the owners & occupiers by annual instalments. In 1872 they revoked the resolution, & made a fresh rate for the whole amount then remaining unpaid to be paid by the owners & occupiers. This rate being unpaid in 1875, they brought an action against deft. to enforce the charge on his land under 21 & 22 Vict. c. 98, s. 62:—*Held*: (1) the limitation of six months, within which summary proceedings must be taken before the justices or in the county ct. under 24 & 25 Vict. c. 61, does not apply to the enforcing of the charge created by 21 & 22 Vict. c. 98, s. 62; (2) the election of the board to declare the expenses to be private improvement expenses did not prevent them from enforcing the charge on the land, but they could only enforce it in respect of the instalments that were for the time being in arrear.

(3) As against the land there is to be a charge for the sum payable with interest at 5 per cent. *per annum* with no limit fixed as to the time within which that charge is to be enforced, & in my opinion, the only proper limit is that which Stat. Limitations fixes (COTTON, L.J.).—*TOTTENHAM LOCAL BOARD OF HEALTH v. ROWELL* (1880), 15 Ch. D. 378; 50 L. J. Ch. 99; 43 L. T. 616; 29 W. R. 36, C. A.

*Annotations*:—As to (1) *Refd.* West v. Downman (1880), 14 Ch. D. 111; *Re* Willenden L. B. & Wright, [1896] 2 Q. B. 412; *North Darley U. D. C. v. Morton* (1906), 70 J. P. Jo. 209; *Bolton Corpn. v. Scott* (1913), 108 L. T. 406. As to (2) *Refd.* Sunderland Corpn. v. Alcock (1882), 46 L. T. 377; *Manchester Corpn. v. Hampson* (1886), 3 T. L. R. 466; *Salford Corpn. v. Hale*, [1925] 1 K. B. 503. As to (3) *Consd.* Birmingham Corpn. v. Baker (1881), 17 Ch. D. 782; *Sunderland Corpn. v. Alcock* (1882), 51 L. J. Ch. 546; *Re Bettsworth & Richer* (1888), 37 Ch. D. 535. *Expld.* Hornsey L. B. v. Monarch Investment Bldg. Soc. (1889), 24 Q. B. D. 1. *Consd.* Newcastle-upon-Tyne Corpn. v. Houseman, Newcastle-upon-Tyne Corpn. v. Francis, Newcastle-upon-Tyne Corpn. v. Jackson, Newcastle-upon-Tyne Corpn. v. Coote (1898), 63 J. P. 85; *Stock v. Meakin*, [1899] 2 Ch. 496. *Refd.* *Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226; *R. v. L. G. Board, Ex p. Thorp* (1914), 84 L. J. K. B. 1184.

**2354. — Estoppel by notice.**—*GOULD v. BACUP LOCAL BOARD*, No. 2258, *ante*.

*(o) Payment by Instalments.*

*See* Public Health Act, 1875 (c. 55), s. 257.

**2355. Instalments payable as private improvement expenses—Decision of authority to recover whole amount due—Recovery of charges.**—*TOTTENHAM LOCAL BOARD OF HEALTH v. ROWELL*, No. 2353, *ante*.

**2356. Rate of interest charged on instalments—Higher than that paid by authority.**—The H. urban authority, after giving notice to N. to pave, etc., a new street adjoining N.'s premises, did the work at a cost of £4,758, to defray which the H. board borrowed, with the sanction of the Local Government Board, money at 4 per cent. The sum apportioned on N. was £2,412, & the local board, by resolution, duly resolved to make the sum payable by N. by instalments during twenty years at 5 per cent. On non-payment of an instalment by N.:—*Held*: the justices were right in enforcing payment, & were not bound to allow the objection that the H. board charged higher interest than they themselves paid.—*NORTH BRITISH RY. CO. v. HOIME CULTRAM LOCAL BOARD* (1889), 54 J. P. 86, D. C.

*(p) Statutory Charges on Premises.*

*See* Public Health Act, 1875 (c. 55), s. 257.

**2357. Incidence of charge—On premises—Value of owner's interest.**—The charge created by Public Health Act, 1875 (c. 55), s. 257, for expenses incurred by a local authority for sewerage & other works, & for the payment whereof the owner of the premises in respect of which the same are incurred is liable under that Act, is a charge upon the "premises" as defined by sect. 4; accordingly, it is a charge, not on the interest of any particular owner of the premises, but on the total ownership, that is to say, on the respective interest of every owner for the time being in proportion to the value of his interest.—*BIRMINGHAM CORPN. v. BAKER* (1881), 17 Ch. D. 782; 46 J. P. 52.

*Annotations*:—*Distd.* Tendring Union Grdms. v. Dowton, [1891] 3 Ch. 265. *Consd.* Hornsey District Council v. Smith, [1897] 1 Ch. 843. *Refd.* Sunderland Corpn. v. Alcock (1882), 51 L. J. Ch. 546; *Manchester Corpn. v. Hampson* (1886), 3 T. L. R. 466; *Hyde v. Berners* (1889), 53 J. P. 453.

**2358. — Separate premises belonging to same owner.**—A local authority under the powers vested in them by Public Health Act, 1875 (c. 55), s. 150, served upon the owner of certain houses & plots of building land, fronting on two roads within their district, notices to make up the two roads opposite his premises. The owner did not comply with the notices & the local authority executed the works themselves & subsequently sent in a demand to him for an apportioned part of the expenses incurred by them. The owner did not pay, & thereupon the local authority issued a summons against him claiming a declaration that they were entitled under sect. 257 of the Act to a charge for the full amount due on all the premises of the owner in the two roads:—*Held*: under sect. 257 the local authority were only entitled to a charge for an apportioned sum in respect of each of the premises fronting on the road in respect of which the apportioned expenses were incurred.—*CROYDON RURAL DISTRICT COUNCIL v. BETTS*, [1914] 1 Ch. 870; 83 L. J. Ch. 709; 58 Sol. Jo. 556; 12 L. G. R. 906; 78 J. P. Jo. 160.

**2359. When charge accrues—Completion of works.**—Leasehold houses in an urban district, abutting partly on a private road, were sold on an open contract; at the date of the sale works had been done by the local board of the district on the

road under Public Health Act, 1875 (c. 55), s. 150; the final demand for payment of the sum apportioned in respect of the premises was served after the purchase ought to have been completed:—*Held*: the apportioned expenses became a charge on the premises at the date of completion, & as between the vendor & purchaser were payable by the vendor.—*Re BETTESWORTH & RICHES* (1888), 37 Ch. D. 535; 57 L. J. Ch. 749; 58 L. T. 796; 52 J. P. 740; 36 W. R. 544; 4 T. L. R. 248.

*Annotations*:—*Consd.* Hornsey L. B. v. Monarch Investment Bldg. Soc. (1889), 24 Q. B. D. 1; *Re Leyland & Taylor's Contract* (1900), 83 L. T. 380; *Stock v. Meakin*, [1900] 1 Ch. 683; *Re Allen & Driscoll's Contract*, [1904] 1 Ch. 493. *Reid*, *Egg v. Blayney* (1888), 21 Q. B. D. 107; *Re Boor, Boor v. Hopkins* (1889), 40 Ch. D. 572; *Millard v. Ballywith-Hexthorpe* U. D. C. (1904), 90 L. T. 489.

**2360.** — — — — — *Where a local authority had under Public Health Act, 1848 (c. 63), s. 69, incurred paving expenses, which by 21 & 22 Vict. c. 98, s. 62 (corresponding to Public Health Act, 1875 (c. 55), s. 257), were made a charge upon the premises in respect of which the same were incurred:—Held*: (1) such expenses became a charge on the premises upon the completion of the works; (2) the period of limitation in respect of such charge under Real Property Limitation Act, 1874 (c. 57), s. 8, began to run from that date, not from the date of the apportionment of such expenses among the frontagers.—*HORNSEY LOCAL BOARD v. MONARCH INVESTMENT BUILDING SOCIETY* (1889), 24 Q. B. D. 1; 59 L. J. Q. B. 105; 61 L. T. 867; 54 J. P. 391; 38 W. R. 85; 6 T. L. R. 30, C. A.

*Annotations*:—*As to (1)* *Consd.* *Stock v. Meakin*, [1899] 2 Ch. 496. *Reid*, *R. v. L. G. Board, Ex p. Thorp* (1914), 84 L. J. K. B. 1181. *As to (2)* *Reid*, *Re Owen*, [1891] 3 Ch. 220; *Stock v. Meakin*, [1899] 2 Ch. 496; *R. v. L. G. Board, Ex p. Thorp* (1911), 84 L. J. K. B. 1181; *Re Witham, Chadburn v. Winfield*, [1922] 2 Ch. 413.

**2361.** — — — — — *The expenses incurred by a local authority for paving & other works executed by them under Public Health Act, 1875 (c. 55), s. 150, first become, within sect. 257 of the Act, "a charge on the premises in respect of which they were incurred" as from the date of the completion of the works.*

Where the owner has agreed to sell the property & to pay the outgoings up to the date of completion, the expenses are payable by the purchaser if the works are not completed till after that date, though at that date an agreement for their execution has been entered into by the local authority & the works are in progress.—*Re ALLEN & DRISCOLL'S CONTRACT*, [1904] 2 Ch. 226; 73 L. J. Ch. 614; 91 L. T. 676; 68 J. P. 469; 52 W. R. 680; 20 T. L. R. 605; 48 Sol. Jo. 587; 2 L. G. R. 959, C. A.

*Annotations*:—*Reid*, *East Ham U. D. C. v. Aylett*, [1905] 2 K. B. 22. *Mentid*, *Re Taunton & West of England Perpetual Benefit Bldg. Soc. & Roberts' Contract*, [1912] 2 Ch. 381.

**2362.** — — — — — *Assessment of amount.*—*Re BOOR, BOOR v. HOPKINS*, No. 2376, *post*.

**2363.** *Enforcement of charge—Against owner for time being.*—The expenses incurred by a local authority for paving & other works remain, until the same have been recovered, a "charge on the premises," by Public Health Act, 1875 (c. 55), s. 257; & accordingly, may be enforced against the owner of the premises for the time being, although he was not the owner at the time the works were completed, & although the local authority have omitted to enforce the summary remedy given them by the Act against the then owner.—*SUNDERLAND CORPN. v. ALCOCK* (1882), 51 L. J. Ch. 546; 46 L. T. 377; 30 W. R. 655.

*Annotation*:—*Consd.* *Manchester Corpn. v. Hampson* (1886), 35 W. R. 334.

**2364.** — — — — — *Order for sale—Land subject to restrictive covenant.*—The word "owner" in Public Health Act, 1875 (c. 55), ss. 150, 257, does not include a person who has the benefit of a covenant restricting the use of the premises in respect of which expenses for street improvement have been incurred.

Where a local authority had obtained a charge under sect. 257 on a piece of land, which was subject to a covenant restricting the owner thereof from building on it:—*Held*: they were not entitled to an order for sale of the land free from such restrictive covenant.—*TENDRING UNION GUARDIANS v. DOWTON*, [1891] 3 Ch. 265; 61 L. J. Ch. 82; 65 L. T. 434; 40 W. R. 145, C. A.

*Annotation*:—*Consd.* *Hornsey District Council v. Smith*, [1897] 1 Ch. 843.

**2365.** — — — — — *Land held under School Sites Act, 1841 (c. 38), s. 6.*—*HORNSEY DISTRICT COUNCIL v. SMITH*, No. 2235, *ante*.

**2366.** — — — — — *Objection to title.*—A certain plot of land was subject to a charge in favour of ptfs. under Public Health Act, 1875 (c. 55), s. 257, for certain apportioned expenses of paving, etc., a private street, incurred by ptfs. for the owner in default, under sect. 150 of that Act, together with interest thereon. The expenses & interest remaining unpaid, & ptfs. being unable to find the owner in default, purported to commence an action in the county ct. to enforce their charge. The action was entered & entitled "The Wealdstone Urban District Council, of Council Offices, Peel Road, Wealdstone, ptfs., & the owner of plot No. 188, Canning Road, Wealdstone, defts." An order was then obtained by ptfs. for substituted service on defts. by advertisement. This order was obtained on an affidavit by ptfs.' surveyor that he had made repeated efforts, but had failed, to ascertain the present owner of the plot, & that notices of apportionment & of a demand for payment had been posted on the said land. Subsequently an order was made that the expenses & interest were a charge upon the land, & that ptfs. were to be at liberty to sell the premises subject to a reserved price, & a further order was made declaring that upon such sale the owner of the plot should be a trustee for the purchaser within Trustee Act, 1893 (c. 53), & that ptfs. be appointed to convey the said plot for the estate of the said owner. The land was sold, but the purchaser, objecting to the title, refused to complete. Ptfs. obtained an order in the county ct. for specific performance, & the purchaser's counterclaim for rescission of the agreement of sale & return of deposit was dismissed. On appeal:—*Held*: the order for substituted service & the orders based thereon were bad, & defts. had not waived his objection to title. The order for specific performance was set aside, & judgment entered for defts. on his counterclaim.—*WEALDSTONE URBAN DISTRICT COUNCIL v. EVERSHERD* (1905), 69 J. P. 258; 3 L. G. R. 722, D. C.

**2367.** — — — — — *Where owner unknown—Substituted service.*—*WEALDSTONE URBAN DISTRICT COUNCIL v. EVERSHERD*, No. 2366, *ante*.

**2368.** *Registration of charge—Land Charges Registration & Searches Act, 1888 (c. 51), ss. 4, 10.*—The corpn. of N., as the sanitary authority, had carried out certain paving & draining works in respect of certain premises, & the expenses so incurred became, by Public Health Act, 1875 (c. 55), s. 257, charges on the premises, one of such charges arising before & one after the passing of Land Charges Registration & Searches Act, 1888 (c. 51). On the charges being tendered for

*Sect. 2.—Extra metropolitan: Sub-sect. 4, A. (p), (q), (r), (s) & (t), & B. (a), (b), (c) & (d).]*

registration under sect. 10 of the last-mentioned Act, as being "land charges" within that Act, the Vice-Registrar of the Office of Land Registry, doubting whether they came within the scope of the Act, refused to register them, & on a rule for a *mandamus* to compel him to register them:—*Held*: discharging the rule, such charges, arising under Public Health Act, 1875 (c. 55), were not "land charges" within the scope or meaning of Land Charges Registration & Searches Act, 1888 (c. 51), & were not intended or required to be registered under it.—*R. v. LAND REGISTRY OFFICE (VICE-REGISTRAR) (1889)*, 24 Q. B. D. 178; 62 L. T. 117; *sub nom. R. v. HOLT (VICE-REGISTRAR OF OFFICE OF LAND REGISTRY)*, 38 W. R. 236, D. C.

Limitation of actions, *see* Sub-sect. 4, A. (m) v., *ante*.

Liability of tenant for life, *see* Sub-sect. 4, A. (r), *post*.

(q) *Appeal to Ministry of Health.*

*See* Public Health Act, 1875 (c. 55), s. 268.

2369. What matters appealable.—*Variance from plans—Overcharge.*—*COOK v. IPSWICH LOCAL BOARD*, No. 2220, *ante*.

2370. — *Part of work done on private land.*—Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district acting under Public Health Act, 1875 (c. 55), s. 150, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewerage, etc., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work, showed that part of the work in respect of which upon his failure to comply with the notice the expenses were incurred, was executed upon land belonging to private owners:—*Held*: as part of the work was executed on a street, the urban authority had power to fix the sum to be apportioned, & the magistrate had jurisdiction to entertain the complaint, & could only make an order for payment of the apportioned sum, & if the frontager was aggrieved by what the urban authority had done his only remedy was to appeal to the Local Government Board under sect. 268 of the Act.—*WAKE v. SHEFFIELD CORPN. (1883)*, 12 Q. B. D. 142. C. A.; *sub nom. R. v. SHEFFIELD RECORDER*, 53 L. J. M. C. 1; 50 L. T. 76; 48 J. P. 197; 32 W. R. 82, C. A.; *affg. S. C. sub nom. Ex p. WAKE*, 11 Q. B. D. 291, D. C.

*Annotations*:—*Consd. Eccles v. Wirral R. S. A. (1886)*, 17 Q. B. D. 107; *Manchester Corpn. v. Hampson (1886)*, 35 W. R. 331. *Folld. Mid. Ry. v. Watton (1886)*, 17 Q. B. D. 30; *Walthamstow L. B. v. Staines, [1891] 2 Ch. 606*; *Derby Corpn. v. Grudgings, [1894] 2 Q. B. 496*. *Apfd. West Hartlepool Corpn. v. Robinson (1897)*, 75 L. T. 877. *Consd. Re Hanwell U. D. C. & Smith (1904)*, 68 L. J. 496. *Refd. Acton U. D. C. v. Watts (1903)*, 1 L. G. R. 594; *Bristol Corpn. v. Sinnott, [1918] 1 Ch. 62*.

2371. — *Amount of frontage.*—*MIDLAND RY. CO. v. WATTON*, No. 2325, *ante*.

2372. — *Inclusive of improper charges & costs.*—A local board, under the powers of Public Health Act, 1875 (c. 55), executed paving & other works in a street, & sought to charge defts. with an apportioned amount of the expenses. In the amount apportioned was comprised an estimated sum in respect of legal & other expenses, including expenses of collection. In an action by the local board to enforce their charge, defts. not only disputed their liability to payment, but contended that the estimated sum was not properly included in the apportionment:—*Held*: it was not competent to defts. to raise the objection in respect

of the estimated sum in the present proceedings, & the only remedy open to them on this point was by way of appeal to the Local Government Board under sect. 268 of above Act.—*WALTHAMSTOW LOCAL BOARD v. STAINES, [1891] 2 Ch. 606*; 60 L. J. Ch. 738; 65 L. T. 430; 7 T. L. R. 446, C. A.

*Annotations*:—*Consd. Derby Corpn. v. Grudgings (1894)*, 63 L. J. M. C. 170. *Folld. West Hartlepool Corpn. v. Robinson (1897)*, 75 L. T. 877. *Consd. Shoburness U. D. C. v. Burges (1924)*, 22 L. G. R. 684. *Refd. Sandgate District L. B. of Health v. Keene (1892)*, 56 J. P. 484; *Folkestone Corpn. v. Brooks, Folkestone Corpn. v. Ladd, [1893] 3 Ch. 22*; *Bower v. Calstow R. D. C. (1911)*, 75 J. P. 186; *Re Stoker & Morpeth Corpn. (1914)*, 84 L. J. K. B. 1169.

2373. — *As to works to be carried out.*—*Re HANWELL URBAN DISTRICT COUNCIL & SMITH*, No. 2300, *ante*.

2374. *When appeal lies—After decision of local authority—Demand for payment.*—*R. v. LOCAL GOVERNMENT BOARD*, No. 2318, *ante*.

2375. *Whether prohibition lies against board.*—*R. v. LOCAL GOVERNMENT BOARD*, No. 2318, *ante*.

(r) *Tenant for Life and Remainderman.*

*See, generally, LAND IMPROVEMENT; SETTLEMENTS.*

2376. *Notice served on tenant for life—Death of tenant for life before apportionment.*—Under Public Health Act, 1875 (c. 55), s. 257, the relation of debtor & creditor can never arise between a local authority & an owner of property in respect of work executed by the local authority. When such work has been done & the period within which summary proceedings may be taken has expired, & it is no longer possible to take such proceedings, the charge for the work attaches to the property, & commences, not from the completion of the work, but from the date at which the amount is assessed.

In 1882 G. executed a deed of gift of two leasehold houses, upon trust for himself for life, he paying all outgoings & performing the covenants in the leases, & after his death for his son, L., absolutely. In 1884 the local board served a notice on G. in respect of each house, under sect. 150 of above Act, requiring him to make up a private road on which the houses abutted. G. did not comply with the notice, & in Feb. 1885, the board completed the work themselves. In June, 1885, G. died, having by his will, in which he recited that he had given the two houses to his son "unincumbered," given his residuary estate to trustees on trust for his widow for life, with remainder to his children. On his father's death L. entered into possession of the houses, & in Sept. 1886, was served with notices by the board assessing the expenses of making up the road; & on Feb. 21, 1887, he was served with notices demanding payment of the money by ten annual instalments. L. then took out a summons to determine whether the assessment should be paid out of his father's estate or by himself personally:—*Held*: the amounts assessed would have been "outgoings" & payable by G. if the board had taken summary proceedings, under sect. 257 of the Act, in G.'s lifetime; but as they had not done so, & the time for doing so had expired, the charge only commenced from the service of the notices demanding payment, & was payable by the son.—*Re BOOR, BOOR v. HOPKINS (1889)*, 40 Ch. D. 572; 58 L. J. Ch. 285; 60 L. T. 412; 53 J. P. 467; 37 W. R. 349.

*Annotations*:—*Consd. Hornsey L. B. v. Monarch Investment Bldg. Soc. (1889)*, 23 Q. B. D. 149. *Distd. Tubbs v. Wynne, [1897] 1 Q. B. 74*. *Consd. Re Allen & Driscoll's Contract, [1904] 2 Ch. 236*. *Refd. Stook v. Meakin, [1899] 2 Ch. 496*; *Re Waterhouse's Contract (1900)*, 44 Sol. Jo. 645.

**2377. Payment by tenant for life—Power to mortgage settled estate—Settled Land Act, 1890 (c. 69), s. 11.]**—The tenant for life of an estate paid expenses which had been incurred by a local authority & made a charge upon the estate by Public Health Act, 1875 (c. 55), s. 257:—*Held*: this was a charge on the inheritance, & he was entitled to keep it alive as an incumbrance on the settled land, & to raise money under Settled Land Act, 1890 (c. 69), s. 11, by mortgage of the estate for the purpose of discharging it.—*Re SMITH'S SETTLED ESTATES*, [1901] 1 Ch. 689; 70 L. J. Ch. 278.

*Annotation*.—*Consd. Re Pizzi, Scrivener v. Aldridge*, [1907] 1 Ch. 67.

**2378. — Repayment by trustees out of capital.]**—Expenses incurred by a local authority in sewerage, paving, & flagging new streets on settled land were charged under statutory powers on the land, & made payable, together with interest thereon, by instalments:—*Held*: the expenses so charged constituted an incumbrance affecting settled land payable out of capital moneys under Settled Land Act, 1882 (c. 38), s. 21 (ii); & out of capital moneys the tenant for life was entitled to repayment of such portion of past instalments paid by him as represented capital, & the trustees ought to pay the corresponding portion of the remaining instalments.—*Re LEGH'S SETTLED ESTATE*, [1902] 2 Ch. 274; 71 L. J. Ch. 668; 80 L. T. 884; 66 J. P. 600; 50 W. R. 570; 46 Sol. Jo. 569.

(s) *Landlord and Tenant.*

Liability as between landlord & tenant, *see* LANDLORD & TENANT.

(t) *Vendor and Purchaser.*

*See, generally*, SALE OF LAND.

**2379. Liability of vendor—Sale after completion of works.]**—*Re BETTESWORTH & RICHER*, No. 2359, *ante*.

**2380. Liability of purchaser—Vendor to pay outgoings up to completion of contract—Works completed at later date.]**—*Re ALLEN & DRISCOLL'S CONTRACT*, No. 2361, *ante*.

*See, also*, Nos. 2436, 2437, *post*.

*B. Private Street Works Act, 1892.*

(a) *Area of Operation of the Act.*

*See* Private Street Works Act, 1892 (c. 57), ss. 2, 4.

(b) *Application of Public Health Acts.*

*See* Private Street Works Act, 1892 (c. 57), ss. 24, 25.

**2381. Notice to make up street under Public Health Acts—Subsequent adoption of Private Street Works Act, 1892 (c. 57)—Effect of adoption.]**—An urban local authority served notice under Public Health Act, 1875 (c. 55), s. 150, to sewer & make up a private street. Under this notice if the frontagers did not do the work within a limited time the local authority had a right to do it themselves & charge the frontages, with the expense to be apportioned as provided by the above sect. The frontagers having made default the local authority took steps towards doing the work; but before it had been commenced they adopted above Act, which by s. 25 provides that from its adoption in any district Public Health Act, 1875 (c. 55), s. 150, shall not apply to that district. The work was subsequently done by the local authority & the expense apportioned according to the Act of 1875:—*Held*: sect. 25 of above

Act did not affect the validity or effect of the notice given while sect. 150 was in force in the district though after the adoption of above Act no fresh notice could be given under sect. 150, & if there would otherwise have been any doubt on the point, it was removed by Interpretation Act, 1889 (c. 63), s. 32 (2), which saves everything duly done under a repealed enactment before its repeal & every right obligation or liability acquired, accrued or incurred under it before the repeal & the subsequent proceedings of the local authority under the notice were effectual.—*HESTON & ISLEWORTH URBAN COUNCIL v. GROUT*, [1897] 2 Ch. 306; 66 L. J. Ch. 647; 77 L. T. 118; 45 W. R. 697; 13 T. L. R. 504; 41 Sol. Jo. 639, C. A.

**2382. Notice to repair private street—Counter notice by frontagers to make up street—Mandamus to local authority to proceed—Public Health Acts Amendment Act, 1907 (c. 53), s. 19.]**—The local authority of a district in which the Private Street Works Act, 1892 (c. 57), had been adopted, & to which above sect. had been applied, served notice to repair a road under above sect. on the persons whom they understood to be the owners of the adjoining premises. The notice recited that the road was not a highway repairable by the inhabitants at large, but in fact there was along the middle of the road a footpath which was so repairable. The majority of the owners served a counter-notice requiring the local authority to proceed under the Private Street Works Act, 1892 (c. 57). The local authority approved a provisional apportionment under that Act, & some of the owners served notice of objection on the ground that the works were unreasonable & too costly. The local authority then withdrew their original notice, being satisfied that it would be unwise to make up the road in a permanent manner as damage would be done to it by building operations. It also appeared that some of the owners of adjoining premises had not been served with the original notice, & no notice had been affixed to the land. On an application for a *mandamus* to the local authority to proceed under the Act of 1892:—*Held*: in the circumstances the ct. would not grant a *mandamus* to the local authority. *Semble*: after the service of a counter-notice by the owners to proceed under Private Street Works Act, 1892 (c. 57), the local authority have a discretion as to whether they shall so proceed or not.—*R. v. EPSOM URBAN DISTRICT COUNCIL*, *Ex p. COURSE* (1912), 76 J. P. 389; 10 L. G. R. 609, D. C.

**2383. — Discretion of local authority to proceed—Under Private Streets Works Act, 1892 (c. 57).]**—*R. v. EPSOM URBAN DISTRICT COUNCIL*, *Ex p. COURSE*, No. 2382, *ante*.

**Paving, etc., under Public Health Acts.]**—*See* Sect. 2, sub-sect. 4, A., *ante*.

**Appeals.]**—*See* No. 2433, *post*.

(c) *Adoption of the Act.*

*See* Private Street Works Act, 1892 (c. 57), ss. 3, 4; Public Health Act, 1875 (c. 55), s. 150.

**Effect of adoption—After notice to proceed under Public Health Acts.]**—*See* No. 2381, *ante*.

(d) *Street or Part of Street.*

*See* Private Street Works Act, 1892 (c. 57), ss. 5, 6, 9 (1), 15.

**2384. Path in Epping Forest—Consent of conservators.]**—*WOODFORD URBAN DISTRICT COUNCIL v. HENWOOD*, No. 2418, *post*.

**2385. Part of street—Tramway & strip on either side.]**—The “estimated expenses” of private



*Sect. 2.—Extra metropolitan: Sub-sect. 4, B. (d), (e) & (f) i. & ii.]*

street works apportioned by a provisional apportionment under Private Street Works Act, 1892 (c. 57), may include in addition to the actual estimated cost of the works & the commission in respect of surveys, etc., allowed by sect. 9, a percentage on the estimated cost for contingencies.

Where a tramway is laid in a street, the two strips of the street on either side of the tramway track & the parts of the road adjacent to it for the repair of which the tramway promoters are liable may be dealt with under the Act of 1892 as together constituting a "part of a street" within the meaning of sect. 6 of the Act, & where this course is adopted the tramway promoters are not chargeable as frontagers in respect of the tramway.—*STANDRING v. BEXHILL CORPN.* (1909), 73 J. P. 241; 7 L. G. R. 670, D. C.

**2386. — Strip of land adjoining street—Marked off by pillars.]**—Resp. council in a provisional apportionment made under Private Street Works Act, 1892 (c. 57), charged applts. with a portion of the expenses of making up a street, & applts. were charged as owners of land abutting upon a strip which was alleged to be part of the street. The strip of land had been shown upon a plan deposited some four years ago by applts.' predecessors in title, & approved by the council under their bye-laws. On this plan the strip, which was coloured green, was bounded by a dotted line on the side adjoining the then existing street, & on the other side by a corner shop which was to be set back in line with existing buildings, & which was built in accordance with the plan. There had been a wall where the dotted line was marked, but it had been removed & five stone pillars erected along its site. The strip between the pillars & the shop was asphalted, & foot traffic was allowed to pass over it without hindrance. After the council had taken proceedings under Private Street Works Act, 1892 (c. 57), with respect to the making up of the street, applts. put wooden rails between the stone pillars & across the strip. Objection having been taken by applts. under sect. 7 that the strip of ground did not form part of the street being made under the Act, & the justices having found that the strip was a part of the street & that applts. were properly chargeable:—*Held*: there was evidence on which the justices could find that the strip of ground had become part of the street, & the apportionment was right.—*BELL & SONS v. GREAT CROSBY URBAN DISTRICT COUNCIL* (1912), 108 L. T. 455; 77 J. P. 37; 10 L. G. R. 1007, D. C.

**2387. Agreement between frontagers & local authority—Street to be dedicated & adopted—Powers reserved under Private Street Works Act, 1892 (c. 57).]**—*FOLKESTONE CORPN. v. MARSH*, No. 2420, *post*.

**2388. — Construction of agreement.]**—The owners of, & frontagers on, certain roads, agreed with the urban authority, by deed made in 1879, that from Jan. 1, 1880, the roads should be dedicated to the public, & should be accepted by the urban authority as public highways, repairable by the inhabitants at large, & should be maintained & repaired accordingly, & that the urban authority should be at liberty to plant trees & to erect & maintain seats for public use thereon, & to do all other acts, & to exercise all other powers, under a local Act of 1855, & Public Health Act, 1875 (c. 55). It was, however, further agreed that the urban authority was to

retain & have the same powers of requiring the frontagers, so soon, & to such extent only as their lands should be actually occupied for building purposes, to sewer, level, pave, etc., such of the said roads as should for the time being not be sewered, levelled, paved, etc., to the satisfaction of the urban authority, & such powers of executing & of recovering expenses, & of taking proceedings in relation to the matters aforesaid, as the urban authority would for the time being have or be capable of exercising under Public Health Act, 1875 (c. 55), or the local Act, if the said roads had, for the time being, not been accepted by the urban authority as public highways, & were not highways repairable by the inhabitants at large.

The corpn., who had adopted Private Street Works Act, 1892 (c. 57), sued a successor in title of one of the frontagers on one of the said roads, under sect. 14 of that Act, for the apportioned expenses of private street works executed on the road. The frontager had taken no objection to the provisional or to the final apportionment under sects. 7 & 12 of the Act:—*Held*: if the meaning of the deed was that the roads were, as between the parties, to be deemed highways repairable by the inhabitants at large, & that—by implication—the corpn. undertook not to put into force Private Street Works Act, 1892, against the frontagers, it was *ultra vires*. If the deed had no such meaning, it was no bar, in the present case, to proceedings under sect. 14 of that Act.—*FOLKESTONE CORPN. v. ROOK* (1907), 71 J. P. 550; 6 L. G. R. 69, D. C.

*(e) Width of Carriageway and Footway.*

**Power of local authority to alter widths.]**—*See* Public Health Act, 1925 (c. 71), s. 35.

*(f) What Premises are Chargeable.*

*i. Premises "Fronting, Adjoining or Abutting."*

*See* Private Street Works Act, 1892 (c. 57), ss. 6 (1) 10.

**2389. Footway on one side only—Liability of frontagers on both sides.]**—A local board, acting as an urban sanitary authority, resolved to execute certain private street works in a street which had buildings on the north side only, & was bounded on the south side chiefly by land of which the local board were owners. The works comprised the making up of the roadway, & the paving & kerbing of a footpath on the north side only; no footpath was made on the south side. The surveyor of the local board made a provisional apportionment, by which the expenses of paving & kerbing the footpath were apportioned among the owners of premises abutting on the north side only, all the other expenses of the proposed works being apportioned among the owners of premises abutting on both side of the street, including the local board, as the owners of land on the south side:—*Held*: the provisional apportionment of the expenses of the footpath was wrong, & they were properly apportionable among the owners of premises fronting, adjoining, or abutting on both sides of the street.—*CLACTON LOCAL BOARD v. YOUNG & SONS*, [1895] 1 Q. B. 395; 64 L. J. M. C. 124; 59 J. P. 581; 15 R. 92; *sub nom.* CLACTON LOCAL BOARD v. HARMAN, CLACTON LOCAL BOARD v. YOUNG & SONS, 11 T. L. R. 118; *sub nom.* GREAT CLACTON LOCAL BOARD v. YOUNG & SONS, 71 L. T. 877; 43 W. R. 219.

*Annotation*:—*Distl.* Herne Bay U. D. C. v. Payne (1907), 96 L. T. 668.

**2390. Strip of land between premises & street.]**—*HALL v. BOLSOVER URBAN DISTRICT COUNCIL*, No. 2429, *post*.



**Premises outside district of local authority.]—**  
*See Sub-sect. 4, B. (f) iii., post.*

ii. "**Access through Court, Passage or otherwise.**"

*See Private Street Works Act, 1892 (c. 57), s. 10.*  
**2391. "Court, passage, or otherwise"**—**Includes private road.]—**(1) By Private Street Works Act, 1892 (c. 57), s. 10, an urban authority about to execute private street works in any street may include in a provisional apportionment of the expenses of the works "any premises . . . access to which is obtained from the street through a court, passage, or otherwise," & which will in their opinion be benefited by the works:—*Held*: there may be included premises access to which is obtained through a private road made primarily for the purpose of giving access thereto, but not premises access to which is obtained through a road which is or is intended for a public street.

(2) The doctrine whereby in construing statutes or other instruments the words "other" & "otherwise" are limited to things or means not before mentioned but being *ejusdem generis* with those already mentioned in the instrument is well known; it has been invoked in the present case to show that in the phrase "access . . . through a court, passage or otherwise" the access other than through a court or passage must be of a width not greater than that of a court or passage. To hold that would be to shut one's eyes to the real intention of the legislature, which was to enable the local authority to include property which gets access to the street in which the works are being executed, & I decline to hold that premises which have such access are not to be included in an apportionment because the means of access may be of a width greater than that which is usual for a court or passage, or that they are only to be included when the access is by means of a court or passage or something of that character. A court does not usually convey any idea of narrowness, & therefore "court or passage" gives no measure whereby to limit the narrowness of the means of access embraced in the words "or otherwise" (LORD ALVERSTONE, C.J.).—NEWQUAY URBAN COUNCIL v. RICKEARD, [1911] 2 K. B. 846; 80 L. J. K. B. 1164; 105 L. T. 519; 75 J. P. 382; 9 L. G. R. 1042, D. C.

*Annotations:—As to (1) Consd. Chatterton v. Glanford R. C., [1915] 3 K. B. 707; Oakley v. Merthyr Tydfil Corpn., [1922] 1 K. B. 409. As to (2) Consd. Chatterton v. Glanford R. C., [1915] 3 K. B. 707.*

**2392. — Public street.]—**NEWQUAY URBAN COUNCIL v. RICKEARD, No. 2391, *ante*.

**2393. — Road intended for public street.]—**NEWQUAY URBAN COUNCIL v. RICKEARD, No. 2391, *ante*.

**2394. — Width immaterial.]—**NEWQUAY URBAN COUNCIL v. RICKEARD, No. 2391, *ante*.

**2395. — Portion of road on which works being carried out.]—**Resps. who were invested with the urban powers conferred by Private Street Works Act, 1892 (c. 57), had included applt.'s premises in a provisional apportionment in respect of the estimated expenses of metalling, flagging, channelling, & making good a part, about 400 feet in length, of a street named G. Lane, which was not a public highway or street. Applt.'s premises did not front or abut upon that portion of G. Lane upon which the works were being carried on, but access therefrom to the premises was obtained through the remaining portion of G. Lane, a length of about 516 yards:—*Held*: the words "court, passage, or otherwise" mean a court or passage or something in the nature of a court or passage, but do not mean a portion of the street

itself; & therefore access to applt.'s premises was not obtained through a "court, passage, or otherwise" within the meaning of sect. 10 of the Act, & the sect. did not empower resps. to include applt.'s property in the provisional apportionment.

The words "or otherwise" must mean some means of access of a similar character to that of a court or passage (LORD READING, C.J.).—CHATTERTON v. GLANFORD RURAL COUNCIL, [1915] 3 K. B. 707; 84 L. J. K. B. 1865; 113 L. T. 746; 79 J. P. 441; 13 L. G. R. 1352.  
*Annotation:—Refd. Oakley v. Merthyr Tydfil Corpn., [1922] 1 K. B. 409.*

**2396. — Side lane.]—**(1) In the district of an urban authority which had adopted Private Street Works Act, 1892 (c. 57), there was a terrace consisting of two blocks of ten houses each numbered respectively 1 to 10 & 11 to 20, which had been taken over by the authority as a public highway, & a street passing from the middle of the terrace Nos. 10 & 11 therein & at right angles thereto. There was also a lane 10 feet wide, which had been made for the convenience of the occupants of the terrace, & which had not been ballasted, metalled, or rolled, passing from the terrace along the side of No. 1 therein, then round behind Nos. 1 to 10 to the said street, then on behind Nos. 11 to 20, & then round along the side of No. 20 back into the terrace. There was a back entrance from the lane to No. 1 in the terrace. The urban authority having passed a resolution to make good the said street:—*Held*: No. 1 in the terrace was not so connected with the said street as to come within the words of sect. 10 of the above Act "premises . . . access to which is obtained from the street through a court, passage, or otherwise," & consequently, that house could not be included in a provisional apportionment of the expenses of making good the said street.

(2) Under sects. 6 & 10 of the Act an urban authority passed a resolution that a certain street should be made good, that their surveyor in accordance with the provisions of the Act should prepare as respected the street (*inter alia*) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Act & that in settling the apportionment of the expenses among the owners of the premises "fronting, adjoining, or abutting on the above-mentioned street" regard should be had to certain matters. The surveyor prepared a provisional apportionment of the expenses, which included certain premises which did not front, adjoin, or abut upon the said street, as coming within the words of sect. 10 "premises . . . access to which is obtained from the street through a court, passage or otherwise" & which would be benefited by the works. The urban authority then passed a second resolution approving of the provisional apportionment:—*Held*: the resolutions were sufficient to authorise a provisional apportionment of the expenses upon premises which came within the above words of sect. 10.

We think it would be more in conformity with the provisions of the Act that the resolution should state expressly that the council "think it just to include" such houses (*per cur.*).—OAKLEY v. MERTHYR TYDFIL CORPN., [1922] 1 K. B. 409; 91 L. J. K. B. 345; 126 L. T. 320; 86 J. P. 1; 38 L. L. R. 60; 66 Sol. Jo. 218; 19 L. G. R. 767, D. C.

**2397. — Back lane.]—**OAKLEY v. MERTHYR TYDFIL CORPN., No. 2396, *ante*.

**2398. — Meaning of "otherwise."]**—NEWQUAY URBAN COUNCIL v. RICKEARD, No.

*Sect. 2.—Extra metropolitan: Sub-sect. 4, B. (f) ii. & iii., & (g) & (h) i., ii. & iii.]*

**2399.** ———.]—*CHATTERTON v. GLANFORD RURAL COUNCIL*, No. 2395, *ante*.

### iii. Exempted Premises.

*See Private Street Works Act, 1892 (c. 57), ss. 16, 22, 26.*

**2400. Indemnity by local authority—Against expense of making up street.]**—In 1878 a local authority did some work on the causeway or pavement of a street within their district, which street was not a highway repairable by the inhabitants at large. A portion of the expenses incurred by the local authority was paid by two frontagers, J. & S. In the following year the local authority passed the following resolution: "Resolved that an indemnity be given to J. & S. against liability on account of further expenses that may be occasioned in connection with" the street in question, & delivered a copy of such resolution to J. & S. In 1902 the local authority resolved to put in force *Private Street Works Act, 1892 (c. 57)*, in the said street, & objection was taken to the provisional apportionment under sect. 7 that the premises of J. & S. ought to be excluded from the provisional apportionment, relying on the above resolution. The justices ordered the premises to be excluded on this ground. On appeal:—*Held*: the above resolution afforded no valid objection for excluding the premises from the provisional apportionment.—*DODWORTH URBAN DISTRICT COUNCIL v. IBBOTSON* (1903), 67 J. P. 132, D. C.

**2401. Land belonging to railway company—Not used for railway purposes.]**—A railway co. acquired a piece of land solely for the purpose of their railway & works, but for the time it was used as garden ground for which the railway co. received rent. The justices found as a fact that the land was not used by the railway co. solely or in any way or at all as a part of their railway or works, & that therefore the co. were not entitled to the exemption provided by sect. 22 of *Private Street Works Act, 1892 (c. 57)*:—*Held*: this was a question of fact on which there was evidence for the justices, & the ct. would not grant a writ of *mandamus* for them to state a case.—*R. v. JONES & HARRY URBAN DISTRICT COUNCIL, Ex p. MEIN* (1907), 96 L. T. 723; 71 J. P. 326; 5 L. G. R. 722, D. C.

**2402. Land extra commercium—Public pleasure ground.]**—*HERNE BAY URBAN COUNCIL v. PAYNE & WOOD*, No. 2425, *post*.

**2403. Land outside district of local authority.]**—The Local Government Board issued an order putting in force certain provisions of *Private Street Works Act, 1892 (c. 57)*, in the contributory place of S. as regards a road which was described in the order as being in that contributory place. Half of the road was in fact in the contributory place of G., which was not included in the order. On objection being taken to a provisional apportionment relating to the whole of the road, on the ground that the local authority had no power under the order to make up the whole of the road at the expense of the frontagers:—*Held*: there was no power in the justices to make any order on the basis that the whole road could be dealt with under the powers of the order of the Local Government Board.—*R. v. CHESHIRE JJ., Ex p. VYNER* (1909), 101 L. T. 683; 73 J. P. 499; 7 L. G. R. 1138, D. C.

**2404.** ———]—*Though fronting, adjoining or abutting*

*on street.]*—A district council has no power under *Private Street Works Act, 1892 (c. 57)*, s. 6, to include in the provisional apportionment of the expenses of private street works any premises which, though fronting, adjoining, or abutting on the street, are not within the district of the council.—*BISHOP AUCKLAND URBAN COUNCIL v. ALDERSON*, [1913] 2 K. B. 324; 76 J. P. 347; *sub nom. ALDERSON v. BISHOP AUCKLAND URBAN COUNCIL*, 82 L. J. K. B. 737; 10 L. G. R. 722.

**2405. Chapel—Not used exclusively for religious worship.]**—By sect. 16 of *Private Street Works Act, 1892 (c. 57)*, a church, chapel, or place appropriated to public religious worship, which is by law exempt from poor rates, is exempt from the expenses of private street works; & by 3 & 4 Will. 4, c. 30, s. 1, a place which is "exclusively appropriated to public religious worship" is exempt from poor rates. A building described as a "disused Wesleyan chapel," had up to five years ago, when a new church was built, been used as a church. The premises were now used on Sundays for a Sunday school, & on week nights for religious services. A debating society met therein, & there had also been held therein a political meeting, an "At Home" in connection with the church work & entertainments open to the public were given, for which a charge for admission was made. The moneys arising therefrom were applied by the owners to meet the expenses of the church. The premises had not in fact been rated for the relief of the poor. Expenses having been incurred by the local authority in executing private street works:—*Held*: the premises were not a place "exclusively appropriated to public religious worship" & were not by law exempt from rates for the relief of the poor, & therefore did not come within the exemption in sect. 16 of *Private Street Works Act, 1892 (c. 57)*, & the owners were liable to the expenses of the private street works.—*WALTON-LE-DALE URBAN DISTRICT COUNCIL v. GREENWOOD* (1911), 105 L. T. 547; 75 J. P. 541; 9 L. G. R. 1148, D. C.

**2406. Tram lines laid in street.]**—*STANDRING v. BEXHILL CORPN.*, No. 2385, *ante*.

### (g) Plans and Estimates.

*See Private Street Works Act, 1892 (c. 57), s. 6, 9 (2), Sched., Part I.*

**2407. Plans—Inspection—Duty of frontager.]**—(1) On premises adjoining a highway, which were the property of & occupied by deft., there was a coal shoot formed by an opening at the bottom of the wall of the house, abutting on the pavement, which was part of the highway. In 1901 the local highway authority, acting under *Private Street Works Act, 1892 (c. 57)*, raised the level of the pavement, & in order to preserve access to the coal shoot left an opening in the pavement. This condition of the pavement remained until Oct. 1914, when pltf. in passing along the pavement, put her foot into the hole, & suffered personal injuries, for which she brought her action against deft.:—*Held*: the action failed, inasmuch as, where a nuisance is created by a highway authority on a highway under their control, the owner or occupier of the land adjoining the highway is not liable for an accident caused by the nuisance.

(2) *Semble*: there was no duty on deft. to inspect the plans prepared by the local authority in 1901 in connection with the work of raising the level of the pavement.—*HORRIDGE v. MAKINSON* (1915), 84 L. J. K. B. 1294; 113 L. T. 498; 79 J. P. 484; 31 T. L. R. 389; 13 L. G. R. 868, D. C.

**2408. Estimated expenses—Sum for contingencies.]—**STANDRING v. BEXHILL CORPN., No. 2385, *ante*.

(h) *Provisional Apportionment.*

i. *Approval by Local Authority.*

See Private Street Works Act, 1892 (c. 57), s. 6 (3), Sched., Part II.

**2409. Resolution of approval—Service of copy on owner—Condition precedent to recovery of expenses.]—**Where works are executed by a local authority under Private Streets Works Act, 1892 (c. 57), it is a condition precedent to the right of the local authority to recover from an owner of premises in the street his apportioned share of the expenses that notice of the provisional apportionment of the estimated expenses, as well as notice of the final apportionment of the ascertained expenses, shall have been served upon him.

Service upon a reputed owner in occupation of the premises is not sufficient. *Semble*: a copy of the resolution addressed & sent to the "owner" of the premises, without naming him, at the premises, is effectively served upon the owner under the Act.—WIRRAL RURAL DISTRICT COUNCIL v. CARTER, [1903] 1 K. B. 646; 72 L. J. K. B. 332; 89 L. T. 171; 67 J. P. 31; 51 W. R. 414; 19 T. L. R. 153; 47 Sol. Jo. 223; 1 L. G. R. 206.

**2410. ——— What is good service—Reputed owner.]—**WIRRAL RURAL DISTRICT COUNCIL v. CARTER, No. 2409, *ante*.

**2411. ——— Amendment of scheme by justices—Necessity for fresh notices.]—**TWICKENHAM URBAN COUNCIL v. MUNTON, No. 2426, *post*.

**2412. ——— Amendment of scheme by justices—Necessity for fresh resolution.]—**TWICKENHAM URBAN COUNCIL v. MUNTON, No. 2126, *post*.

**2413. ——— Inclusion of premises not abutting on street—If local authority "think just."]—**OAKLEY v. MERTHYR TYDFIL CORPN., No. 2396, *ante*.

ii. *Notice of Objections.*

See Private Street Works Act, 1892 (c. 57), s. 7.

**2414. Sufficiency of notice—Objections must be specific.]—**An urban authority resolved to sewer, level, pave, etc., a certain road within their district under Private Street Works Act, 1892, & a provisional apportionment of the expenses of the works was prepared & approved. The owners of certain premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works, delivered to the corpn. a memorial stating that they had no desire that the road should be taken over by the sanitary authority, & that the proposed works were unreasonable & unnecessary, & asking that before further steps were taken to carry out the works inquiry should be made into the matter:—*Held*: the memorial was not a notice of objection within sect. 7 of Private Street Works Act, 1892, & therefore that it did not cast upon the urban authority the obligation of taking the proceedings prescribed by sect. 8 (1) of that Act.—SOUTHAMPTON CORPN. v. LORD (1903), 67 J. P. 189; 1 L. G. R. 324, C. A.

**2415. ——— Amendment by justices—On hearing of objection.]—**CAREY v. BEXHILL CORPN., No. 2417, *post*.

iii. *Grounds of Objections.*

See Private Street Works Act, 1892 (c. 57), s. 7.

**2416. Locus not a "street" within the Act—Footway repairable by inhabitants at large.]—**The definition of "street" in Private Street Works Act, 1892 (c. 57), s. 5, excludes "a highway

repairable by the inhabitants at large. By sect. 8 an urban authority is empowered with respect to streets to do certain sewerage works.

An urban authority proposed to do sewerage works in a certain place in their borough. The place in question (which was called a street) was formed before 1816 & had always been open at both ends into highways & the place & buildings had existed in the same condition for seventy years & since its formation the way had been used by foot-passengers without interruption. Neither public nor private repairs were proved. On a case stated on the hearing & determination by justices of objections to the proposed works:—*Held*: (1) the place in question was not a "street" within the Act being a footway repairable by the inhabitants at large, & therefore the urban authority had no power to execute the proposed works.

(2) The *onus probandi* is upon the authority to show that a street is a street within the Act.—RISHTON v. HASLINGDEN CORPN., [1898] 1 Q. B. 294; 67 L. J. Q. B. 387; 77 L. T. 620; 62 J. P. 85; 14 T. L. R. 155, D. C.

*Annotations*:—As to (1) *Reid*. Folkestone Corpn. v. Brockman, [1914] A. C. 338. As to (2) *Reid*. Kingston-upon-Thames Corpn. v. Baverstock (1909), 100 L. T. 935.

**2417. ——— Evidence admissible to show highway repairable by inhabitants at large.]—**By sect. 7 of Private Street Works Act, 1892 (c. 57), the owner of premises liable to be charged with any part of the cost of executing works under the Act may by written notice to the local authority object to the proposed works on the following, amongst other, grounds: (a) that an alleged street is not a street within the meaning of the Act; (b) that a street is a highway repairable by the inhabitants at large. By sect. 5 the expression "street" in the Act means a street as defined by the Public Health Acts, & not being a highway repairable by the inhabitants at large:—*Held*: where the ground of objection was that the alleged street was not a street within the Act, evidence was admissible to prove that the street was a highway repairable by the inhabitants at large.

*Qu.*: whether on the hearing of an objection under the Act, the justices can amend the notice of objection so as to let in evidence which would be inadmissible under the notice as drawn.—CAREY v. BEXHILL CORPN., [1904] 1 K. B. 142; 73 L. J. K. B. 74; 90 L. T. 58; 68 J. P. 78; 2 L. G. R. 367, D. C.

**2418. ——— Objections limited to section 7 of the Act.]—**A path in Epping Forest, subject to the Epping Forest Act, 1878, may, with the consent of the conservators, be dealt with as a street under the Private Street Works Act, 1892 (c. 57), that Act being in force in the district in which such path is situate. The question whether the path is a street within Private Street Works Act, 1892 (c. 57), cannot be raised at all unless duly raised under s. 7 of that Act. Notices duly served in accordance with Public Health Act, 1875 (c. 55), s. 267, are to be deemed to have been duly served although, in point of fact, they never reach the party to whom they are addressed.—WOODFORD URBAN DISTRICT COUNCIL v. HENWOOD (1899), 64 J. P. 148, D. C.

*Annotation*:—*Reid*. Teddington U. D. C. v. Ville (1906), 70 J. P. 381.

**2419. Street repairable by inhabitants at large—Finding of magistrates conclusive—Estoppel.]—**In proceedings taken by an urban authority under Private Street Works Act, 1892 (c. 57), ss. 6, 7, 8, to compel owners of premises to do private street works in a street, the determination by a ct. of

*Sect. 2.—Extra metropolitan: Sub-sect. 4, B. (h) iii., iv. & v., & (i) i. & ii.]*

summary jurisdiction that the street is a highway repairable by the inhabitants at large is a judgment *in rem* & conclusive as to the status of the street & the question whether it is so repairable is *res judicata* in any future proceedings under these sects.—*WAKEFIELD CORPN. v. COOKE*, [1904] A. C. 31; 73 L. J. K. B. 88; 89 L. T. 707; 68 J. P. 225; 52 W. R. 321; 20 T. L. R. 115; 48 Sol. Jo. 130; 2 L. G. R. 270, H. L.

*Annotations:—Consd. Scott v. Lowe* (1902), 86 L. T. 421. *Refd. Pearce v. Maidenhead Corpn.* (1907), 76 L. J. K. B. 591. *Mentd. Oaten v. Auty*, [1919] 2 K. B. 278.

**2420. — Agreement between frontagers & local authority—To dedicate & accept street—Powers reserved against frontagers.]—**Under an agreement made in 1879 between a railway co., certain property owners, & the local authority, it was agreed that a road should be dedicated to the public & taken over by the local authority as a highway repairable by the inhabitants at large, but that the local authority should retain the same powers of requiring the respective owners & occupiers for the time being of land, fronting, adjoining, or abutting on the road to sewer & make up, etc., all or such parts of the road, carriageway, or footway as were not already sewered & made up, & their rights under Public Health Act, 1875 (c. 55), & a local Act were also reserved to the local authority. At the date of the agreement the road was properly made up, but the footway was not paved. The local authority having decided under the powers conferred by Private Street Works Act, 1892 (c. 57), to pave the footway, they served notices of apportionment on the frontagers:—*Held*: the frontagers were not liable, as the road was a highway repairable by the inhabitants at large, & the powers which the local authority attempted to enforce did not apply to such a highway, & the local authority could not, under the agreement make the frontagers liable.—*FOLKESTONE CORPN. v. MARSH* (1905), 94 L. T. 511; 70 J. P. 113; 4 L. G. R. 382.

**2421. — — — — —.]—FOLKESTONE CORPN. v. ROOK**, No. 2388, *ante*.

**2422. Proposed work unreasonable—Sewering street—Existing state of drainage.]—**A ct. of summary jurisdiction, upon the hearing of a frontager's objection to a private street work under Sheffield Corporation Act, 1890 (c. cxxv), ss. 53 (d), 54, & *semble*, under Private Street Works Act, 1892 (c. 57), ss. 7 (d), 8, has jurisdiction when determining whether the proposed work, as for instance sewerage of a street, is itself unreasonable, to take into consideration the existing state of the drainage of the houses in such street.—*SHEFFIELD CORPN. v. ANDERSON* (1894), 64 L. J. M. C. 44; *sub nom. SHEFFIELD CORPN. v. ALEXANDER*, 72 L. T. 242; 14 R. 275, C. A.

*Annotation:—Refd. Mansfield Corpn. v. Butterworth*, [1898] 2 Q. B. 274.

**2423. — — — — —.]—CHESTER CORPN. v. BRIGGS**, No. 2447, *post*.

**2424. Proposed works insufficient—Narrow street—Jurisdiction of magistrates.]—**An objection was taken to works of paving, levelling, sewerage, & lighting a street proposed by an urban authority to be done under Private Street Works Act, 1892 (c. 17), the ground of objection being that the proposed works were "insufficient" & "unreasonable" within sect. 7 (d). On the hearing of the objection before a ct. of summary jurisdiction it was proved that the works were necessary & proper in order that the street might be safely

& conveniently used as a street; but the justices allowed the objections, holding that the works were insufficient, & therefore unreasonable, because the street at one point was too narrow, & the urban authority did not propose to take any steps to have it widened:—*Held*: the expression "insufficient" in sect. 7 (d) limited the jurisdiction of the ct. of summary jurisdiction to determining whether or not the works were insufficient to effect the purpose proposed to be effected by them, & therefore the justices' decision, being founded upon considerations which they ought not to have entertained, was wrong.—*MANSFIELD CORPN. v. BUTTERWORTH*, [1898] 2 Q. B. 274; 67 L. J. Q. B. 709; 78 L. T. 527; 62 J. P. 500; 46 W. R. 650; 14 T. L. R. 431; 42 Sol. Jo. 524, D. C.

**2425. All premises not included in apportionment.]—**(1) A provisional apportionment of the estimated expenses of private street works made under Private Street Works Act, 1892 (c. 57), s. 6, is defective & may be successfully objected to under sect. 7 of the Act if it does not include all the premises fronting, adjoining, or abutting on the street the subject of the private street works, irrespective of the question how much, if anything, is ultimately charged upon some of the premises.

(2) Land acquired by an urban authority under sect. 164 of Public Health Act, 1875 (c. 55), to be used as public walks or pleasure grounds are not *extra commercium*. The urban authority is the "owner" of such lands within the meaning of the public Health Acts.—*HERNE BAY URBAN COUNCIL v. PAYNE & WOOD*, [1907] 2 K. B. 130; 76 L. J. K. B. 685; 96 L. T. 666; 71 J. P. 282; 23 T. L. R. 442; 5 L. G. R. 631, D. C.

*Annotations:—As to* (1) *Expld. Bishop Auckland U. C. v. Alderson*, [1913] 2 K. B. 324. *Refd. Carlisle Corpn. v. Saul's Executors* (1907), 5 L. G. R. 1128; *R. v. Jones, etc.*, J.J. & Barry U. D. C. (1907), 5 L. G. R. 722; *Bridgwater Corpn. v. Stone* (1908), 99 L. T. 806.

#### iv. Hearing of Objections.

*See Private Street Works Act*, 1892 (c. 57), ss. 3 (4), 8; *Public Health Act*, 1875 (c. 55), s. 269; *Summary Jurisdiction Act*, 1848 (c. 43), s. 14; *Summary Jurisdiction Act*, 1879 (c. 49), s. 39 (2); *Documentary Evidence Act*, 1868 (c. 37), s. 2; *Documentary Evidence Act*, 1882 (c. 9), s. 2; *Local Government Board Act*, 1871 (c. 70), s. 5.

**2426. Jurisdiction of magistrates—To amend scheme—Power of local authority to proceed—After amendment.]—**Where a resolution has been passed by an urban authority under Private Street Works Act, 1892 (c. 57), s. 6 (1), approving the plans, sections, estimates, & provisional apportionments for making up the whole of a street, & the resolution has been published & copies thereof have been served on the frontagers under sub-sect. 3, the justices have, on the hearing of an objection by a frontager under sect. 7 that part of the street is repairable by the inhabitants at large, jurisdiction under sect. 8 (1), to amend the resolution, plans, etc., by limiting the scheme to the remaining portion of the street: & the urban authority can then carry out the amended scheme without it being necessary for them to begin their proceedings *de novo* or to pass a resolution approving the amended scheme.

Where, on the hearing of an objection to the original scheme, the justices have decided upon amending the scheme, the question whether or not, under sect. 8 (1), they shall adjourn the hearing & direct any further notices to be given, is a matter entirely within their discretion; but where the amendment is of a material character,

it is desirable, though not obligatory upon them, that they should adjourn the hearing & direct further notices to be given in order that persons affected by the amended scheme may have an opportunity of being heard.—**TWICKENHAM URBAN COUNCIL v. MUNTON**, [1899] 2 Ch. 603; 68 L. J. Ch. 601 81 L. T. 136; 47 W. R. 660; 15 T. L. R. 457; 43 Sol. Jo. 673, C. A.

*Annotations*:—**Reid**, *Hall v. Bolsover U. D. C.* (1909), 100 L. T. 372; *R. v. Cheshire J.J.* (1909), 7 L. G. R. 1138.

**2427.** ——— To order further notices to be served.]—**TWICKENHAM URBAN COUNCIL v. MUNTON**, No. 2426, *ante*.

**2428.** ——— Degree of benefit derivable from works.—No resolution by local authority.]—Where an urban authority has not resolved under sect. 10 of Private Street Works Act, 1892 (c. 57), that in settling the apportionment, regard is to be had to the greater or less degree of benefit to be derived by any premises from the works, or to the amount & value of any work already done by the owners or occupiers of such premises, the justices have no jurisdiction, when determining objections under sect. 8 (1) of that Act, to have regard to those matters & to reduce the apportionment in respect thereof.—**BRIDGWATER CORPN. v. STONE** (1908), 99 L. T. 806; 72 J. P. 487; 6 L. G. R. 1171, D. C.

*Annotation*:—**Mentd.** *R. v. Minister of Health, Ex p. Aldridge*, [1925] 2 K. B. 363.

**2429.** ——— Omission of name of person chargeable.]—Applt. was the owner of certain land abutting on a street in the district of resp., who resolved under Private Street Works Act, 1892 (c. 57), to make up the street. Applt. appeared in the provisional apportionment as liable to be charged in respect of certain land abutting on the south side of the street, & a colliery co. appeared therein as owners or reputed owners of certain agricultural land abutting on the north side of the street. Applt. gave written notice of objection on the ground that the provisional apportionment was incorrect in respect of the degree of benefit to be derived by the owners & occupiers on the north side. The justices ordered that the provisional apportionment should be amended & that the expenses should be apportioned according to frontage, & that notice should be given to the owners or reputed owners shown as liable to be charged, & they adjourned the hearing. At the adjourned hearing the justices found that the colliery co. were only lessees & they ordered the name of the Duke of P. to be substituted as the owner of the agricultural land, that notice should be given to the duke & that the hearing should be further adjourned. On the further adjournment the ct. found that the duke's land did not abut upon the street & they ordered his name to be omitted & the provisional apportionment to be amended, & they adjourned the hearing again. In the provisional apportionment thus amended applt. appeared as owner or reputed owner of a strip of land lying between the duke's land & the street. On the final hearing it was proved that applt. was the owner of this strip of land & the justices, confirmed the provisional apportionment as thus amended:—**Held**: although there had been no notice of objection to the provisional apportionment on the ground of the omission of the name of applt. as the person chargeable in respect of the strip of land, the justices had power to amend the provisional apportionment in this respect & to confirm it as so amended.—**HALL v. BOLSOVER URBAN DISTRICT COUNCIL** (1909), 100 L. T. 372; 73 J. P. 140; 7 L. G. R. 403, D. C.

—VOL. XXVI.

**2430.** ——— To amend resolution of local authority.]—**CHESTER CORPN. v. BRIGGS**, No. 2447, *post*.

**2431.** Evidence & proof—Onus of proof.—That street is "street" within the Act.]—**RISHTON v. HASLINGDEN CORPN.**, No. 2416, *ante*.

#### v. Appeals.

**2432.** Appeal lies to quarter sessions—From decision of magistrates.]—An appeal lies to quarter sessions from the decision of a ct. of summary jurisdiction under Private Street Works Act, 1892 (c. 57), s. 8, determining the matter of objections to proposed works under the Act.—**PEARCE v. MAIDENHEAD CORPN.**, [1907] 2 K. B. 96; 76 L. J. K. B. 591; 90 L. T. 639; 71 J. P. 230; 5 L. G. R. 622, D. C.

*Annotation*:—**Reid**, *R. v. Minister of Health, Ex p. Aldridge*, [1925] 2 K. B. 363.

**2433.** To Minister of Health—From decision of local authority—Under Public Health Act, 1875 (c. 55), s. 268.]—Public Health Act, 1875 (c. 55), s. 268, has not been superseded or rendered nugatory by sect. 8 (2), or by any other provision, of Private Street Works Act, 1892 (c. 57), or otherwise, as regards objections to an apportionment of the expenses of private street works, other than objections admissible under the latter Act; & consequently, a frontager, who takes an objection not so admissible to an apportionment of that kind, is entitled under Public Health Act, 1875 (c. 55), s. 268, to address a memorial to the Minister of Health, as the successor of the Local Government Board, stating the objection, & the Minister is entitled thereunder to make such order in the matter as to him may seem equitable.—**R. v. MINISTER OF HEALTH, Ex p. ALDRIDGE** [1925] 2 K. B. 363; 94 L. J. K. B. 707; 133 L. T. 139; 80 J. P. 114; 41 T. L. R. 465; 23 L. G. R. 449, D. C.

#### (i) Final Apportionment.

##### i. Notice of Apportionment.

See Private Street Works Act, 1892 (c. 57), ss. 12–14.

**2434.** Service of notice — On "owner."]—**WIRRAL RURAL DISTRICT COUNCIL v. CARTER**, No. 2409, *ante*.

**2435.** ——— Owner of premises mortgagor—Mortgagees in possession.]—An urban district council served a copy of a resolution to execute certain private street works under Private Street Works Act, 1892 (c. 57), upon a mtgor. of two houses as "owner" of the houses. They executed the works & served notice of final apportionment upon the mtgor. as "owner." At the time when the copy resolution & the notice were served mtgees. of the premises were in possession. Upon action by the mtgees. to restrain the council from selling under sect. 13 (1) of the Act to recover the sums apportioned:—**Held**: as the mtgees. were in possession when the copy resolution & the notice were served on the mtgor. the council had not served the "owner" as defined by sect. 4 of Public Health Act, 1875 (c. 55), & they were not, therefore, entitled to sell the premises.—**MAGUIRE v. LEIGH-ON-SEA URBAN DISTRICT COUNCIL** (1906), 95 L. T. 319; 70 J. P. 479; 34 L. G. R. 979.

##### ii. Recovery of Expenses.

See Private Street Works Act, 1892 (c. 57), ss. 12–14; Public Health Act, 1875 (c. 55), s. 257.

**2436.** Charge on premises—From when charge dates—Sale of premises before final apportionment—Indemnification of purchaser.]—The amount of

*Sect. 2.—Extra metropolitan: Sub-sect. 4, B. (i) ii. & (j), (k), (l), (m) & (n).*

the apportioned expenses of private street works executed under Private Street Works Act, 1892 (c. 57), become a charge on the premises in respect of which they are apportioned as from the date of the completion of the works, & not merely as from the date of the final apportionment. If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises.—*Strock v. MEAKIN*, [1900] 1 Ch. 683; 69 L. J. Ch. 401; 82 L. T. 248; 48 W. R. 420; 16 T. L. R. 284, C. A.

*Annotations.*—*Folld. Surtees v. Woodhouse*, [1903] 1 K. B. 396. *Apld. Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226. *Distd. Re Farrer & Gilbert's Contract*, [1914] 1 Ch. 125. *Reid. Re Leyland & Taylor* (1900), 69 L. J. Ch. 764; *Re Waterhouse's Contract* (1900), 44 Sol. Jo. 645; *Lumby v. Faupel* (1903), 88 L. T. 562.

**2437. — Covenant by lessee to pay all charges—Street charge imposed before commencement of lease—When payable.**—Where by a covenant in a lease the lessee covenanted that he would during the term pay & bear all present & future rates, taxes, duties, assessments, & outgoing charges upon the demised premises, or the owner or occupier in respect thereof:—*Held*: the covenant did not apply to expenses of private street works which, under Private Street Works Act, 1892 (c. 57), had become a charge upon the premises on the completion of the works before the date of the commencement of the term granted by the lease, though not payable until after that date.—*SURTEES v. WOODHOUSE*, [1903] 1 K. B. 396; 72 L. J. K. B. 302; 88 L. T. 407; 67 J. P. 232; 51 W. R. 275; 19 T. L. R. 221; 47 Sol. Jo. 276; 1 L. G. R. 227, C. A.

*Annotations.*—*Apld. Lumby v. Faupel* (1904), 90 L. T. 110. *Reid. Re Allen & Driscoll's Contract*, [1904] 2 Ch. 226.

**2438. — Settled property—Payment by tenant for life—Apportionment between capital & income.**—A person entitled to the interest of a tenant for life in certain property paid the expenses incurred by a local authority in paving a private street, & charged upon the property under sect. 13 of Private Street Works Act, 1892 (c. 57):—*Held*: he was entitled to a charge for the capital moneys so paid under sect. 13, which gives an absolute charge on the fee simple, notwithstanding the fact that sect. 17 of the same Act gives limited owners a power to raise moneys so paid by mtge. on the terms that the capital shall be repaid by instalments within twenty years.—*Re Pizzi, SCRIVENER v. ALDRIDGE*, [1907] 1 Ch. 67; 76 L. J. Ch. 87; 95 L. T. 722; 71 J. P. 58; 5 L. G. R. 86.

**2439. — Local authority entitled to.**—An action will lie at the suit of an urban authority for a declaration that ptfs. are entitled under sect. 13 of Private Street Works Act, 1892 (c. 57), to a charge on premises for the apportioned expenses incurred by ptfs. in executing works under the Act, & payable by deft. in respect of the premises, & for an order that the premises may be sold & for the appointment of a receiver.—*WEST HAM CORPN. v. SHARP*, [1907] 1 K. B. 445; 76 L. J. K. B. 307; 96 L. T. 230; 71 J. P. 100; 5 L. G. R. 694, D. C.

**2440. Sale of premises—Appointment of receiver.**—*WEST HAM CORPN. v. SHARP*, No. 2439, *ante*.

**2441. Rate of interest.**—Resolutions were duly passed by an urban district council to adopt Private Street Works Act, 1892 (c. 57), & that a certain street should be sewered, levelled, paved, metalled, flagged, channelled & made good.

£137 7s. 9d. was charged on deft.'s premises, which consisted of nine houses. A summons was taken out for payment of this sum with 5 per cent. interest. Deft. paid £137 7s. 9d. with 4 per cent. interest, & objected that (a) the action had been commenced before three months had expired from the date of the notice; (b) 4 per cent. only should have been asked; (c) the £137 7s. 9d. was asked as a whole sum & not apportioned on the houses individually; (d) the proceedings ought to have been brought in the county ct. An application for leave to interrogate was adjourned into ct. to come on with the summons, & the summons was amended by stating in a schedule how the £137 7s. 9d. was apportioned upon deft.'s premises:—*Held*: deft. must pay the costs. *Semble*: an originating summons in the Ch. Div., if it is not adjourned into ct., is cheaper & more expeditious than a plaint in the county ct.—*PONTYPRIDD URBAN DISTRICT COUNCIL v. JONES* (1911), 75 J. P. 345.

**2442. In what court action brought—County court—Summons in Chancery Division.**—*PONTYPRIDD URBAN DISTRICT COUNCIL v. JONES*, No. 2441, *ante*.

**Hearing of objections—On proceedings to recover.**—*See Sect. 2, sub-sect. 4, B. (i) iii., post.*

### iii. Objections to Final Apportionment.

*See Private Street Works Act, 1892 (c. 57), ss. 12–14.*

**2443. When objection must be taken—Departure from specification.**—By Private Street Works Act, 1892 (c. 57), s. 12, "When any private street works have been completed, & the expenses thereof ascertained," the urban authority's surveyor shall make a final apportionment of the expenses, which final apportionment shall be conclusive for all purposes, & the owners of premises affected thereby may, within one month after receiving notice thereof, object thereto upon the grounds (*inter alia*), or either of them, that the final apportionment has not been made in accordance with the sect., & that there has been an unreasonable departure from the deposited specification, plans, & sects.

An urban authority employed a contractor to execute, under the powers given by the Act, works of paving, &c., in a street according to a specification, plans, & an estimate duly made & deposited. Being satisfied on the report of their surveyor, who had inspected the work from time to time during its progress & given certificates for payments on account to the contractor, that it had been satisfactorily completed, they paid the contractor the balance of the contract price, & the surveyor then made a final apportionment of the expenses among the owners, notice of which was served upon them. Applt., an owner affected by the final apportionment, did not object thereto within one month after he received the notice; but the urban authority having, after the month had expired, taken summary proceedings to obtain payment of the sum apportioned upon him, he objected before the justices that the works had not been "completed" within sect. 12, because the road & footways of the street had not been formed & levelled, not had they been ballasted & metalled to the thickness, or with the materials, specified in the specification, nor did the channeling & kerbing comply therewith, & the surveyor had, therefore, no power to make a final apportionment of the expenses:—*Held*: applt. could not take those objections before the justices, & they were right in rejecting evidence in support of



them.—*HAYLES v. SANDOWN URBAN DISTRICT COUNCIL*, [1903] 1 K. B. 169; 72 L. J. K. B. 48; 88 L. T. 61; 67 J. P. 177; 51 W. R. 348; 1 L. G. R. 187, D. C.

*Annotations*.—*Consd.* Pearce v. Maidenhead Corpn., [1907] 2 K. B. 96. *Refd.* R. v. Minister of Health, *Ex p* Aldridge, [1925] 2 K. B. 363.

**2444.** — **Expenses wrongly included in apportionment.**—Resp. purchased a house in a

Resp. knew nothing of the agreement. Appls. having decided to make up the street under sect. 6 of Private Street Works Act, 1892 (c. 57), caused a notice to be served on resp. as a frontager, & no notice of objection was given by resp. under sect. 7 of the Act. The work having been done by the urban authority, notice of the final apportionment, which included the cost of the sewer previously laid as aforesaid, was served on resp., & no objection was taken by her under sect. 12. Upon proceedings before the justices to recover the amount of the final apportionment:—*Held*: resp. having failed to object either under sect. 7 or 12 of the Act, no objection could be raised by her that the cost of the said sewer ought not to have been included in the apportioned expenses.

—*TEDDINGTON URBAN DISTRICT COUNCIL v. VILE* (1906), 70 J. P. 381; 4 L. G. R. 782, D. C.

**2445.** — **Premises wrongly included in apportionment.**—An urban authority, under the provisions of a local Act analogous to Private Street Works Act, 1892 (c. 57), resolved to execute certain private street works, & served statutory notices on a firm of estate agents as “owners,” within sect. 4 of Public Health Act, 1875 (c. 55), of premises fronting, adjoining, or abutting on the street. The agents made no objection to the provisional or final apportionment of expenses. Some time after the works had been completed & the final apportionment made, the agents discovered that the boundary wall fronting the street was not part of their premises, but was the property of other owners, & they therefore denied liability for the apportioned expenses:—*Held*: inasmuch as their names appeared in the provisional apportionment as owners of the premises fronting the street, & although served with the statutory notices, they had made no objection to the proposals of the urban authority on the ground that their premises ought to be excluded from the provisional apportionment, the agents were liable for the apportioned expenses.—*WALLASEY URBAN DISTRICT COUNCIL v. WALKER* (W. II.) & Co. (1906), 70 J. P. 199; 4 L. G. R. 1042.

*Annotation*.—*Apprvd.* & *Folld.* Porthcawl U. D. C. v. Brogden, [1917] 1 Ch. 534.

**2446.** — **Agreement with local authority—For exemption of premises.**—Where an urban authority has adopted Private Street Works Act, 1892 (c. 57), & has duly published the resolution required by sect. 6 of that Act with reference to the making up of a new street, an objection by an owner of property fronting on the street, who is shown in a provisional apportionment as liable to be charged with an apportioned amount of the expenses of the making up, on the ground that by agreement with the urban authority he has been exempted from liability in respect of his property, is, if not an objection that the property “ought to be excluded from . . . the provisional apportionment” within sect. 7 (e) of the Act, at any rate an objection “that the provisional apportionment is incorrect in respect of some matter of fact,” within sect. 7 (f), which must be taken by written notice to the urban

authority within one month after the publication of the resolution; & having regard to sect. 8 (2), of the Act, the objection cannot be taken in proceedings to enforce the charge upon the property to secure the apportioned amount.—*PORTHCAWL URBAN DISTRICT COUNCIL v. BROGDEN*, [1917] 1 Ch. 534; 86 L. J. Ch. 393; 116 L. T. 405; 81 J. P. 137; 61 Sol. Jo. 300; 15 L. G. R. 601.

#### (j) Contribution to Expenses by Local Authority.

**2447. Necessity for resolution of local authority—Power of magistrates to amend resolution.**—Private Street Works Act, 1892 (c. 57), s. 6, provides that an urban authority may pass a resolution with respect to private street works, & sect. 10, that the expenses incurred in executing such works shall be apportioned among the frontagers, unless the urban authority otherwise resolve.

By sect. 7 provision is made for objections by frontagers & by sect. 8 these are to be heard & determined by a ct. of summary jurisdiction, which may quash or amend the resolution on the application of either an objector or of the urban authority. By sect. 15 the urban authority may at any time resolve to contribute the whole or a portion of the expenses of any private street works & may pay the same out of the district fund:—*Held*: in the absence of a resolution of the urban authority under sect. 15, justices engaged in hearing objections under sect. 8 have no power to insert by way of amendment to a resolution under sect. 6 a resolution that the urban authority shall contribute in whole or in part to the expenses of private street works.

In considering an objection under sect. 7 (d) that the proposed works are unreasonable the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such works should be done at the frontagers' expense (*SALTER, J.*).—*CHESTER CORPN. v. BRIGGS*, [1924] 1 K. B. 239; 93 L. J. K. B. 69; 130 L. T. 221; 88 J. P. 1; 40 T. L. R. 85; 68 Sol. Jo. 276; 21 L. G. R. 807, D. C.

#### (k) Charge by Limited Owners.

*See* Private Street Works Act, 1892 (c. 57), s. 17. **Charge on settled estates—Apportionment between capital & income.**—*See* No. 2438, *ante*.

#### (l) Expenses of Local Authority.

*See* Private Street Works Act, 1892 (c. 57), s. 23.

#### (m) Power to Borrow.

*See* Private Street Works Act, 1892 (c. 57), s. 18; PUBLIC HEALTH.

#### (n) Accounts and Application of Money.

*See* Private Street Works Act, 1892 (c. 57), s. 21 (1) (2).

#### C. Local Acts.

##### (a) Execution of Works.

###### i. In General.

**2448. Execution of works by frontager—Not owner of soil of street—Not trespass.**—By a local Act, the material provisions of which were substantially the same as those of Public Health Act, 1875 (c. 55), comrs. were created, having duties with regard to streets & buildings within a certain area. In 1878 it was proposed to lay out an estate within such area for building, & plans were submitted to & approved by the comrs. By



*Sect. 2.—Extra metropolitan: Sub-sect. 4, C. (a) i., ii., iii. & iv.]*

agreement between them & deft., he was, on completion of certain roads, to throw 18 feet of his land into those roads, so as to increase the width to 36 feet, which was done, but not to make the roads. In 1887 the powers of the comrs. passed to the pltf. corpn.

In 1892 the corpn. by an order required deft. to sewer, drain, level, flag & metal the roads (being the 18 feet width which was not on his land) so far as his premises fronted, adjoined, or abutted thereon. Deft. had done the necessary work of sewerage & paving on the 18 feet portion of his land which he had, as agreed, thrown into the roads for the purpose of making them 36 feet wide. The order not having been complied with, the corpn. executed the work themselves, & on making request for payment deft.'s agent disputed that the property was liable. A summons was accordingly taken out by the corpn. to have the sums expended declared a charge on the property:—*Held*: (1) half of each of the roads was a "street" within the Act, so as to bring it within the power of the corpn. to sewer & pave it compulsorily, at the expense of the adjoining owners, in case of their not complying with a proper notice to do so; (2) the notice was properly made & served on deft.; (3) entry on lands in obedience to the order did not constitute a trespass; (4) as deft. did not rest his defence on a wrong apportionment, there was no question within the jurisdiction of an arbitrator to decide, & his decision was unnecessary; (5) the proper course for deft. was by way of appeal to the Secretary of State by memorial for relief.—*WEST HARTLEPOOL CORPN. v. ROBINSON* (1897), 77 L. T. 387; 62 J. P. 35; 46 W. R. 218; 14 T. L. R. 18, C. A.

*Annotation*:—As to (4) *Refd. Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169.

**2449. Dispute between frontager & local authority—Reference to arbitration.]—***WEST HARTLEPOOL CORPN. v. ROBINSON*, No. 2448, *ante*.

*ii. Notice to Frontagers.*

**2450. Notice as condition precedent—To execution by local authority.]—**A local Act for paving & improving the town of S., appointed comrs. for putting it into execution, & authorised them to pave new streets, & provided that the expenses of such new pavements should be paid & reimbursed to the comrs. by the owners or occupiers of the land adjoining the streets, in manner therein mentioned; & empowered the comrs. to recover such expenses by action at law. A subsequent sect. commencing, "Provided always, & be it enacted," directed, that before the comrs. should cause the streets to be paved, they should in the first place give notice to the owner or occupier of every house, land, etc., adjoining the street, requiring him to pave the same as the comrs. should direct; & if any such owner or occupier should for six months neglect to pave pursuant to the notice, then it should be lawful for the comrs., & they were thereby required, to cause the same to be done, & to recover the expenses from such owner or occupier:—*Held*: the giving of this notice was a condition precedent to the comrs. executing the paving themselves, & charging the expenses on the owner or occupier,

& it must be averred in the declaration, in an action brought under the Act for the recovery of such expenses.—*SALFORD CORPN. v. ACKERS* (1846), 16 M. & W. 85; 16 L. J. Ex. 6; 7 L. T. O. S. 341; 10 J. P. Jo. 359; 153 E. R. 1100.

**2451. Validity of notice—Insufficient specification of works required—Formation of new street required.]—**A local Act of Parliament authorised resps., when any street, not being a highway, was not sufficiently sewered, levelled, paved, flagged & channelled, to give notice to the respective owners of the premises fronting, etc., such street, to sewer, level, pave, flag, or channel, & if the requirements of the notice were not complied with, resps. might execute the works referred to in such notice, & recover the expenses from such owners. Resps. gave notice to applts. & others, owners of premises in a street not a highway, to "repair form & pave the same":—*Held*: the notice was bad, (1) because it did not sufficiently specify the works required to be done; & (2) because it went beyond the provisions of the Act in requiring the formation of a street.—*PARKINSON v. BLACKBURN CORPN.* (1859), 33 L. T. O. S. 119; 23 J. P. Jo. 294.

*Annotations*:—As to (1) *Distd. Bayley v. Wilkinson* (1864), 16 C. B. N. S. 161; *R. v. Lincoln Corpn.* (1876), 62 L. J. Q. B. 542, n. As to (2) *Distd. Hall v. Potter* (1869), 39 L. J. M. C. 1.

**2452. — Misdescription of road.]—**(1) Under a local Act, a "backroad" is defined as "a road upon which the backs alone of buildings abut." In a notice under the Act requiring the owners to make up certain roads, two roads were described as "backroads between E. Street & K. Street." On one side of each of these two roads the sides & not the backs of houses in E. Street & K. Street abutted:—*Held*: as no one could be misled by the misdescription the notice was sufficient.

(2) By the above Act, damages, etc., incurred by the corpn. in making up the roads may be recovered summarily before justices, subject to a limitation of six months imposed by reference to Summary Jurisdiction Act, 1848 (c. 43), s. 11, "or, if the corpn. think fit, in the superior cts. or any ct. of competent jurisdiction":—*Held*: the limitation of six months is not applicable to proceedings in the High Ct.—*BLACKBURN CORPN. v. SANDERSON*, [1902] 1 K. B. 794; 71 L. J. K. B. 590; 86 L. T. 304; 66 J. P. 452; 18 T. L. R. 436, C. A.

*Annotations*:—As to (2) *Folld. Bolton Corpn. v. Scott* (1913), 108 L. T. 406. *Consd. Metropolitan Water Board v. Bunn*, [1913] 3 K. B. 181.

**2453. — Owner of abutting land—Having no interest in soil of street.]—***WEST HARTLEPOOL CORPN. v. ROBINSON*, No. 2448, *ante*.

**2454. Effect of Public Health Act, 1875 (c. 55), ss. 149, 340.]—**Where a local Act, passed in 1849, gave power to a municipal corpn. to order that any street, whether a public highway or not, should be sufficiently sewered, drained, levelled, flagged, paved, & otherwise completed by the frontagers, & provided that, if they made default in the execution of the work, the corpn. might cause the work to be executed & recover the expense incurred in respect thereof from the frontagers:—*Held*: Public Health Act, 1875 (c. 55), s. 149, had not the effect of repealing the provision of the local Act as regards streets which were highways repairable by the inhabitants at large.—*ASH-TON-UNDER-LYNE CORPN. v. PUGH*, [1898] 1 Q. B.

**PART XIII. SECT. 2, SUB-SECT. 4.—C. (a) ii.**

**2450 i. Notice as condition precedent—To execution by local authority.]—***ABERDEEN (CITY) v. WATT* (1901), 3 F. (Ct. of Sess.) 787.—*SCOT.*

45; 67 L. J. Q. B. 32; 77 L. T. 583; 61 J. P. 788; 46 W. L. 100, C. A.

*Annotations*.—*Apld. Lodge v. Huddersfield Corpn.*, [1898] 1 Q. B. 847; *Crump v. Chorley Corpn.* (1908), 98 L. T. 805.

2455. — **Local Government Act, 1888 (c. 41), s. 11.**—*LODGE v. HUDDERSFIELD CORPN.*, No. 2459, *post*.

### iii. "Paving and Levelling."

2456. **Alteration of levels—Level raised—Passage & light obstructed.**—Comrs. for paving have not an arbitrary discretion: but limited by law & reason. Special action upon the case against paviors for raising the street in the front of pltf.'s houses in G. Lane, by which the passage, & lights to the houses were obstructed—*LEADER v. MOXON* (1773), 3 Wils. 461; 2 Wm. Bl. 921; 95 E. R. 1157.

*Annotations*.—*Consd.* British Cast Plate Manufacturers Co. v. Meredith (1792), 4 Term Rep. 791; Boulton v. Crowther (1824), 2 B. & C. 703; R. v. St. Lukes (1871), L. R. 7 Q. B. 148. *Refd.* Sutton v. Clarke (1815), 6 Taunt. 29; Hall v. Smith (1824), 2 Bing. 158; Mercy Dock Trustees v. Gibbs (1866), L. R. 1 H. L. 93.

2457. — **Old & new streets.**—Sects. 55 & 56, of a local Act for the improvement of a township, enabled the comrs. executing the Act, to pave in a sufficient manner, on default of the owners or occupiers for six months after notice requiring them to do so, the public streets, ways, & passages within the township which are now built upon, but not made, paved, flagged, cleansed, or otherwise put into good order & condition, & all such other streets, etc., within, etc., which are now making or being built upon, or may hereafter be made, laid out, or built upon, or such thereof respectively as may require the same. Sect. 56 empowered the comrs., after such streets should have been completed as to paving & other matters required by the comrs., & the owners, etc., should have paid the expenses, to declare them highways. Sect. 53 empowered & required the comrs. to cause the present & future streets, etc., & each & every part or parts thereof to be paved, etc., & the ground or soil thereof to be raised, lowered, or altered from time to time, in such manner & with such materials as the comrs. should think fit. Sect. 44 enabled the comrs. to declare new streets to be highways, provided they were of certain width. The Act did not contain a clause giving compensation for damages occasioned by the exercise of the powers conferred by sect. 53:—*Held*: the general powers conferred by sect. 53 were to be exercised for the repair only of pavements in old streets, & streets declared to be highways under the Act; & they were inconsistent with the specific powers conferred by sects. 55 & 56; & lowering the ground or soil of a street described in the sects. 55 & 56 was an act of trespass not to be justified under sect. 53.—*BROWN v. CLEGG* (1851), 16 Q. B. 681; 17 L. T. O. S. 122; 15 J. P. 609; 117 E. R. 1041.

2458. **Agreement to postpone—Pending completion of buildings.**—*BOOTH v. STONE* (1855), 19 J. P. Jo. 68.

2459. **Newly constructed road.**—A local Act passed in 1871 gave a corp'n. of a municipal borough power at any time, & from time to time, to order

that if in any street, whether or not a highway repairable by the inhabitants at large, there was not a properly paved, asphalted or flagged footway on each side, the owners or occupiers of buildings or lands in the street should make a footway or pathway at their own expense along their respective frontages, & provided that if they made default in so doing, the corp'n. might at any time, & from time to time, execute the work & recover the expenses thereof from such frontagers:—*Held*: (1) though the frontagers could be required under the sect. of the local Act to make a footway where no footway exists, they could not be required to contribute the expenses of repairing or modernising footways already existing.

(2) Sect. 11 of Local Government Act, 1888 (c. 41), which casts the entire maintenance of main roads upon the county council, does not repeal the sect. of the local Act which empowers the corp'n. to call upon frontagers to make & repair footways.—*LODGE v. HUDDERSFIELD CORPN.*, [1898] 1 Q. B. 847; 67 L. J. Q. B. 508; 78 L. T. 422; 62 J. P. 387, D. C.

2460. **Repairing & modernising existing road.**—*LODGE v. HUDDERSFIELD CORPN.*, No. 2459, *ante*.

### iv. "Streets."

2461. **What included in—Street made by local authority.**—*HULL LOCAL BOARD OF HEALTH v. JONES*, No. 2212, *ante*.

2462. — **Highway repairable by inhabitants at large.**—To an action by comrs. acting under a local Improvement Act against the owners, etc., of buildings, to recover the expenses incurred in paving, flagging, soughing, cleansing, & completing a certain street, deft. pleaded that the street was a public street, & common highway, repairable & repaired by the inhabitants at large as a common highway:—*Held*: on demurrer, with reference to the several local Acts, a bad plea.—*STOCKPORT CORPN. v. CHEETHAM, STOCKPORT CORPN. v. DAVENPORT* (1890), 1 L. T. 541; 24 J. P. 106.

2463. — — — In 1853 a corp'n. obtained an Act which recited that it was expedient that further provision be made for the widening, paving, & altering of streets, the drainage & general improvement of the town, & other purposes. Sect. 109 provided that if any street or part of a street, not being a street repairable by the surveyor of the township, was not drained or sewered to the satisfaction of the comrs., the comrs. might cause such street or part of a street not so drained & sewered to be drained & sewered in such manner as they thought fit, & the expenses incurred by the comrs. in respect thereof should be repaid to them by the owners of the lands abutting on such street or part of a street, & should be recoverable from such owners as private improvement expenses. In 1872 the corp'n. obtained a further Act which recited that it was expedient to extend the boundaries of the town & borough, to construct new streets & bridges, to make better & further provision for the making & levying of rates, & for other purposes. Sect. 2 provided that the word "street" should apply to & include the whole or any part of any existing or future square,

it:—*Held*: (1) the street had not become a public street by reason of the removal of the barricade; & (2) the town council were not barred by their actions from now calling on the proprietors to pave it, in respect that these actions had not prejudiced the proprietors in their obligation to pave the street.—*ALLOA MAGISTRATES v. WILSON*, [1913] S. C. 6.—*SCOT*.

### PART XIII. SECT. 2, SUB-SECT. 4.—C. (a) iii.

q. *Liability of adjoining proprietors.*—A barricade, which had been erected across an unpaved private street by the adjoining proprietors was removed by the town council without the consent of these proprietors, who had refused their consent except on condition that they should not be called

upon to pave the street. Some years after the removal of the barricade the proprietors, on being called upon by the town council to level & pave the street under Burgh Police (Scotland) Act, 1903, c. 104, maintained that the street had become a public street & so was maintainable by the town council, or in any event that the town council were barred from calling them to pave

**Sect. 2.—Extra metropolitan: Sub-sect. 4, C. (a) iv., & (b) i., ii. & iii.]**

row of houses, street, highway, road, lane. . . . Sect. 171 provided that where the corpn. caused any new sewer to be constructed in any street in which there was not a sewer, or in which the existing sewer was insufficient, they might charge the owners of the lands abutting upon such street with the payment of the expenses incurred in the construction of the same, & the payment of such expenses should be recoverable in like manner in every respect as private improvement expenses.

Ptfs. having resolved that a certain road which was a public highway repairable by the inhabitants at large & was brought within the borough boundaries should be drained & sewered, & deft. as owner of lands & property abutting on the road not having executed the works, in the exercise of their powers caused the sewer & branch drains in connection with the sewer to be constructed, & by sect. 171 they charged deft. with the payment of his proportion of the expenses incurred by them in the construction of the works:—*Held*: "street" as defined by sect. 2 of the Act of 1872 was applicable to all the streets in the borough, & was sufficient to make a highway repairable by the inhabitants at large a street for the purposes of the sect., & where the corpn. caused any new sewer to be constructed in any street in which there was not a sewer, or in which the existing sewer was insufficient, they had by sect. 171 the power to charge the owners of the lands abutting upon such street with the payment of the expenses incurred in the construction of the same.—*ROCHDALE CORPN. v. LEACH* (1909), 101 L. T. 881; 74 J. P. 89; 54 Sol. Jo. 134; 8 L. G. R. 267, C. A.

**2464. — Two adjoining strips.—In ownership of different persons.]—***WEST HARTLEPOOL CORPN. v. ROBINSON*, No. 2448, *ante*.

**(b) Charges and Expenses.**

**i. Premises adjoining Street.**

**2465. Premises separated by wall from street.—End of cul de sac.]—**By a local Act the liability to pave & sewer any street within the borough of M. was cast on the owners of the houses & ground lying alongside or adjoining to such street, & in case of neglect power was given to the borough council to sewer & pave the street, & to charge the owners with their proportionate parts of the expenses thereof, according to the extent of their respective

houses & grounds lying alongside or adjoining to the street:—*Held*: an owner of ground at the end of a street which was a *cul de sac*, & which ground was only separated from such street by a wall the property of such owner, was the owner of ground adjoining to the street within the Act, & therefore liable to contribute his proportionate part of the expenses of sewerage & paving such street.—*MANCHESTER CORPN. v. CHAPMAN* (1868), 37 L. J. M. C. 173; 18 L. T. 640; 32 J. P. 582; 16 W. R. 974.

*Annotation*:—*Folld. Newport Urban S. A. v. Graham* (1882), 9 Q. B. D. 183.

**ii. Apportionment amongst Owners.**

**2466. Objection to apportionment—Must be taken within time limited—For execution of works.]**

—An owner on whom notice to level, etc., under Public Health Act, 1848 (c. 63), & 26 & 27 Vict. c. 70, has been served, & who has not given notice of objection, is estopped from showing that the street in question is a highway repairable by the inhabitants at large.—*R. v. LIVESSEY* (1870), 22 L. T. 470; 34 J. P. 645.

**2467. Who is "owner"—Lessee of building property—No buildings erected—At time expense incurred.]—**(1) The town council of the borough of S. having, under a local Act, incurred certain expenses in sewerage, levelling, etc., a street, not being a highway repairable by the inhabitants at large, adjoining lands in the occupation of deft., brought the present action for their recovery. The local Act contained provisions similar to those contained in Public Health Act, 1875 (c. 55), s. 150. Deft. was the lessee of the lands in question, under a building lease for nine hundred & ninety-nine years at a ground rent of £26, & at the time the expenses were incurred there were no buildings erected upon the lands. By the local Act the expenses were to be charged upon the several owners of buildings or lands in the street in proportion to the extent of the frontage of their respective buildings & lands; the word "owner" being defined as meaning the person for the time being receiving the rack-rent of the land . . . or who would so receive the same if such lands or premises were let at a rack-rent; & the definition of rack-rent being the same as that contained in Public Health Act, 1875 (c. 55):—*Held*: deft. was the owner of the lands in question within the definition in the local Act.

(2) The local Act enacted that the proportion in

**PART XIII. SECT. 2, SUB-SECT. 4.—C. (b) i.**

**r. Special frontage assessment.—Frontage on two streets.]—**The special frontage assessment provided for in the Medicine Hat charter, is governed by the number of lineal feet measured along the front or other abutting portion of the land; & the fact that the abutting lots vary in depth does not render improper assessment by the frontage method proportionate to the benefits received. Where a lot was divided so that one-half fronted on the street, and the other half on another street:—*Held*: each half was liable to the full assessment by the frontage method, but only in respect of improvements on that street upon which such half lot fronted or "abuted".—*RE BROTHERTON & CITY OF MEDICINE HAT* (1907), 7 W. L. R. 187; 1 Alta. L. R. 119.—*CAN.*

**s. Adjoining owner not entitled to use of street—Whether liable.]—**The council of a municipality desiring to form a street set out on private property served a notice on ptff., who was the owner of land abutting on the

street but who had not the right to use, & did not commonly use, the street:—*Held*: ptff. was not bound by the adoption of the scheme, & was not liable to contribute to the cost of constructing the street.—*MOORABBIN (SHIRE) v. ABBOTT* (1914), 17 C. L. R. 549.—*AUS.*

**t. Liability of railway company.—To contribute to construction of street—Lands of company fronting & abutting on street.]—***CALEDONIAN RY. CO. v. EDINBURGH MAGISTRATES* (1901), 3 F. (Ct. of Sess.) 645.—*SCOT.*

**u. —.]—**In 1884 a railway co. acquired house property in an old but uncompleted street in G. & demolished the houses on both sides & excavated the ground for the purposes of their line, which ran under the street at right angles to it. For the portion of the street excavated a bridge with parapets & steps giving access to the railway station underneath was substituted. The bridge with the parapets was the property of the co. In 1903, the corpn. decided to complete the formation of the street by causewaying the carriage-way, etc.:—*Held*: the railway co. were liable as proprietors

of adjoining property to pay the expense of the formation of the street so far as carried by the bridge.—*CAMERON v. CALEDONIAN RY. CO.* (1904), 6 F. (Ct. of Sess.) 763.—*SCOT.*

**PART XIII. SECT. 2, SUB-SECT. 4.—C. (b) ii.**

**b. Scheme of apportionment.]—**A municipal council, for the purpose of distributing the cost of constructing a street may treat the street as divided into two equal parts by a line running along its entire length, & may apportion the cost of the work done on one side of the line among the owners of the premises fronting the street on that side.—*BRUNSWICK (CITY) v. BAKER* (1916), 21 C. L. R. 407.—*AUS.*

**c. — Subdivision of lands chargeable with cost.]—**Where under a local improvement bye-law an assessment is made of the lands benefited & chargeable with the cost of the improvement, & lands having a specified street frontage are thereafter charged with a specific amount of the cost of the improvement which is entered on the assessment & collectors' rolls, & such

which such expenses were to be apportioned was to be ascertained & settled by the corpn. :—*Held*: the fact that the apportionment had been corrected by the surveyor of the corpn. after it had been approved by the corpn. did not invalidate it.—*ST. HELEN'S CORPN. v. RILEY* (1883), 47 J. P. 471.

2468. — *Agent for collection of rents.*—An "agent" employed to collect the rents of the property charged by the apportionment is an "owner" within St. Helen's Improvement Act, 1869 (c. cxx), & is liable to be called upon to pay, whether he has money of his principal in hand or not, at any time whilst the sum assessed upon the premises remains unpaid.—*ST. HELEN'S CORPN. v. KIRKHAM* (1885), 16 Q. B. D. 403; 50 J. P. 647; 34 W. R. 440.

*Annotation.*—*Folld. Broadbent v. Shepherd* (1900), 65 J. P. 70.

2469. — *Mortgagee.*—A local Act of a town enabled expenses of paving new streets to be made a charge on the premises, & successive owners of the premises were made liable, the words "successive owners" having the same meaning as in Public Health Act, 1875 (c. 55). M., the mtgor., who had charged the expenses on the premises, made default in paying instalments :—*Held*: the mtgee., as a successive owner, was liable, & might be sued notwithstanding the charge existing.—*BLACKBURN CORPN. v. MICKLETHWAIT* (1886), 54 L. T. 539; 50 J. P. 550, D. C.

2470. — — *In possession when expenses apportioned.*—By their private Act a local board were empowered to execute works of sewerage & paving in streets, & to apportion among & demand from the owners of adjoining premises the estimated expenses. Deft. was a second mtgee. of houses abutting on a street, & from Apr. 1891, to June, 1892, was in possession & collected the rents, which he applied in keeping down outgoings & the interest on the first mtge. These payments being made, no surplus remained. In June, 1891, the local board apportioned sums in respect of estimated expenses of sewerage & paving the street, & demanded £113 from deft. as his share. The first mtgee. entered into possession in June, 1892. The works were not completed till July or Aug. following :—*Held*: deft. was "owner" of the houses, within Public Health Act, 1875 (c. 55), s. 4 (embodied in the private Act), & liable for the estimated expenses apportioned in respect of them.—*TOTTENHAM LOCAL BOARD v. WILLIAMSON* (1893), 62 L. J. Q. B. 322; 69 L. T. 51; 57 J. P. 614; 9 T. L. R. 372.

2471. *Validity of apportionment—Correction by surveyor—After approval by local authority.*—*ST. HELEN'S CORPN. v. RILEY*, No. 2467, *ante*.

### iii. Recovery of Expenses.

2472. *Charge on premises of owner—Actual expenses—Not estimated expenses.*—By a special Act, which was to be read together with Public Health Act, 1875 (c. 55), as one Act, a local authority were empowered to apportion the "estimated expenses" of sewerage, paving, & other works in a street among frontagers, & recover

the expenses so apportioned either before the work was commenced, during its progress, or after its completion, by action at law or summary proceedings, & if the actual expenses were less than the estimated sum the difference was to be paid to the frontagers who had paid such sum or whose property might have been "charged therewith":—*Held*: the right conferred by Public Health Act, 1875 (c. 55), s. 257, to charge the property of frontagers with expenses incurred was not, by virtue of the above provisions of the special Act, extended to estimated expenses.—*WEST HAM CORPN. v. GRANT* (1888), 40 Ch. D. 331; 58 L. J. Ch. 121; 60 L. T. 17; 5 T. L. R. 107.

*Annotation.*—*Conad. Re Allen & Driscoll's Contract*, [1904] 1 Ch. 493.

2473. — *Order for inquiry as to prior charges—Attachment on failure to obey.*—Pltfs. paved & metalled the road in front of defts.' property. Defts. having declined to pay their apportioned share of the expense, pltfs., obtained an order of the ct. that under their special Act, they were entitled to a prior charge on defts.' property for the amount with costs. On an inquiry as to other incumbrances the sole partner in deft. firm made no affidavit, but stated that there were other incumbrances on the property. He failed to appear, as directed by order of ct. at judge's chambers to be examined as to the incumbrances, & he declined to give pltfs. any further information :—*Held*: (1) a writ of attachment must issue against him for his contempt in disobeying the order; (2) pltfs. might add the costs of the motion to their security.—*TOTTENHAM URBAN COUNCIL v. NIELSEN & Co.* (1915), 85 L. J. Ch. 272; 114 L. T. 159; 79 J. P. 504; 59 Sol. Jo. 667; 14 L. G. R. 333.

2474. — — *Costs of enforcing order—Added to charge.*—*TOTTENHAM URBAN COUNCIL v. NIELSEN & Co.*, No. 2173, *ante*.

2475. *Proceedings to recover—Service of notice to execute works—Condition precedent—Must be pleaded.*—*SALFORD CORPN. v. ACKERS*, No. 2450, *ante*.

2476. — *Statutory remedy.*—*ST. PANCRAZ VESTRY v. MORGAN* (1857), 21 J. P. Jo. 280.

2477. — — — *"The B. Improvement Act, 1854" incorporates Railway Clauses Act, 1845 (c. 20), Towns Improvement Clauses Act, 1847 (c. 34), & empowers the corpn. of B. to recover the expenses of paving certain streets, on default of the owner to pave after notice "from the last mentioned owner as damages." Towns Improvement Clauses Act, 1847 (c. 34), s. 149, authorises recovery from the owner "in the same manner as damages, or in an action of debt," & Railways Clauses Consolidation Act, 1845 (c. 20), s. 210, which, as to the recovery of damages not specially provided for, directs that the amount be ascertained by two justices & recovered by their warrant. An action having been brought under the local Act, to recover from an owner the expenses of paving :—*Held*: the action did not lie, & the expenses were to be recovered as damages by proceedings before justices.—*BLACKBURN CORPN. v. PARKINSON* (1858), 1 E. & E. 71; 28 L. J. M. C. 7;*

614; 1 O. W. R. 661.—*CAN.*

6. — *Whether lessee.*—Under the municipal law the "proprietor" of each house was liable to lay down a sidewalk in front of same. Deft. contended that his tenant was liable under his lease :—*Held*: deft. was liable as "proprietor."—*MUNICIPAL COUNCIL v. STARR* (1891), 7 Nfld. L. R. 486.—*NFLD.*

lands are subsequently subdivided, the whole rate cannot legally be charged against a portion of the lands so subdivided.—*CAPON v. TORONTO (CITY)* (1894), 28 O. R. 178.—*CAN.*

d. *Who is "owner"—Crown lessee.*—Under an agreement, entered into by the Crown, as representing the University of T., & the city of T., confirmed by 32 V. c. 53 (O.), College

street in T. has become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the costs of the construction, as a local improvement, of a sidewalk in front of the leased land, even though the lease has been made before the agreement.—*RE LEACH & CITY OF TORONTO* (1902), 22 C. L. T. Occ. N. 406; 4 O. L. R.

*Sect. 2.—Extra metropolitan: Sub-sect. 4, C. (b) iii. & iv.; sub-sects. 5 & 6, A. & B.]*

32 L. T. O. S. 91; 23 J. P. 262; 5 Jur. N. S. 572; 7 W. R. 11; 120 E. R. 834.

*Annotation:—Refd. Derby (Mayor) v. Grudgings (1894), 10 R. 565.*

**2478.** ———.]—The L. Improvement Act, 1877, s. 96, provided that summary proceedings before justices for the recovery of expenses must be brought within one year. Sect. 109 provided that when any person neglected to pay any sum due to the corpn., such sum might be recovered in any ct. of competent jurisdiction for the recovery of debts of the like amount. Other remedies were given for the recovery of these sums, one by an Act of 1842 by way of distress, in which there was no limit of time, & another by an Act of 1866 by way of action at law:—*Held*: the limitation of one year did not apply to proceedings by way of action of debt in the county ct.—**LEEDS CORPN. v. ROBshaw** (1887), 51 J. P. 441, D. C.

*Annotations:—Consd. Blackburn Corpn. v. Sanderson, [1902] 1 K. B. 794; Bolton Corpn. v. Scott (1913), 108 L. T. 406; Metropolitan Water Board v. Bunn, [1913] 3 K. B. 181.*

**2479.** ———.]—**BLACKBURN CORPN. v. SANDERSON**, No. 2452, *ante*.

**2480.** ——— *Period of limitation.*—By a local Act comrs. are required to cause all such parts of the streets, ways or places, within the township, not being public or common highways which are now in the estimation of the comrs. fully built upon, but not sufficiently paved or put in good condition, & all such streets, ways, or places as are now making or may hereafter be made within the township, although not fully built upon, to be made, paved & cleansed, as to the comrs. shall seem necessary; the expenses to be paid by the frontagers. Deft. occupied a house in a street formed about seventeen years ago, & ever since used by the public:—*Held*: deft. was liable to contribute to the making & sewerage of this street lately resolved upon by the comrs.—**BIRKENHEAD IMPROVEMENT COMRS. v. SANSOM** (1876), 34 L. T. 175; 40 J. P. 406.

**2481.** ——— *Action in county court.*—**LEEDS CORPN. v. ROBshaw**, No. 2478, *ante*.

**2482.** ——— *Action in High Court.*—**BLACKBURN CORPN. v. SANDERSON**, No. 2452, *ante*.

**2483.** ———.]—The B. Corporation Act, 1872, provided by sect. 117 that all expenses incurred by the corpn. for private improvements expenses under the Public Health Acts, for the payment of which the owner of the land or buildings concerned was liable, should, if not paid on demand, be recoverable by the corpn. either as a debt in any court of competent jurisdiction, or by distress after summoning the owner.

In 1901 S. was served with notice to execute certain improvements which was executed by the corpn., the apportionment of expenses being in Dec. 1905. Notice of the apportionment was served in Feb. 1906, & a demand for payment in June, 1906. In Aug. 1911, summary proceedings were taken for recovery of the amount due, but were dismissed as being out of time.

In March, 1912, proceedings were commenced in the Salford Hundred Court for recovery of the amount due as a civil debt:—*Held*: the remedies given by sect. 117 of the Act were cumulative; the limitation of time applicable to summary proceedings did not apply to proceedings in a court

of competent jurisdiction for the recovery of a sum as a civil debt, which was six years, running from the date of the demand for payment, & not from the apportionment, & plffs. were entitled to the amount claimed.—**BOLTON CORPN. v. SCOTT** (1913), 108 L. T. 406; 77 J. P. 193; 11 L. G. R. 352, C. A. *Annotation:—Refd. Metropolitan Water Board v. Bunn, [1913] 3 K. B. 181.*

*See, generally, LIMITATION OF ACTIONS.*

**2484.** *Expenses payable by instalments—Interest—Deduction of income tax.*—Plffa., as the urban authority of a borough, had under Public Health Act, 1875 (c. 55), s. 150, & a local Improvement Act, some years before action brought paved & made up certain streets, & had from time to time apportioned the expenses thereof among the owners of the premises fronting thereon. Deft. was the owner of premises in these streets, & plffs., under power conferred upon them by the local Act, allowed him time for the repayment of the sums apportioned in respect of his premises, interest being payable thereon at the rate of 5 per cent. *per annum*. Deft. paid to plffs. varying sums at irregular intervals in part payment of the amount due which plffs. credited in the first place to the interest due & in the second place towards payment of the principal. There was no evidence to show that plffs. made a regular practice of allowing these expenses to remain unpaid, bearing interest, as a mode of investing their funds. Deft. claimed, upon paying off the final amount due for principal & interest, to be entitled to deduct the income tax upon the amount due for interest as being "yearly interest of money" within sect. 40 of Income Tax Act, 1853 (c. 34):—*Held*: the interest did not come within the words "yearly interest of money" in sect. 40, & deft. was not entitled to deduct income tax therefrom.—**GATESHEAD CORPN. v. LUMSDEN**, [1914] 2 K. B. 883; 83 L. J. K. B. 1121; 111 L. T. 26; 78 J. P. 283; 58 Sol. Jo. 453; 12 L. G. R. 701, C. A.

*iv. Appeals.*

**2485.** *Objection of apportionment—Appeal to Secretary of State.*—**WEST HARTLEPOOL CORPN. v. ROBINSON**, No. 2448, *ante*.

SUB-SECT. 5.—LIGHTING STREETS.

*See Part VIII., Sect. 1, sub-sect. 11, ante.*

SUB-SECT. 6.—CONSTRUCTION OF NEW STREETS.

*A. In General.*

*See Public Health Act, 1875 (c. 55), s. 157.*

**2486.** *"Construction"—Includes building of houses.*—**BAKER v. PORTSMOUTH CORPN.**, No. 2488, *post*.

**2487.** ———.]—**HENDON LOCAL BOARD v. POUNCE**, No. 2498, *post*.

*What is a "new street."*—*See Part I., Sect. 6, ante.*

*B. Validity of Bye-Laws.*

*See Public Health Act, 1875 (c. 55), ss. 157, 182–188; & generally, PUBLIC HEALTH.*

**2488.** *Power to make bye-laws.*—(1) The power to make provision as to removing, altering, or pulling down buildings [under 21 & 22 Vict. c. 98,

**PART XIII. SECT. 2, SUB-SECT. 6.—B.**

*1. Cost of new street.*—*Held*: a clause "that petitioners should pay all expenses & costs incurred in

establishing the road, & that none of the county funds should be applied for land taken for said road," & referring plff. to unnamed petitioners for

compensation, was void.—**LAFFERTY v. STOCK** (1853), 3 C. P. 1.—**CAN.**

*g. Necessity for notice.*—**LAFFERTY v. STOCK** (1853), 3 C. P. 1.—**CAN.**

s. 34] is not confined to bye-laws relating to structure, but may be extended to & incorporated in bye-laws as to notice & deposit of plans.

A sanitary authority, before the Public Health Act, 1875 (c. 55), made bye-laws as to the construction of new streets under 21 & 22 Vict. c. 98, s. 34, & one bye-law required previous notice to the board, & plans of proposed buildings, & in default of notice the authority might, on forty-eight hours' notice, pull down the buildings so erected. Buildings having been erected in a new street without notice:—*Held*: the sanitary authority acted lawfully in pulling them down after forty-eight hours' notice.

The sanitary authority were right to say that until the street was approved of by them as a street, no building by the side of it should be erected (*BRAMWELL, L.J.*).

(2) The words "with respect to the level, width, & construction of new streets" include the construction of the buildings, & the buildings themselves & front gardens, or whatever else is at the side of the roadway (*BRAMWELL, L.J.*).—*BAKER v. PORTSMOUTH CORPN.* (1878), 3 Ex. D. 157; 47 L. J. Q. B. 223; 37 L. T. 822; 42 J. P. 278; 26 W. R. 303, C. A.

*Annotations*:—As to (2) *Consd.* *Robinson v. Barton-Eccles* L. B. (1883), 8 App. Cas. 798; *Hendon L. B. v. Pounce* (1889), 42 Ch. D. 602. *Generally, Mentd.* *James v. Wyvill* (1884), 51 L. T. 237; *Hopkins v. Smethwick L. B.* (1890), 59 L. J. Q. B. 250; *Hanrahan v. Leigh-on-Sea U. C.*, [1909] 1 K. B. 263.

**2489.** — *Public Health Act, 1875 (c. 55), ss. 4, 157.*—(1) In making bye-laws, & insisting on their observance, a local authority is entitled to consider what may happen in the future, when present conditions have been altered & the neighbourhood has developed, even although the present necessity for the bye-laws may not be obvious.

(2) The power to make bye-laws, as regards new streets, given by sect. 157 of above Act, is not confined to streets in the popular sense of the term, namely, roadways, with houses on both sides of them, but applies to streets, as defined by sect. 4 of the Act, which are proposed to be laid out & constructed for the first time.

The bye-laws of an urban sanitary authority required every new street over 100 feet long to be so laid out that its width should be 36 feet at the least, & that it should be constructed for use as a carriage drive. W., who was employed as a builder, by G., the owner of land, to erect some cottages on the land of G., sent to the urban authority plans showing an intended footpath, 202 feet long & 5 feet wide, affording the principal access to the cottages. The proposed footpath being objected to as not complying with the bye-laws, W., without any authority from G., undertook that a roadway, 36 feet wide, should be made as soon as possession of sufficient land on the side further from the cottages to enable a road of the required width to be made could be obtained from a tenant whose tenancy could not be determined for some months. The plans, varied so as to show a roadway 36 feet wide, were approved on the conditions of the undertaking. The cottages were then erected, & the footpath was levelled & surfaced with rubble & sand. It was 5 feet & bounded on the further side from the cottages by an ancient hedge, & on the nearer side by a fence in which were openings giving access to the

cottages:—*Held*: (3) defts. had laid out & constructed a street within the bye-laws; (4) the bye-laws were *intra vires* & reasonable; (5) although W., by reason of his having no control over the land, was not a proper party to the action, an injunction to enforce the obligations under the bye-laws must be granted against G.—*A.-G. v. GIBB*, [1909] 2 Ch. 265; 78 L. J. Ch. 521; 101 L. T. 16; 73 J. P. 343; 7 L. G. R. 754.

**2490.** *Secondary means of access.*—21 & 22 Vict. c. 98, s. 34, does not empower the making of a bye-law, that "no dwelling house shall be erected without having, at the rear or side thereof, a good & sufficient back street or roadway, at least 12 feet wide, communicating with some adjoining public street or highway, for the purpose of affording access to the privy or ashpit of such house."—*WAITE v. GARSTON LOCAL BOARD* (1867), L. R. 3 Q. B. 5; 37 L. J. M. C. 19; 17 L. T. 201; 32 J. P. 228; 16 W. R. 78.

*Annotations*:—*Distd. R. v. Goole L. B.*, [1891] 2 Q. B. 212. *Refd.* *Rudland v. Sunderland Corpn.* (1884), 52 L. T. 617.

**2491.** — *Width.*—An urban authority made a bye-law under Public Health Act, 1875 (c. 55), directing that all new streets be of a width of not less than 10 feet. Certain ways existed communicating with the backs of the houses, & used by the urban authority, who did the scavenging of the town, for the purpose of obtaining access to privies & ashpits in order to remove the contents thereof. Plans were submitted for approval to the urban authority showing ways such as above described of the width of 6 feet, & the urban authority, who had published a bye-law under above Act, prescribing 10 feet as the minimum width of new streets, refused to approve such plans:—*Held*: discharging a rule for a *mandamus* to compel the approval of the plans, the ways in question were "passages" within sect. 4 of the Act, & therefore were "streets" within that sect., & therefore the urban authority had power by sect. 157 (1), to make bye-laws with respect to their width & construction, & the bye-law was valid.—*R. v. GOOLE LOCAL BOARD*, [1891] 2 Q. B. 212; 60 L. J. Q. B. 617; 64 L. T. 595; 55 J. P. 535; 30 W. R. 608, D. C.

*Annotations*:—*Consd.* *Walthamstow U. D. C. v. Sandell* (1904), 68 J. P. 509. *Refd.* *Oakley v. Merthyr Tydfil Corpn.*, [1922] 1 K. B. 409.

—*Sec Public Health Acts Amendment Act, 1890 (c. 59), s. 23 (1).*

**2492.** *Restraint of building operations.—Until street plans approved.*—*BAKER v. PORTSMOUTH CORPN.*, No. 2488, ante.

**2493.** — *Unless along defined building line.*—

(1) The words "new streets" in Public Health Act, 1875 (c. 55), s. 157, are not confined to streets constructed for the first time, but apply also to an old highway, formerly a country lane, which has long been a "street" within the interpretation clause (sect. 4) of that Act, & which by the building of houses on each side of it has recently become a street in the popular sense of the term.

(2) A bye-law made by an urban authority under that sect. provided that every new street should be laid out & formed of such width & as such level as the urban authority should in each case determine:—*Held*: "width" in sect. 157 & in the above bye-law meant width of roadway, & not width between houses on each side of the street; & the urban authority were not entitled

h. —*Re OSTROM & SYDNEY CORPN.* (1888), 15 A. R. 372.—CAN.

k. *Necessity for sufficient definition of street.*—*MOINTYRE v. BOSANQUET TOWNSHIP* (1854), 11 U. C. R. 460.—CAN.

l. —*Re THOMPSON & BEDFORD, OLDEN, OSO & PALMERSTON UNITED TOWNSHIPS CORPN.* (1862), 21 U. C. R. 545.—CAN.

m. —*ST. VINCENT CORPN. v.*

*GREENFIELD* (1886), 12 O. R. 297.—CAN.

n. —*Re CHAMBERS & BURGTON TOWN CORPN.* (1894), 25 O. L. 276.—CAN.

o. *Bye-law creating future liability*



**Sect. 2.—Extra metropolitan: Sub-sect. 6, B.]**

under the above bye-law, or any other of their existing bye-laws, to disapprove of & pull down houses in the course of erection in a new street on the ground that the building line was too near the roadway.

The only facts upon which, I think, the case turns are these:—There is at P. a public highway called "New Lane," on each side of which within the last ten years a considerable number of houses, not all continuous, have been built; & the present applt. proposed to build a row of nine houses fronting upon that public highway. The local board, the urban authority under Public Health Act, 1875 (c. 55), have objected to his right to do so, & have asserted the right to remove those houses if built otherwise than in the line set back from the roadway which they have defined (LORD SELBORNE, C.).—ROBINSON v. BARTON-ECCLES LOCAL BOARD (1883), 8 App. Cas. 708; 53 L. J. Ch. 226; 50 L. T. 57; 48 J. P. 276; 32 W. R. 249, H. L.

**Annotations:—**As to (1) *Consd.* Metropolitan Board of Works v. Nathan (1885), 54 L. T. 423; Jowett v. Idle L. B. (1887), 36 W. R. 138; Fenwick v. Croydon Union L. S. A., (1891) 2 Q. B. 218; 55 L. J. Q. B. 33; Davis v. Greenwich District Board of Works (1895) 2 Q. B. 219; Allen v. Fulham Vestry (1899) 1 Q. B. 681. *Appld.* A.-G. v. Rufford (1899) 1 Ch. 537. *Consd.* A.-G. v. Gibb (1909) 2 Ch. 265; A.-G. v. Laird (1925) Ch. 318. *Refd.* Mid. Ry. v. Watton (1886), 17 Q. B. D. 30; Devonport Corp. v. Tozer (1902) 2 Ch. 182; A.-G. v. Dorin (1912) 1 Ch. 369. *As to* (2) *Consd.* Williams v. Powning (1883), 48 L. T. 672; Williams v. Wallasey L. B. (1886), 16 Q. B. D. 718; A.-G. v. Dorin (1912) 1 Ch. 369. *Generally, Refd.* Portsmouth Corp. v. Smith (1885), 10 App. Cas. 364; Woodhill v. Sunderland Corp. (1887), 57 L. T. 303; A.-G. v. Ashbourne Recreation Ground Co. (1902), 1 L. G. R. 146.

**2494. — Until footpath kerbed.]**—Where a bye-law under Public Health Act, 1875 (c. 55), as to new streets, required that no person shall begin to build in a new street unless & until the kerb of each footpath therein shall be put in:—*Held*: the bye-law was *ultra vires* as to requiring the kerb to be done before beginning to build.—RUDLAND v. SUNDERLAND CORPN. (1884), 52 L. T. 617; 49 J. P. 359; 33 W. R. 164, D. C.

**Annotation:—***Consd.* Layton U. C. v. Chew, [1907] 2 K. B. 283.

**2495. — Until whole street constructed.]**—Applts., who were builders, gave notice to the S. local authority, resps., of their intention to lay out a certain new street, & plans for the construction of which were approved by resps. They subsequently gave notice that they intended to erect four new houses in that street, the plans of which were submitted to & approved by resps. Applts. began to erect these houses abutting upon or fronting that part of the new street which had been sewered, levelled, paved, metalled, flagged, & channelled to the satisfaction of resps.; but the whole of the new street had not been constructed & made good to the satisfaction of resps. within Sunderland Local Improvement Act, 1885 (c. clxxxiii), s. 37. Applts. were summoned in respect of the infringement of that sect., & were fined. They appealed:—*Held*: the conviction was right, & as applts. had given notice to lay out the whole of a new street, the urban authority, under their local Act, were entitled to withhold

their consent to the erection of any house or building abutting on the new street unless the whole of the new street were constructed & sewered to their satisfaction.—WOODHILL v. SUNDERLAND CORPN. (1887), 57 L. T. 303; 52 J. P. 5; 3 T. L. R. 648, D. C.

**2496. — Until street sewered.]**—WOODHILL v. SUNDERLAND CORPN., No. 2495, *ante*.

**2497. — Until agreement to provide sewer.]**—An owner of land in a rural sanitary district, who proposed to lay it out as a building estate & to erect on it blocks of houses arranged in streets deposited with the local authority plans of the proposed buildings, from which it appeared that each of the houses was to be drained with a separate drain ending in the middle of one of the proposed new streets. The local authority refused to approve the plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, & also the necessary main outfall sewer:—*Held*: the local authority were not entitled to attach such a condition to their approval.—R. v. TYNEMOUTH RURAL DISTRICT COUNCIL, [1896] 2 Q. B. 451; 65 L. J. Q. B. 545; 75 L. T. 86; 60 J. P. 804; 12 T. L. R. 536; 40 Sol. Jo. 667, C. A.

**Annotations:—***Refd.* Smith v. Chorley District Council, [1897] 1 Q. B. 532. *MENTD.* White v. Sunderland Corp. (1903), 88 L. T. 592; Titterton v. Kingsbury Collieries (1911), 104 L. T. 569.

**2498. — Until adequate entrance to new street provided.]**—The bye-laws of a local board provided: (4) "Every person who shall lay out a new street shall so lay out such street that the width thereof shall be 40 feet at the least." (6) "Every person who shall construct a new street shall provide at one end, at least, of such street an entrance of a width equal to the width of such street, & open from the ground upwards:—*Held*: (1) the 6th bye-law was *intra vires* & reasonable, & it prevented a landowner from "constructing" a new street upon his land until he had provided an "entrance" to the new street of the specified width, even though that entrance could only be made upon the land of another person over whom he had no control; (2) the "construction" of a new street included the building of the houses abutting on it, & the landowner could not, until an adequate entrance had been provided, erect houses abutting on the proposed new street.—HENDON LOCAL BOARD v. POUNCE (1889), 42 Ch. D. 602; 61 L. T. 465; 38 W. R. 377.

**Annotations:—***As to* (1) *Folld.* Bromley L. B. v. Lloyd (1892), 66 L. T. 462; Barton Regis R. D. C. v. Stevens (1896), 61 J. P. 598. *Generally, Refd.* Devonport Corp. v. Tozer, [1902] 2 Ch. 182; A.-G. v. Ashbourne Recreation Ground Co., [1903] 1 Ch. 101.

**2499. Width of entrance to new street.—Owner's land insufficient.]**—HENDON LOCAL BOARD v. POUNCE, No. 2498, *ante*.

**2500. — Existing entrance a narrow public road.]**—A landowner submitted to the local sanitary authority plans for a new street which he proposed to make upon his land, wherein the proposed new street was shown to be the width of 40 feet through its entire length, & to open into a lane which had been for a long time lighted &

—*Submission to ratepayers.*—A bye-law for construction of a road creating a future indefinite & contingent liability ought to be submitted to the vote of the ratepayers.—*Re* CARPENTER & BARTON CORPN. (1888), 15 O. R. 55.—*CAN.*

*p. Bye-law facilitating avoidance of*

*tolls.*—A bye-law passed to open a free road, solely for the purpose of enabling the public to avoid travelling upon a toll road, & thus avoid the payment of tolls—the "free road" not being otherwise required for the public convenience—cannot be supported.—*Re* CARPENTER & BARTON

CORPN. (1888), 15 O. R. 55.—*CAN.*

*q. Must not be for benefit of individuals.*—*Re* OSTRUM & SYDNEY CORPN. (1888), 15 O. R. 43.—*CAN.*

*r. —.*—A municipal bye-law provided for closing part of a street & conveying it to a co. by way of *bonus*



kept in repair by the sanitary authority & their predecessors, & was in fact a public road. This lane led out of the market square at B., & was of a width varying throughout its length from 10 to 20 feet. The plans, however, showed the lane where it bounded the landowner's property, & where the proposed new street debouched into it, of a width of 40 feet, by means of the inclusion therein of part of the adjoining land. The bye-laws of the sanitary authority which had been duly confirmed by the Local Government Board provided that: "4. Every person who shall lay out a new street which shall be intended for use as a carriage road, shall so lay out such street that the width thereof shall be 40 feet at least. 8. Every person who shall construct a new street shall provide at one end at least of such street an entrance of a width equal to the width of such street, & open from the ground upwards." The plans were rejected on the ground of non-compliance with bye-law 8. The landowner thereupon gave notice of his intention to make the proposed street in accordance with the plans. Upon motion on behalf of the sanitary authority for an injunction to restrain the landowner from constructing or commencing the new street until an entrance should have been provided according to bye-law 8:—*Held*: under the bye-laws of the sanitary authority, a person proposing to construct a new street must provide a mode of access thereto of a width equal to the width of the new street; it made no difference that the mode of access to the new street was by means of a public street if such street was of less than the required width: & an injunction must be granted as asked.—*BROMLEY LOCAL BOARD v. LLOYD* (1892), 66 L. T. 462; 56 J. P. 278; 9 T. L. R. 306.

*Annotations*:—*Fold*, *Barton Regis R. D. C. v. Stevens* (1896), 61 J. P. 598. *Refd.* *Devonport Corp'n. v. Tozer*, [1902] 2 Ch. 182.

**2501. — Outside district of local authority.**—The bye-laws of pltf. authority provided: "(4) Every person who shall lay out a new street which shall be intended for use as a carriage road shall so lay out such street that the width thereof shall be 36 feet at the least." "(8) Every person who shall construct a new street shall provide at one end at least of such street an entrance of a width equal to the width of such street & open from the ground upwards." Defts. proposed to construct a new street of the prescribed width, the entrance to which was to be by an already existing street outside pltf's. district. Such existing street was not of the width prescribed by pltf's. bye-laws. Pltfs. refused to pass defts.' plans for laying out such proposed new street on the ground that the entrance to such proposed new street was not in accordance with the bye-laws:—*Held*: pltfs. were justified in refusing to pass the said plans.—*BARTON REGIS RURAL DISTRICT COUNCIL v. STEVENS* (1896), 61 J. P. 598; 12 T. L. R. 347, D. C.

**2502. — Wider than other streets in district.**—A bye-law of urban authority provided that every person who constructed a new street which was 100 feet long should make it 30 feet wide. The other streets in the town were generally of less width. R. bought some land on one side of a road, & built alongside a wall, 170 feet long, reducing the previous width of way to 7 feet:—

*Held*: R. committed the offence, & there was nothing unreasonable in laying down an absolute rule as to width, such as the bye-law contained.—*ROBERTS v. RICHARDS* (1890), 54 J. P. 693, D. C.  
*Annotation*:—*Consd.* *A.-G. v. Dorin*, [1912] 1 Ch. 369.

*Compare* No. 2491, *ante*.

**2503. Subsequent diminution of width of street.—Whether intra vires.**—A bye-law provided that "Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building" shall comply with certain requirements as to the width of the carriageway & footways:—*Held*: when once the construction of a new street has been completed no offence is committed against such a bye-law by a subsequent diminution of the width of the carriageway or footways below the required minimum.

*Semble*: Public Health Act, 1875 (c. 55), s. 157, which authorises the making by urban authorities of bye-laws "with respect to the level, width, & construction of new streets," does not authorise the making of a bye-law which would render such a reduction of the original width of the street an offence.—*TARRANT v. WOKING URBAN COUNCIL*, [1914] 3 K. B. 796; 84 L. J. K. B. 314; 111 L. T. 800; 79 J. P. 22; 12 L. G. R. 1293, D. C.

**2504. Raising street level.—Affecting low-lying land.—Reasonableness.**—A public authority, acting under their local Act, required a new street to be constructed (if at all) with a minimum level of 9 feet above Ordnance datum. This would necessitate raising the level of some 200 acres at an estimated cost of £220,000:—*Held*: having regard to the nature of the locality & other circumstances, the requirement was reasonable.—*GREAT SALTERNS SYNDICATE v. PORTSMOUTH CORPN.* (1904), 68 J. P. 48.

**2505. Channelling.—Alternative materials.—Uncertainty.**—A bye-law of a local authority dealing with the construction of new streets provided that in all cases where the street was of a certain width the person constructing it should make on each side of it "a proper channel not less than 12 inches wide & 6 inches deep either of granite cubes laid on a bed of cement concrete at least 6 inches in thickness or in a suitable manner & with suitable materials":—*Held*: (1) the fact that the bye-law did not give any power to the person constructing the street to object before some independent tribunal that the requirement was unnecessary in the circumstances of the particular case did not make the bye-law bad as being unreasonable; (2) the liberty of making the channel in another manner & of other materials than those specified, did not make the bye-law bad for uncertainty.—*LEYTON URBAN COUNCIL v. CHEW*, [1907] 2 K. B. 283; 76 L. J. K. B. 781; 96 L. T. 727; 71 J. P. 355; 5 L. G. R. 837, D. C.

**2506. Appeal.—No right provided for.—Reasonableness.**—*LEYTON URBAN COUNCIL v. CHEW*, No. 2505, *ante*.

**2507. Penalties for breach.—Power to demolish buildings.**—*BAKER v. PORTSMOUTH CORPN.*, No. 2488, *ante*.

**2508. — — — — —**—*ROBINSON v. BARTON-ECCLES LOCAL BOARD*, No. 2493, *ante*.

—*See, generally*, PUBLIC HEALTH.

for the promotion of their business & of an intended enlargement of their works:—*Held*: the fact that a municipal council in serving the interest of the public are at the same time

serving that of the grantee of the *bonus*, is not an objection to a bye-law.—*Re INGLIS CO. & CITY OF TORONTO CORPN.* (1905), 9 O. L. R. 562.—*CAN.*  
a. —*See* *WEIR & CALGARY*

(CITY) (1907), 7 W. L. R. 45.—*CAN.*  
1. —*See* *JONES v. TUCKERSMITH TOWNSHIP* (1915), 7 O. W. N. 579; 8 O. W. N. 344; 33 O. L. R. 634; 23 D. L. R. 569.—*CAN.*

*Sect. 2.—Extra metropolitan: Sub-sect. 3, C. & D.]**C. Deposit and Approval of Plans.*

*See, now, Public Health Act, 1875 (c. 55), s. 158; Public Health Amendment Act, 1907 (c. 53), s. 15.*

**2509. Approval of plans—Subsequent abandonment—Rebuilding on old frontage.]—S.**, having an old farmhouse with a shop front abutting on a lane, & other property near, gave notice to the urban authority of his intention to lay out a street, & submitted a plan, which was approved, showing the alterations & proposed width of new street, which involved the setting back of the shop & garden. He did nothing to carry out the plan, & two months later, put in a new shop front & rebuilt the garden wall on the old site:—*Held*: S. had done nothing contrary to the bye-law as to width of new street, & committed no offence.—*SUNDERLAND CORPN. v. SKINNER* (1889), 53 J. P. 600.

**2510. ——— Power to impose conditions—Provision of sewer.]—R. v. TYNEMOUTH RURAL DISTRICT COUNCIL**, No. 2197, *ante*.

**2511. Effect of approval—Without knowledge of facts—Width of street.]—T.** having land within the area of a local board, upon which he proposed to build six houses, sent a notice & plan showing what he intended to do & where the new street of 10 yards wide was to be. The board sanctioned the houses, & they were built, & some years afterwards T. was summoned for disobeying the bye-law in not leaving a space of 30 feet wide for the street. The fact was that his land extended only 9 feet in front of the houses, but this was not known to the board till afterwards. T. was convicted:—*Held*: the conviction was wrong, & the local board ought to have satisfied themselves before sanctioning the plans that T. had land of sufficient width to make the proposed new street when the house should be completed.—*THOMPSON v. FAIRSWORTH LOCAL BOARD* (1881), 46 J. P. 21, D. C.

*Annotations:—Apld. R. v. Tynemouth Corpn.*, [1911] 2 K. B. 361. *Refd. Re McIntosh & Pontypridd Improvements Co., Re Pontypridd (Mill Street & Rhondda Road) Improvements Act, 1890, & Lands Clauses Act, 1815* (1891), 61 L. J. Q. B. 164.

**2512. Grounds for disapproval—Sewer not provided.]—R. v. TYNEMOUTH RURAL DISTRICT COUNCIL**, No. 2197, *ante*.

**2513. ——— Width of street insufficient.]—**Where a local authority have, in good faith, refused to pass building plans, on the ground that the erection of the proposed houses would amount to the laying out a new street of a width which is insufficient under their bye-laws, no action will lie for a *mandamus* to compel them to approve the plans.—*SMITH v. CHORLEY RURAL COUNCIL*, [1897] 1 Q. B. 678; 66 L. J. Q. B. 427; 76 L. T. 637; 61 J. P. 340; 45 W. R. 417; 13 T. L. R. 327; 41 Sol. Jo. 422, C. A.; *affg.*, [1897] 1 Q. B. 532.

*Annotations:—Apld. R. v. Eastbourne Corpn.* (1900), 83 L. T. 338. *Refd. R. v. Preston R. D. C.*, *Ex p. Longworth* (1911), 106 L. T. 37. *Mentd. Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 248; *Everett v. Griffiths*, [1924] 1 K. B. 941.

**2514. ——— ———.]—**The owner of a building estate deposited with the local authority plans of works intended to be executed by him, including a new street of the minimum width permitted by a local bye-law. Part of the site of the new street lay on a field which was subject to a re-

strictive covenant preventing the field from being used for the purpose of a street. The local authority refused to approve the plans on the ground that the existence of the covenant made it impossible for a new street of the width shown on the plans to be constructed:—*Held*: the local authority were entitled to refuse to approve the plans on that ground.—*R. v. TYNEMOUTH CORPN.*, [1911] 2 K. B. 361; 9 L. G. R. 953; *sub nom. R. v. TYNEMOUTH CORPN.*, *Ex p. COWPER*, 80 L. J. K. B. 892; 105 L. T. 217; 75 J. P. 420, D. C.

**2515. Appeal from refusal to approve—Local Act.]—**The right of appeal to the Local Government Board under Portsmouth Corporation Act 1883 (c. ccxi), s. 31, is limited to cases similar to those mentioned in Public Health Act, 1875 (c. 55), s. 268, & does not extend to an order, determination, or decision not falling within that sect.—*LOCAL GOVERNMENT BOARD v. STREET* (1908), 98 L. T. 599; 72 J. P. 177; 6 L. G. R. 515; *sub nom. R. v. LOCAL GOVERNMENT BOARD*, *Ex p. STREET*, 52 Sol. Jo. 300, H. L.

*Notice of disapproval of plans.]—See PUBLIC HEALTH.*

*Mandamus to compel approval of plans.]—See PUBLIC HEALTH.*

*D. "Laying out" New Street.*

*See Public Health Acts, 1875 (c. 55), s. 157; 1925 (c. 71), s. 30.*

**2516. "Person laying out" new street—Owner of land.]—**The owner of certain building land gave notice to appts. of his intention to lay out certain new streets, including a certain back street, & deposited plans of such streets. Notice was also received by appts. from resp., a builder, of his intention to dig & lay out the foundations of four cottages in the back street, & a plan of such street was deposited by him. In the plans deposited by the owner & builder, the back street in which it was intended to build the four cottages was shown as of the width of 12 feet, whereas the minimum width of back streets prescribed by the bye-laws, made by the appts. in pursuance of Public Health Act, 1875 (c. 55), s. 157, was 18 feet. Appts. accordingly gave the owner & resp. notice of their disapproval of such plans, & on his proceeding to build the cottages according to the disapproved plans, appts. took out a summons against resp. for unlawfully laying out a new street on insufficient width contrary to their bye-laws, which summons was dismissed:—*Held*: the magistrates were right in dismissing the summons, the owner of the land & not the builder being the person who laid out the streets within the sect.—*SUNDERLAND CORPN. v. BROWN* (1880), 43 L. T. 479; 41 J. P. 831, D. C.

*Compare No. 2489, ante.*

**2517. What constitutes "laying out"—Physical act done on the street.]—**The model bye-laws of urban authorities under Public Health Act, 1875 (c. 55), s. 157, with respect to the level, width, & construction of new streets, are of a penal character, & ought not to be construed so as to impose on the party whose compliance with them it is sought to enforce any greater burden than the bye-laws in their fair & natural construction will allow.

The bye-laws refer, as regards the laying out of a new street, to a physical laying out, & not to

**PART XIII. SECT. 2, SUB-SECT. 6.—D.**

*a. What constitutes "laying out"—Fencing.]—*It is not necessary for the

cours. of highways, in laying out a street to put up fences or grade the road.—*R. v. McGOWAN* (1877), 1 P. & B. 191.—*CAN.*

*b. Statutory precept for "laying out"—Disinterested freeholders.]—*Three magistrates, forming a part of the Ct. of Sessions, by whom the return of a

a metaphorical one; & a person does not "lay out" a new street within their meaning merely by making a road a street by building houses on the side of it, but only if he does something on the street itself.

In 1907 deft. bought a field surrounded by a hedge, bordering on an occupation road about 19 feet wide, which had been made up under sect. 150 of above Act, & on the other side of which two houses had been built with their sides turned towards the road. No house fronted towards it. Deft. submitted to the local authority, in whose district the model bye-laws were in force, plans for building a row of houses on the field, to be approached by a footpath a few feet wide, leading from the road to the side of the houses furthest from the road, & with an open space of about 16 feet between them & the road. The local authority objected to the plans on the ground of their non-compliance with the bye-laws; & deft. thereupon removed the footpath, when it had reached a length of about 150 feet, & informed the authority that he had abandoned the intention of laying it out. Instead, he made the approaches to the houses on the side of the road, putting gates in the hedge opposite each house as it was completed, with cement paths leading to the houses. He also carried the drains under the road; but he did nothing on the road itself; nor had he made, or proposed to make, the space between the houses & the road part of the road:—*Held*: the footpath would have been a breach of the bye-laws, but in view of deft.'s abandonment of it there was no ground for an injunction; & while deft. by building the row of houses had made the road a street, he had not laid out a street within the bye-laws.—*A.-G. v. DORIN*, [1912] 1 Ch. 369; 81 L. J. Ch. 225; 106 L. T. 18; 76 J. P. 181; 28 T. L. R. 105; 56 Sol. Jo. 123; 10 L. G. R. 194.

**2518. — Erection of houses along existing road.**—W. had ground abutting on one side of a lane 250 feet long & 6 feet wide, adjoining a town, there being no other houses, & he built six cottages standing back 15 feet from the lane. The lane was within an urban district, the bye-laws of which required new streets to be 18 feet wide. W. was convicted by justices of laying out a new street contrary to the bye-laws:—*Held*: the justices were wrong, the mere fact of six cottages being built in the lane not making it a new street.—*WILLIAMS v. POWNING* (1883), 48 L. T. 672; 47 J. P. 486, D. C.

*Annotations*:—*Consd.* Devonport Corp'n. v. Tozer, [1902] 2 Ch. 182. *Refd.* Fellows v. Sedgely U. D. C. (1906), 4 L. G. R. 970.

**2519. — Existing houses opposite—Side of house abutting on road.**—Where the owner of a strip of land by the side of a lane which ran into a road began to build on a portion of his land a house fronting to the road, the side of which abutted on the lane, & there was nothing to show any intention on his part of building other houses along the lane:—*Held*: he was not laying out a new street along the lane within bye-laws with respect to the construction of new streets made under Public Health Act, 1875 (c. 55), s. 157.—*ST. GEORGE'S LOCAL BOARD v. BALLARD*, [1895] 1 Q. B. 702; 64 L. J. Q. B. 547; 72 L. T. 345; 59 J. P. 182; 43 W. R. 409; 11 T. L. R. 263; 14 R. 295, C. A.

*Annotations*:—*Consd.* A.-G. v. Dorin, [1912] 1 Ch. 369. *Refd.* St. Mary, Battersea, Vestry v. Palmer & Winder

(1896), 60 J. P. 774; *Smith v. Chorley District Council* (1897), 76 L. T. 637; *Devonport Corp'n. v. Tozer*, [1902] 2 Ch. 182; *A.-G. v. Ashbourne Recreation Ground Co.*, [1903] 1 Ch. 101.

**2520. — — — — —.]—A country lane in the neighbourhood of a town, & situate within the district of the urban district council of that town, was defined for the greater part of its length (581 yards) by hedges. On one side of it were buildings, extending for 485 feet along the lane, belonging to brickmakers, who were proposing to erect on the other side of the lane, opposite to their existing buildings, new buildings, which would extend for 233 feet along the lane:—*Held*: by the erection of these new buildings the lane between them & the old buildings opposite would become a "new street" within Towns Improvement Clauses Act, 1847 (c. 34), s. 63, & subject to the provisions of that sect. as to width.**

An interlocutory injunction was accordingly granted to restrain defts. (the brickmakers) from building so as to make or lay out the lane as a new street less than 30 feet wide.—*A.-G. v. RUFFORD & Co., LTD.*, [1899] 1 Ch. 537; 68 L. J. Ch. 179; 80 L. T. 17; 63 J. P. 232; 47 W. R. 405; 15 T. L. R. 152.

*Annotations*:—*Consd.* A.-G. v. Ashbourne Recreation Ground Co., [1903] 1 Ch. 101. *Refd.* A.-G. v. Dorin, [1912] 1 Ch. 369.

**2521. — — — — — Right of way over private road.]—By Public Health Act, 1875 (c. 55), s. 157, every urban sanitary authority may make bye-laws with respect to the width & construction of new streets. Resps., an urban sanitary authority, made bye-laws providing that every person who should lay out a new street exceeding 100 feet in length should lay out such street as a carriage road, with footways, & of a width of not less than 36 feet. Applt. was lessee of a piece of ground, together with a right of way over the adjoining road, which was 15 feet wide, for a distance of more than 100 feet. Applt. commenced to build two houses on the ground of which he was lessee, but did not widen the road over which he had a right of way to 36 feet. He was summoned by resps. for laying out a new street of a width of less than 36 feet, contrary to the bye-laws:—*Held*: what applt. had done, in commencing to erect the houses on the piece of ground adjoining the road, did not amount to laying out the road as a new street, & he was not liable to be convicted.—*GOZZETT v. MALDON SANITARY AUTHORITY*, [1894] 1 Q. B. 327; 70 L. T. 414; 58 J. P. 229; 38 Sol. Jo. 185, D. C.**

*Annotations*:—*Refd.* St. George's L. B. v. Ballard (1895), 14 R. 295; St. Mary, Battersea, Vestry v. Palmer & Winder (1896), 60 J. P. 774; *Devonport Corp'n. v. Tozer*, [1902] 2 Ch. 182.

**2522. — — — — — Road widened.]—Applt. purchased 7 acres of land abutting on, but not comprising any part of, an old private road, together with rights of way over the road, intending to re-sell the land in plots for building. He attempted, without success, to sell the whole of the land, except a portion which he intended to make into a new road communicating with the private road in question. He subsequently sold three plots, granting the purchasers rights of way over the private road, but reserving to himself a narrow strip of land between the three plots & that road along the whole front of the three plots. The purchasers from applt. built on these plots; & applt. removed so much of the hedge separating his property from the private road as**

precept issued under Revised Statutes, c. 62, for laying out a road, is to be decided, are not the three disinterested

freeholders contemplated by that Act.—*R. v. CHIPMAN* (1858), 2 Thom. 292.—*CAN.*

*c. Cul de sac—Egress provided by law.*—*STEVENSON v. LEE*, [1910] S. C. 14.—*SCOT.*

*Sect. 2.—Extra metropolitan: Sub-sect. 6, D., E. & F.; sub-sect. 7, A. (a).]*

was opposite these plots, & threw the strip of land he had retained into the road so as to widen it. The land on the opposite side of the road was at the time, as applt. knew, in process of development as a building estate.—*Held*: there was no evidence that applt. had laid out or intended to lay out a new street within bye-laws made under Public Health Act, 1875 (c. 55), s. 157, as to new streets & buildings.—*FELLOWES v. SEDGLEY URBAN DISTRICT COUNCIL* (1900), 70 J. P. 412; 4 L. G. R. 970.

**2523. ——— Openings made in roadside fence.**—Defts. were the owners of a triangular piece of land within pltf's borough. Two sides of the triangle abutted upon public highways within the borough. Defts., in pursuance of a building scheme, commenced erecting houses on their land fronting the highways. Pltfs. alleged that defts. were laying out the highways as "new streets" which did not comply with the requirements of the borough bye-laws as to width, & they claimed, first, an injunction, & secondly, a declaration that pltfs. were entitled to remove or pull down any work begun or done by defts. in contravention of the bye-laws. The bye-laws, which were framed under the Public Health Act, 1875 (c. 55), prescribed a penalty for infringement, to be recovered by summary proceedings, & provided that pltfs. might, subject to any statutory provision, in that behalf, remove, alter, or pull down any work begun or done in contravention of the bye-laws.—*Held*: (1) the facts were not sufficient to justify the inference that defts. were laying out the highways as "new streets" within the bye-laws; (2) the action was not maintainable in the absence of the A.-G.—*DEVONPORT CORPN. v. TOZER*, [1903] 1 Ch. 759; 72 L. J. Ch. 411; 88 L. T. 113; 67 J. P. 269; 52 W. R. 6; 19 T. L. R. 257; 47 Sol. Jo. 318; 1 L. G. R. 421, C. A.

*Annotations*:—As to (1) *Appld.* *Fellowes v. Sedgley U. D. C.* (1906), 70 J. P. 412; A.-G. v. Dorin, [1912] 1 Ch. 369. *Refd.* A.-G. v. Wimbledon House Estate Co., [1904] 2 Ch. 31; Watson v. Hythe B. C. (1906), 4 L. G. R. 340; A.-G. v. Gibb, [1909] 2 Ch. 265. As to (2) *Appld.* A.-G. v. Pontypidd Waterworks Co., [1908] 1 Ch. 388.

**2524. ———**—A.-G. v. GIBB, No. 2489, *ante*.

**2525. ——— Drainage into sewer in road.**—A.-G. v. DORIN, No. 2517, *ante*.

*See, now*, Public Health Act, 1925 (c. 71), s. 30.

**2526. ——— Building wall along road—Width of road reduced.**—*ROBERTS v. RICHARDS*, No. 2502, *ante*.

**2527. ——— Line of road defined.**—B. was the owner of a piece of land on one side of a road 160 yards long, which road was of less width than that required by the local bye-laws for a new street. On the roadside of B.'s land was a wooden fence. This fence B. removed & on its site built a wall, & subsequently proposed to build a house inside the wall. The opposite side of the road was defined by a wall enclosing a dwelling-house. The justices were of opinion that B. had defined the line of road & had converted the road into a

new street, & convicted him of laying out a new street not in accordance with the bye-laws:—*Held*: there was no evidence of laying out a new street & the conviction ought to be quashed.—*BUSHELL v. CREER* (1900), 64 J. P. 600, D. C.

For what constitutes a new street, see Part I., Sect. 6, *ante*.

*E. Width of Street.*

*See, generally*, Towns Improvements Clauses Act, 1847 (c. 34), s. 63; Public Health Act, 1875 (c. 71), s. 31.

**2528. Power to alter statutory width—Local Act.**—A.-G. v. FOLKESTONE CORPN., [1873] W. N. 127.

**2529. Width insufficient—Refusal to approve plans.**—*SMITH v. CHORLEY RURAL COUNCIL*, No. 2513, *ante*.

**2530. ———**—R. v. TYNEMOUTH CORPN., No. 2514, *ante*.

**2531. Encroachment—Remedy of opposite owner.**—An alleged encroachment upon a street marked in a plan approved by a local board was made by a building which was itself built according to a plan approved by the local board:—*Held*: the owner of a house in the same street opposite the alleged encroachment had no cause of action, either in the name of the A.-G. against the local board for not preventing the encroachment, or against the alleged trespasser.—A.-G. v. PUDSEY LOCAL BOARD (1895), 59 J. P. 329; 39 Sol. Jo. 315.

**Width of entrance to new street—Regulation by bye-law.**—*See* Nos. 2489–2491, 2498, 2501–2503, *ante*.

*F. Enforcement of Bye-Laws.*

*See* Public Health Act, 1875 (c. 55), ss. 157, 158, 183, 251, 253; & *generally*, PUBLIC HEALTH.

**2532. Demolition of building—Failure to deposit plans—After notice.**—*BAKER v. PORTSMOUTH CORPN.*, No. 2488, *ante*.

**2533. ——— Building line infringed.**—*ROBINSON v. BARTON-ECCLES LOCAL BOARD*, No. 2493, *ante*.

**2534. Injunction—Joinder of Attorney-General.**—Where persons are laying out a new street in such a manner as not to comply with the requirements of bye-laws made by a local authority under Public Health Act, 1875 (c. 55), which prescribes a penalty for infringement recoverable by summary proceedings before justices, the High Ct. of Justice has jurisdiction to enforce the bye-laws by injunction in an action brought by the A.-G. at the relation of the local authority & by the local authority.—A.-G. v. ASHBORNE RECREATION GROUND CO., [1903] 1 Ch. 101; 72 L. J. Ch. 67; 87 L. T. 561; 67 J. P. 73; 51 W. R. 125; 19 T. L. R. 39; 47 Sol. Jo. 50; 1 L. G. R. 146.

*Annotations*:—*Apprvd. & Appld.* *Devonport Corpn. v. Tozer*, [1903] 1 Ch. 759. *Consd.* A.-G. v. Wimbledon House Estate Co., [1904] 2 Ch. 34. *Refd.* *Carlton Illustrators v. Coleman*, [1911] 1 K. B. 771. *Mentd.* *Russell v. Midhurst R. D. C.* (1908), 98 L. T. 530.

**2535. ——— Necessity for.**—*DEVONPORT CORPN. v. TOZER*, No. 2523, *ante*.

**2536. ——— Laying out street less than required width—Undertaking by builder—Injunction against owner.**—A.-G. v. GIBB, No. 2489, *ante*.

**PART XIII. SECT. 2, SUB-SECT. 6.—E.**

*d. Power to alter statutory width.*—The deft. corpn., under colour of improving an existing street, attempted to lay out & open a new street of less than the statutory width:—*Held*: such attempt & all proceedings connected therewith were illegal & void.—*PARTRIDGE v. NORTH SYDNEY TOWN* (1893), 25 N. S. R. 557.—*CAN.*

*e. Action for declaration as to width—Evidence.*—In an action for a declaration as to the width of a street in a city, the expert testimony of surveyors to show that there was no boundary to the street on the river side except the river itself, & testimony to show the instructions given to the surveyors who laid out the street, were held inadmissible—the plans must speak for themselves.—*SASKATOON*

(CITY) v. TEMPERANCE COLONISATION SOCIETY (1912), 32 W. L. R. 897; 8 D. L. R. 875.—*CAN.*

*f. Duty of master of works.*—*Held*: Under Glasgow Building Regulations Act, 1900, s. 20, the master of works was bound to fix as the width of a public street the width of the street actually existing.—*NISBET v. HAMILTON*, [1907] A. C. 158.—*SCOT.*

**2537. Summary proceedings—“Constructing & laying out” new street—Duplicitly & uncertainty.]**—Applt. was convicted for neglecting to comply with a notice specifying certain matters in respect of which the laying out or construction of certain streets was in contravention of the bye-laws relating to new streets:—*Held*: the conviction must be quashed, in that it was either for more than one offence contrary to the Summary Jurisdiction Act, 1848 (c. 43), or was void for uncertainty.—*R. v. SLATER, Ex p. BOWLER* (1903), 67 J. P. 299, D. C.

*Annotation*.—*Reid. R. v. Jones, Ex p. Thomas*, [1921] 1 K. B. 632.

**2538. — Continuing offence—After notice—Public Health Act, 1875 (c. 55), s. 158.]**—Where an information charged applt. with executing certain work [in a new street] in contravention of the bye-laws of a local authority, & it was proved that he was responsible for the continued existence of the work after receiving notice that it was in contravention of the bye-laws:—*Held*: he might be convicted on this information by virtue of above sect. of a continuing offence as well as of the offence specifically charged.—*ALREY v. SMITH* [1907] 2 K. B. 273; 76 L. J. K. B. 766; 96 L. T. 691; 71 J. P. 285; 23 T. L. R. 447; 5 L. G. R. 713, D. C.

#### SUB-SECT. 7.—BUILDING LINE IN STREETS.

##### A. Under Public Health (Buildings in Streets) Act, 1888.

###### (a) “Written Consent” to Erect or Bring Forward.

*See* Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

**2539. Mandamus to compel consent—When consent refused—Refusal bonâ fide.]**—A prerogative writ of *mandamus* will not be granted to compel a local authority to approve plans of a proposed building which the local authority has in good faith refused to approve upon the ground that the building would contravene above Act, by being brought forward beyond the front main wall of the building on one side thereof in the same street.—*R. v. EASTBOURNE CORPN.* (1900), 83 L. T. 338; 64 J. P. 721; 16 T. L. R. 546, C. A.

*Annotations*.—*Follis. R. v. Chiswick U. D. C., Ex p. Brickett* (1908), 72 J. P. 165. *Distd. R. v. Preston U. D. C., Ex p. Longworth* (1911), 106 L. T. 37. *Reid. White v. Sunderland Corpn.* (1903), 88 L. T. 592.

**2540. — — —.]**—A prerogative writ of *mandamus* will not be granted to a local authority to approve plans which they have in good faith refused to approve.

A *mandamus* will be granted to a local authority to hear & consider an application or to consider plans, & if this had been a case of refusal by the local authority to consider plans [counsel] would have been right (LORD ALVERSTONE, C.J.).—*R. v. CHISWICK URBAN DISTRICT COUNCIL, Ex p. BRICKELL* (1908), 72 J. P. 165; 6 L. G. R. 605, D. C.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 276–352.

**2541. What amounts to consent—Acquiescence.]**—A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. Pltfs., owners of a house & area situate in & fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage but not beyond the limits of the area. After the completion of the alterations defts., the local authority, threatened pltfs. with summary proceedings before the justices

for the recovery of penalties under Public Health Act, 1875 (c. 55), on the ground that pltfs. had set forward their building without the written consent of defts. under sect. 156 of the Act. Pltfs. then moved *ex p.* for an injunction to restrain defts. from taking these proceedings, alleging that as the alterations had been made over their own property, defts., in threatening proceedings, were acting *ultra vires*; that defts., having had notice of pltfs.’ intention to make the alterations, were bound by acquiescence; & that the justices had no jurisdiction as defts. had not made their complaint within six months after the alleged offence, as required by Public Health Act, 1875 (c. 55), s. 252. Motion refused.—*KEUR v. PRESTON CORPN.* (1876), 3 Ch. D. 463; 46 L. J. Ch. 409; 25 W. R. 265.

*Annotations*.—*Consd. Grand Junction Waterworks Co. v. Hampton U. C.*, [1898] 2 Ch. 331. *Distd. A.-G. v. Denby*, [1925] Ch. 596. *Reid. Barlow v. St. Mary Abbott’s, Kensington, Vestry* (1883), 31 W. R. 514; *Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718; *Yabbicom v. King*, [1899] 1 Q. B. 444; *Merrick v. Liverpool Corpn.*, [1910] 2 Ch. 449. *Mentd. Hedley v. Bates* (1880), 42 L. T. 41; *R. v. Briton Medical & General Life Assco. Asscn.* (1886), 32 Ch. D. 503; *R. v. McIntosh & Pontypridd Improvements Co., R. v. Pontypridd (Mill St. & Rhondda Road) Improvements Act, 1890* (1891), 61 L. J. Q. B. 161.

**2542. — Approval by building committee—Ratification by council.]**—Def’t. had erected a building after submitting plans of it to the urban authority. The plans were certified by the borough surveyor as being in order, & were afterwards approved, subject to a slight amendment, by a resolution passed by a committee of the corpn. of L., the urban authority for the district. Subsequently various proceedings of the committee, including the resolution as to the plans, were approved & adopted at a general meeting of the corpn. A minute to this effect was entered in the minute book of the corpn., approved at the next general meeting, & thereupon signed by the chairman of the corporation. The new erections projected beyond the building line, & pl’tf., the owner of an adjoining house, brought this action, alleging that “no written consent” of the urban authority within sect. 3 of above Act had been obtained; & that, in consequence, the erection constituted a breach of such section. He maintained that he had suffered special damage thereby, & had therefore a private right of action; he claimed damages & a mandatory injunction against def’t. —*Held*: (1) upon the true construction of sect. 3 of above Act only one statutory offence was thereby created for which a fine, to be exacted by the urban authority, was constituted the appropriate penalty. The exaction of this fine was therefore the sole remedy, & pl’tf. had no cause of action; (2) had it been necessary to decide the point, the proceedings of the urban authority stated above would almost certainly have constituted a sufficient “written consent.”—*MULLIS v. HUBBARD*, [1903] 2 Ch. 431; 72 L. J. Ch. 593; 88 L. T. 661; 67 J. P. 281; 51 W. R. 571; 1 L. G. R. 769.

*Annotation*.—*Generally, Mentd. Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

**2543. — — — Knowledge of infringement.]**—Applt. was convicted under sect. 3 of above Act for erecting & bringing forward certain bay windows of his house in a street beyond the front main wall of the house or building on one side of his house in the same street. Applt. had, before commencing to build, submitted plans of his house to resps. These plans were examined by resp.’s surveyor, & submitted to the roads & health committees of resp. council, & the committees stamped their approval on the plans, & the approval was signed by their respective chairmen.

*Sect. 2.—Extra metropolitan: Sub-sect. 7, A. (a), (b), (c), (d), (e), (f) & (g).]*

Resp. council duly confirmed the approval. The plans thus submitted & approved showed a contemplated "bringing forward" of certain bay windows beyond the front main wall of the building on one side of the house. The attention of neither of the said committees nor of resp. council was specifically called to the intended projection. Resps. contended, *inter alia*, that the approvals & confirmation only extended to approval of the plans as complying with their bye-laws as regards building construction & drainage, & that, therefore, they had given no "written consent" to the "bringing forward" within sect. 3 of above Act:—*Held*: there was a "written consent" within the sect.—*MERLETT v. CHARLTON KINGS URBAN DISTRICT COUNCIL* (1903), 67 J. P. 419, D. C.

**2544.** ————*]*—On Dec. 10, 1923, plans for a hotel were approved by the building committee of an urban authority without their attention being drawn to the fact that the proposed building would infringe Public Health (Buildings in Street) Act, 1888 (c. 52), s. 3, & on the faith of that approval the building was commenced on Dec. 16. On May 12, 1924, when a substantial portion had been erected, & after a complaint by an adjoining owner raising the exact point, the urban authority gave a written consent to the hotel being erected beyond the front main wall of the adjoining house. In an action by the A.-G. for a mandatory injunction to restrain the breach of the sect.:—*Held*: (1) there was a sufficient written consent within the sect. & no breach; (2) in the circumstances, in no case ought a mandatory injunction to be granted.—*A.-G. v. DENBY*, [1925] 1 Ch. 596; 94 L. J. Ch. 434; 133 L. T. 722; 80 J. P. 145; 23 L. G. R. 625.

(b) "*Erect or Bring Forward.*"

See Public Health Act, 1875 (c. 55), s. 156, & now, Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

**2545.** Whether statute applicable to new buildings—Public Health Act, 1875 (c. 55), s. 156.—In Public Health Act, 1875 (c. 55), s. 156, the expression "house or building" does not include new buildings in course of erection upon land never before built upon.—*WILLIAMS v. WALLASEY LOCAL BOARD* (1886), 16 Q. B. D. 718; 55 L. J. M. C. 133; 55 L. T. 27; 50 J. P. 582; 34 W. R. 517, D. C.

*Annotations*:—*Consd. Warren v. Mustard* (1891), 61 L. J. M. C. 18; *A.-G. v. Laird*, [1925] Ch. 318.

**2546.** ————*]*—*WARREN v. MUSTARD*, No. 2555, *post*.

Premises rebuilt.]—See Sub-sect. 7, B., *post*.

(c) "*House or Building.*"

See Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

**2547.** Glass show case—In front of photographer's house.]—An information was laid against applt., a photographer, by resps., an urban sanitary authority, for erecting a building without their consent, contrary to sect. 3 of above Act. The structure had been erected beyond applt.'s front main wall, fronting a certain street. It was made of wood & glass, & was used for showing photographs as an advertisement of applt.'s business. It was 9 feet 6 inches long, 3 feet wide from back to front, & 7 feet high. It was roofed over, had a glass front & a door, & it was fastened on four posts fixed into the ground for about 9 inches in depth. There

was no brickwork about the building or basement. The justices found as a fact that this structure was a building within above Act, & convicted applt. of the offence of erecting it without the consent of the local sanitary authority:—*Held*: the justices were justified, in point of law, in coming to such a conclusion, & their finding in fact could not be disturbed.—*LEICESTER CORPN. v. BROWN* (1892), 62 L. J. M. C. 22; 41 W. R. 78; 9 T. L. R. 8; 37 Sol. Jo. 28; 5 R. 35; *sub nom. BROWN v. LEICESTER CORPN.*, 67 L. T. 686; 57 J. P. 70, D. C. *Annotations*:—*Refd. Anderson v. Richards* (1906), 70 J. P. 231; *R. v. Denman, Ex p. Palace Co.* (1907), 96 L. T. 672.

**2548.** Buildings of waterworks company—Under private Act—Waterworks Clauses Act, 1847 (c. 17), s. 93.]—Public Health (Buildings in Streets) Act, 1888 (c. 52), is an "Act for improving the sanitary condition of towns & populous districts" within Waterworks Clauses Act, 1847 (c. 17), s. 93. Therefore, if the Act of 1847 is incorporated by the special Act of a waterworks co., the co. is liable to be convicted upon an information under sect. 3 of the Act of 1888 for erecting a building in a street beyond the front main wall of the house or building on either side thereof, inasmuch as the effect of sect. 93 of the Act of 1847 is to make the co. subject to the provisions of the Act of 1888.—*GRAND JUNCTION WATERWORKS CO. v. HAMPTON URBAN COUNCIL* (1898), 67 L. J. Q. B. 903; 79 L. T. 176; 42 Sol. Jo. 716, D. C.

*Annotation*.—*Refd. L. C. C. v. Wandsworth & Putney Gas Co.* (1900), 82 L. T. 562.

(d) "*Street.*"

See Public Health Act, 1875 (c. 55), s. 156, & now, Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

See Nos. 107, 110, 111, 130, *ante*, & generally, Part I., Sect. 5, *ante*.

(e) "*Front Main Wall of the House on Either Side.*"

See Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

**2549.** What constitutes "front main wall"—General rule.]—In considering which is the "front main wall" of a house or building for the purposes of sect. 3 of above Act, & whether such house or building is "on either side of" or "in the same street" as a house or building in course of erection, for the purposes of the same sect., all the circumstances of the case must be taken into consideration. The building must be looked at as a whole; its character, its position, its distance from the house or building which is being erected or brought forward in alleged contravention of sect. 3, must be considered; & particular wing or other projection must not be selected, the front of which is to be treated as the "front main wall" which is to give the governing line, nor are two buildings necessarily "in the same street" for the purposes of the sect., because one faces on the same road or street, or a continuation of the same road or street, as the other.

Regarding the asylum, then, as a whole, can it be properly said that within the fair meaning of sect. 3 it is a building on the side of deft.'s shops? In my opinion, no. I have looked at the general nature of the building, its position & its distance, 57 feet 3 inches from the nearest portion of deft.'s shops, & the fact that it is separated from deft.'s shops by a portion of a garden, then by a private road leading to the back of the asylum, & again by a strip of land belonging to deft. Looking at all these circumstances of the case, it appears



to me not to be a building on a side of deft.'s shop within sect. 3 (ROMER, J.).—A.-G. v. EDWARDS, [1891] 1 Ch. 184; 63 L. T. 639.

*Annotations*.—*Distd.* R. v. Fulwood L. B. (1895), 72 L. T. 592. *Consd.* A.-G. v. Laird, [1925] Ch. 318. *Refd.* Anderson v. Richards (1906), 70 J. P. 231.

**2550. — Building just commenced.**—Resp. began to erect the front main wall of a new house in a street: at that time B. had raised the front main wall of a new house, which he was erecting on the same side of the street, to the height of five inches above the ground: it did not appear to what extent the other walls of B.'s house had been built, or that they were connected with the front main wall: there was a distance of about 300 or 400 [yards] between the two houses, & there was no house between them: the front main wall of resp.'s house was six feet nearer the roadway than that of B.'s house:—*Held*: resp. had not erected any part of a house beyond the "front main wall of the house or building on either side thereof," within sect. 3 of above Act.—*RAVENSTHORPE LOCAL BOARD v. HINCHCLIFFE* (1880), 24 Q. B. D. 168; 59 L. J. M. C. 19; 61 L. T. 780; 51 J. P. 421, D. C.

*Annotations*.—*Distd.* Warren v. Mustard (1891), 61 L. J. M. C. 18. *Consd.* A.-G. v. Laird, [1925] Ch. 318.

**2551. — Wing or projection.**—A.-G. v. EDWARDS, No. 2549, *ante*.

(f) *House or Building "on Either Side."*

See Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

**2552. What constitutes being "on either side" — General rule.**—A.-G. v. EDWARDS, No. 2549, *ante*.

**2553. — Question of fact for justices.**—WARREN v. MUSTARD, No. 2555, *post*.

**2554. — Reasonable proximity—300 yards.**—RAVENSTHORPE LOCAL BOARD v. HINCHCLIFFE, No. 2550, *ante*.

**2555. — — 64 feet.**—At the junction of two roads, O. & C., a house was built abutting on to the footpath of C. road. The main entrance of the house was in the O. road. In C. road a row of cottages had been built eight feet back from the road. These cottages were situated at a distance of 64 feet from the house in question. Applt., the owner of the house in question, built a wall close up to the footpath along C. road. The justices on an information against applt. under sect. 3 of above Act held that the house in question was in both C. & O. roads, & that the cottages were buildings on one side of the house within the sect. & convicted applt.:—*Held*: it was a question of fact for the justices to decide whether this house was or was not in both O. & C. roads, & also whether the cottages on one side of the house in C. road were sufficiently near to be "on either side thereof in the same street," within the sect., & the magistrates' conviction must be affirmed.

We held in a case of *Williams v. Wallasey Local Board*, No. 2545, *ante*, that the expression "house or building" as used in Public Health Act, 1875 (c. 55), s. 150, did not include new buildings in course of erection on land never before built upon, but in Public Health (Building in Streets) Act, 1888 (c. 52), the word "erect" is inserted as well "as being forward," so as to meet that decision (SMITH, J.).—WARREN v. MUSTARD (1891), 61 L. J. M. C. 18; 66 L. T. 26; 50 J. P. 502; 8 T. L. R. 65; 36 Sol. Jo. 61, D. C.

*Annotation*.—*Consd.* A.-G. v. Laird, [1925] Ch. 318.

**2556. — — 57 feet—Intervening strip & private road.**—A.-G. v. EDWARDS, No. 2549, *ante*.

**2557. — — 90 feet—No continuous line of buildings.**—In Nov. 1893, T. built a house near to,

but not abutting on, the west side of Westbourne Grove, part of Ormesby road, 240 yards north of a house on the west side erected in 1886. The house fronted towards the south. In Feb. 1894, T. bought some land, 70 feet deep, along the west side of Ormesby road, to the north of his house, with the object of erecting cottages upon it. On the east side of Ormesby road a number of houses had been built close up to the road. The building plans showed that the cottages would be somewhat nearer Ormesby road than T.'s house was. The urban authority decided that the cottages must be in line with T.'s house under sect. 3 of above Act. There was no continuous line of buildings where it was proposed to build the cottages:—*Held*: the cottages need not be in line with T.'s house, as, in the above circumstances, there would be no erection of a "house or building beyond the front main wall of the house or building on either side thereof in the same street."—*R. v. ORMESBY LOCAL BOARD OF HEALTH* (1894), 43 W. R. 96, D. C.

*Annotations*.—*Consd.* A.-G. v. Laird, [1925] Ch. 318. *Refd.* R. v. Fulwood L. B. (1895), 72 L. T. 592.

**2558. — — 700 feet.**—A.-G. v. LAIRD, No. 112, *ante*.

**2559. — Buildings on one side only.**—Where sect. 3 of above Act prohibits a house being brought forward beyond the front main wall of the house or building on either side thereof, this includes the case of buildings being only on one side thereof.—*LEYTON LOCAL BOARD v. CAUSTON* (1893), 57 J. P. 135; 9 T. L. R. 180, D. C.

*Annotation*.—*Refd.* Anderson v. Richards (1906), 70 J. P. 231.

**2560. Variation of line—Between buildings on either side—Least prominent line prevails.**—Resp., the occupier of a corner house, put up a shop front in front of his own main wall which projected beyond the main front wall of the house on one side of it, but did not project beyond the front main wall of the house on the other side, which was separated from resp.'s house by a cross street:—*Held*: resp. had committed an offence against sect. 3 of above Act, which forbids the erection or bringing forward, without the consent of the urban authority, of any house or building beyond the front main wall of the house or building on either side of same.—*ANDERSON v. RICHARDS* (1906), 70 J. P. 231; 4 L. G. R. 401, D. C.

(g) *House or Building "in Same Street."*

See Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3.

**2561. What constitutes being "in same street" — General rule.**—A.-G. v. EDWARDS, No. 2549, *ante*.

**2562. — — Frontage to same street—Insufficient of itself.**—A.-G. v. EDWARDS, No. 2549, *ante*.

**2563. — — — Set back 60 feet.**—In 1887 R., the owner of a plot of ground on an estate laid out for building purposes, abutting on a new street, built two semi-detached villas on his property, leaving a space of 62 feet between their front wall & the road. In 1889 R. acquired the adjoining plot on the east side, & built other two villas at the same distance back from the road as the first. In 1894, L., who had in 1887 acquired the plot adjoining R.'s plot on the west side, proposed to erect a house on his property with a clear space of only 21 feet between the house & the road. The local authority considered that the proposed new house was a building in a street "beyond the front main wall of the house or building on either side thereof in the same street," within sect. 3 of above Act & in the exercise of the discretion conferred upon them by that sect. refused to admit



*Sect. 2.—Extra metropolitan: Sub-sect. 7, A. (g), (h) & (j), & B.]*

the plans. Upon a rule *nisi* for a *mandamus* to compel the local authority to admit the plans:—*Held*: R.'s villas, although they were buildings "on either side" of the proposed new building, were not buildings "in the same street," within the sect.—*R. v. FULWOOD LOCAL BOARD, Ex p. LIVESY* (1895), 72 L. T. 592; 59 J. P. 311, D. C. 2564. ——— Set back 30 feet.]—*A.-G. v. SIDDALL* (1898), *Times*, June 24, C. A.

2565. Corner houses—Whether house in both streets—Question of fact for justices.]—*WARREN v. MUSTARD*, No. 2555, *ante*.

(h) "Addition to House or Building."

See Public Health (Buildings in Streets) Act 1888 (c. 52), s. 3.

2566. What constitutes "addition"—Movable porch—Adjacent but not attached to main wall—Question of fact.]—Resp. was the owner & occupier of a house in a terrace with a small garden between the house & the carriageway. The front door was approached by a pathway & a flight of stone steps. He had erected in front of the door & upon the steps a porch of wood & glass, roofed with felt & containing a seat. The porch from back to front was 4 feet 8½ inches deep, 7 feet 5 inches high at the eaves, 10 feet 1 inch high at the ridge of the roof, & 8 feet 6 inches wide. The back of the porch was immediately adjacent to the pilasters of the front door, & projected 6 feet 6 inches beyond the front main wall of the houses on either side. The porch was not attached in any way to the house & stood on wheels, three on each side. It was possible to move the porch a few inches from the pilasters of the doorway, but an iron railing prevented it from being moved further. Justices dismissed proceedings against resp. under sect. 3 of above Act, finding that the porch was not attached to the house & did not constitute an "addition to a house or building" within the sect.:—*Held*: the justices having found these facts, their decision should not be disturbed.—*SUNDERLAND CORPN. v. CHARLTON* (1912), 77 J. P. 127; 11 L. G. R. 484, D. C.

(j) Proceedings for Infringement of Statute.

See Public Health Act, 1875 (c. 55), s. 156, & now, Public Health (Buildings in Streets) Act, 1888 (c. 52).

2567. Summary proceedings for penalty—Injunction to restrain.]—*KERR v. PRESTON CORPN.*, No. 2541, *ante*.

2568. ———.]—Pltfs., a waterworks co., purporting to act under their local Act, proposed to erect a new pumping station on a piece of their land abutting on a street. Defts., the local authority, gave them notice that as the proposed new building would extend beyond the building line they objected, & should proceed before the magistrates for penalties under above Act. Pltfs. thereupon brought an action for a declaration that they were entitled to build without interference by defts. Defts. pleaded that there was no jurisdiction to make such a declaration, & alternatively that, assuming jurisdiction, it was discretionary & the discretion ought not to be exercised:—*Held*: on the authorities there might be jurisdiction to make such a declaration, but the cases were limited to injunctions against apprehended trespass. An injunction against merely proceeding before magistrates ought to be granted if at all in very special circumstances which did not exist in this case, & accordingly

a *fortiori* the declaration asked for ought not to be made.—*GRAND JUNCTION WATERWORKS CO. v. HAMPTON URBAN COUNCIL*, [1898] 2 Ch. 331; 67 L. J. Ch. 603; 78 L. T. 673; 62 J. P. 566; 46 W. R. 644; 14 T. L. R. 467; 42 Sol. Jo. 571; subsequent proceedings, 67 L. J. Q. B. 903, D. C.

*Innotations*.—*Consd. Elsdon v. Hampstead Corp.*, [1905] 2 Ch. 633. *Reid. A.-G. & District Council v. Rufford* (1899), 63 J. P. 232; *Devonport Corp. v. Tozer*, [1902] 2 Ch. 182; *Russell v. Midhurst R. D. C.* (1906), 98 L. T. 530; *Merrick v. Liverpool Corp.*, [1910] 2 Ch. 449. *Mentd. A.-G. v. Merthyr Tydfil Grdms.*, [1900] 1 Ch. 516; *St. James's Hall v. L. C. C.* (1900), 83 L. T. 98; *R. v. Philbrick, Ex p. Edwards* (1905), 63 W. R. 527; *Williams v. Weston-super-Mare U. D. C.* (1910), 74 J. P. 370; *Burghes v. A.-G.*, [1911] 2 Ch. 139; *Slimmonds v. Newport Abercrom Black Vein Steam Coal Co.*, [1920] 3 K. B. 131; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A. C. 438; *Everett v. Griffiths*, [1924] 1 K. B. 941.

2569. ——— Dismissal by justice—Further proceedings for same offence—*Res judicata*.]—A. was summoned for an offence under sect. 3 of above Act in building a house, the front wall of which projected beyond the building line. At the hearing the justices were equally divided in opinion, & on the advice of their clerk the chairman dismissed the information. A second information was subsequently laid in precisely same terms, save that the period for which penalties were claimed was different from that in the first. The justices convicted:—*Held*: (1) the dismissal of the first information was a good dismissal, although the justices were equally divided; (2) such dismissal decided that the erection of the house was not an offence under sect. 3, & the continuing of that erection could therefore not be an offence.—*KINNIS v. GRAVES* (1898), 67 L. J. Q. B. 583; 78 L. T. 502; 46 W. R. 480; 42 Sol. Jo. 512; 19 Cox, C. C. 42, D. C.

*Innotations*.—As to (1) *Reid. Bagge v. Colquhoun*, [1904] 1 K. B. 554. *Generally, Mentd. R. v. Hertfordshire J.J., Ex p. Larsen* (1925), 89 J. P. 205.

2570. ———.]—An urban district council served a summons on J. under sect. 3 of above Act. No previous notice had been given to J. by the urban authority as required by the sect., & the stipendiary magistrate dismissed the summons upon the ground that it was defective in that no offence to which a penalty was attached was set out. Notice was then served on J., & a second summons taken out, under which the magistrate convicted. J. appealed upon the plea that, as the first summons had been dismissed, the matter was *res judicata*:—*Held*: as the matter had not been decided at all on the first summons, it was not *res judicata*, & the magistrate was entitled to convict.—*JENKINS v. MERTHYR TYDVIL URBAN DISTRICT COUNCIL* (1899), 80 L. T. 600, D. C.

2571. ——— Necessity for previous notice.]—*JENKINS v. MERTHYR TYDVIL URBAN DISTRICT COUNCIL*, No. 2570, *ante*.

2572. ——— Continuing offence—Infringement before notice.]—An offence to which the penalty [under Public Health Act, 1875 (c. 55), s. 156] is applicable continues so long as the addition to the house is maintained after written notice from the urban authority, notwithstanding that the addition was completed before the notice was given.—*RUMBALL v. SCHMIDT* (1882), 8 Q. B. D. 603; 40 L. T. 661; 40 J. P. 567; 30 W. R. 949, D. C. *Innotations*.—*Distd. Blackpool Corp. v. Johnson*, [1902] 1 K. B. 646. *Consd. Mullis v. Hubbard*, [1903] 2 Ch. 431. *Reid. Reay v. Gateshead Corp.* (1886), 55 L. T. 92; *Welsh v. West Ham Corp.* (1899), 82 L. T. 262.

2573. ——— Change of ownership of building.]—A house was erected by a builder in contravention of sect. 3 of above Act, & subsequently passed into the ownership of resp., who maintained the house in the same street after

written notice from the urban authority:—*Held*: resp. had not committed an offence under the sect.—**BLACKPOOL CORPN. v. JOHNSON**, [1902] 1 K. B. 646; 71 L. J. K. B. 485; 87 L. T. 28; 18 T. L. R. 494; 20 Cox, C. C. 276, D. C.

*Annotation*:—*Consd.* Mullis v. Hubbard, [1903] 2 Ch. 431.

**2574. — Whether sole remedy for offence—Action for damages—By private individual.**—*MULLIS v. HUBBARD*, No. 2542, *ante*.

**2575. — Action for injunction—By Attorney-General.**—The penalty prescribed by sect. 3 of above Act, for a breach of the prohibition in the first part of the sect. against infringing the building line is not the only remedy for the offence. It is a public general Act, & an injunction will lie at the suit of the A.-G. on behalf of the public to restrain the infringement of the building line, & in a proper case a mandatory order to pull down will be made, even although the offender has been previously convicted & fined under the sect. for the offence by a ct. of summary jurisdiction.—*A.-G. v. WIMBLEDON HOUSE ESTATE CO., LTD.*, [1904] 2 Ch. 34; 73 L. J. Ch. 593; 91 L. T. 163; 88 J. P. 341; 20 T. L. R. 489; 2 L. G. R. 826.

*Annotations*:—*Refd.* A.-G. v. Birmingham, Tame & Rea District Drainage Board, [1910] 1 Ch. 48; A.-G. v. Denby, [1925] Ch. 596.

**2576. Mandatory order to pull down—After summary proceedings.**—*A.-G. v. WIMBLEDON HOUSE ESTATE CO., LTD.*, No. 2575, *ante*.

**Action—By private individual.**—*See* No. 2542, *ante*.

#### *B. Under Public Health Acts.*

*See* Public Health Act, 1875 (c. 55), ss. 155, 157.

**2577. Power to prescribe building line—After plans of rebuilding approved.**—*A.*, owner of a factory, which he was desirous of pulling down & re-erecting, sent plans & sections of his proposed new building, showing thereon its site with reference to the adjacent property, to the town council of the borough in which the factory was situate for their approval, before he pulled down his factory. An approval was returned to him by the building & improvement committee of the council, which committee had been appointed under a section in a local Act, enabling the town council to delegate its authority on any subject to a committee. A note was added to the approval, stating that the ratification of the approval of any plans & particulars by such committee referred only to such matters & to such parts of the said plans & particulars as were required to be set forth therein in accordance with the bye-laws made for the regulation & laying out of new streets & the erection of new buildings, which bye-laws were made under Local Government Act, 1858 (c. 98), s. 34; but such approval was not to extend to the doing of any work whatsoever other than that set forth, described, & required by such bye-laws. *A.*, thinking that this was a sufficient approval of his plan pulled down his factory; afterwards he received a notice from the town council, under the powers given by Local Government Act, 1858 (c. 98), s. 34, that any new building to be erected must have its frontage set back to a line marked on an accompanying plan, such line being about 13 feet behind the line shown on the plan & sections first mentioned:—*Held*: the corp. were not at liberty to give any such notice after the approval given by their committee, & an injunction was granted to restrain them from interfering in any manner with the erection of the new building according to *pltf.*'s plan & sections.—*SLEE v. BRADFORD CORPN.* (1863), 4 Giff. 262; 1

New Rep. 386; 8 L. T. 491; 27 J. P. 612; 9 Jur. N. S. 815; 66 E. R. 704.

*Annotations*:—*Consd.* Ashworth v. Hebden Bridge L. B. (1877), 47 L. J. Ch. 195. *Apld.* Masters v. Pontypool L. G. Board (1878), 9 Ch. D. 677. *Refd.* Newhaven L. B. v. Newhaven School Board (1885), 30 Ch. D. 350; Withington U. D. C. v. Moore (1896), 60 J. P. 408.

**2578. —**—*J.*—The owner of a house after having in accordance with a bye-law of the Local Government Board left, on Oct. 16, a plan of an intended new building, the local board passed a resolution that the plan was approved of, & that he should be offered £40 for certain land of his thrown into the street. He refused to accept the £40 but proceeded with his works, & by Oct. 26 had pulled down the front wall of his house. On Oct. 27, the board passed a resolution abandoning the terms before offered, & requiring him to set his frontage further back. This notice was given under Public Health Act, 1875 (c. 55), s. 155, as on the front of a house having been pulled down. On Nov. 27, the owner of the house proceeded with his building, & on Dec. 21, he was served with notice to pull down his new building:—*Held*: (1) the local board having approved of a plan, & having allowed a house owner to proceed & pull down the front wall of his house, could not afterwards avail itself of the powers acquired when the front of a house has been taken down; (2) where a local board has not, during the month prescribed by Public Health Act, 1875 (c. 55), s. 158, signified its disapproval of plans laid before it, it cannot afterwards object to the building according to the plan; (3) a local board cannot, under Public Health Act, 1875 (c. 55), s. 158, pull down a building without giving the owner an opportunity of showing cause why it should not be pulled down.—*MASTERS v. PONTYPPOOL LOCAL GOVERNMENT BOARD* (1878), 9 Ch. D. 677; 47 L. J. Ch. 797.

*Annotations*:—*As* to (1) & (2) *Expld.* Newhaven L. B. v. Newhaven School Board (1885), 30 Ch. D. 350. *Refd.* Withington U. D. C. v. Moore (1896), 60 J. P. 408. *As* to (3) *Consd.* Hopkins v. Smethwick L. B. of Health (1890), 24 Q. B. D. 712.

**2579. — Building taken down—Rebuilding of portion commenced—Alternative site.**—*Defts.*, being about to pull down a school & erect a new one, submitted plans to the local board. The local board objected to the plans, giving as a reason that they violated a bye-law, which obliged a person laying out a new street to leave it of a certain width. This bye-law was not applicable, as South Lane on which the school was fronted was not a new street. *Defts.* disregarded the objection, commenced their works on Jan. 5, 1885, laid the foundations of the main wall towards South Lane on Jan. 12, & proceeded rapidly with the erection of it. On Jan. 22 the local board prescribed a building line which did not interfere with the main wall, but would prevent the erection of certain annexes not then commenced, lying between South Lane & the main wall, which annexes were shown on the plans laid before the board. *Defts.* had ground enough to allow of the annexes being erected elsewhere. *Defts.* proceeded with the annexes, & the board brought their action to restrain them from building beyond the line, & to compel them to pull down what they had built beyond it:—*Held*: (1) where a building is taken down to be rebuilt, a building line may be prescribed under Public Health Act, 1875 (c. 55), s. 155, for any portion of it which has not been commenced, although other portions have been commenced, unless what has been commenced necessarily involves as a matter of construction a projection beyond the line afterwards prescribed, & here no such necessity existed, as the annexes

*Sect. 2.—Extra metropolitan: Sub-sect. 7, B., C. & D.; sub-sects. 8, 9 & 10.]*

could be erected elsewhere; the commencement of the main building therefore did not preclude the board from laying down a line which would prevent the erection of the annexes which had not then been commenced; (2) as the notice given by the board, though ineffectual for the purpose of empowering them to pull down the erection under sect. 158, gave defts. to understand that the board objected on the ground that the buildings according to the plan would make the street too narrow, the board had not done anything to induce defts. to believe that they would not prescribe a building line, & there was no equity to prevent the board from exercising their powers under sect. 155 on the ground that they had misled defts.—*NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD* (1885), 30 Ch. D. 350; 53 L. T. 571; 34 W. R. 172; 1 T. L. R. 626, C. A.

*Annotations:—As to (1) Reidd. A.-G. v. Hatch, [1893] 3 Ch. 36. As to (2) Apprvd. A.-G. v. Hatch, [1893] 3 Ch. 36.*

**2580. — Front wall of ground & first floors taken down.]**—The owner of a house in a street took out the front wall of the ground & first floors, & removed the first floor, with the view of turning the two lowest storeys into one lofty shop, which was also to be extended behind the house. The second floor was not disturbed, but was shored up with timber, which was afterwards replaced by iron girders & brick piers. Shortly after the erection of the iron girders & piers had been completed the urban authority prescribed a building line under Public Health Act, 1875 (c. 55), s. 155, & commenced an action to restrain the owner from building in front of it:—*Held*: inasmuch as a substantial part of the house & of its front wall was left standing, neither the house nor the front thereof had been taken down within Public Health Act, 1875 (c. 55), s. 155, & the power to fix a building line had never arisen.—*A.-G. v. HATCH*, [1893] 3 Ch. 36; 62 L. J. Ch. 857; 69 L. T. 469; 57 J. P. 825; 9 T. L. R. 513; 2 R. 533, C. A.

*Annotation:—Mentd. A.-G. v. Ashborne Recreation Ground Co., [1903] 1 Ch. 101.*

**2581. Notice of building line—Whether rejection of plans sufficient.]**—*NEWHAVEN LOCAL BOARD v. NEWHAVEN SCHOOL BOARD*, No. 2579, *ante*.

**2582. — Whether necessary.]**—Action based on Public Health Act, 1875 (c. 55), s. 155, for an injunction to compel deft. to remove a building completed before writ issued. Deft. owned a house in a street & being desirous of pulling it down & rebuilding it on the same site, duly deposited plans with the local authority. The latter thereupon adopted a plan showing a building line for the whole of the street which cut a considerable slice off the site of deft.'s house. This plan did not refer expressly to the house. The authority further resolved that his deposited plan "be not approved" & wrote to him to that effect. Correspondence ensued; deft. insisted on rebuilding on the site of the old house, & completed the new building. The authority did not give him notice under which sect. of the Act they were proceeding or make any tender of compensation; but they commenced this action for a mandatory injunction to compel deft. to pull down so much of the structure as was in advance of the building line. By their statement of claim they alleged that they had at all times been & now were ready to pay compensation:—*Held*: (1) a building line had been

duly prescribed & the fact that it purported to refer to the whole of the street in general terms was immaterial, it was not necessary to give notice, & in fact deft.'s advisers knew, under which sect. the proceedings were taken; (2) tender of compensation was not a condition precedent to enforcing compliance with the building line, & if it was, deft. by his hostile attitude had waived the objection; (3) the dispute was trivial, but deft. had challenged the local authority & could not be allowed to avoid compliance with the building line; & a mandatory injunction must be granted.—*A.-G. v. PARISH*, [1913] 2 Ch. 444; 82 L. J. Ch. 562; 109 L. T. 57; 77 J. P. 391; 29 T. L. R. 608; 57 Sol. Jo. 625; 11 L. G. R. 1134, C. A.

**2583. Enforcement of building line—Right of building owner to state objections.]**—*MASTERS v. PONTYPOOL LOCAL GOVERNMENT BOARD*, No. 2578, *ante*.

**2584. — — —.]**—Where a building has been erected in contravention of the bye-laws of a local board of health, the board cannot under Public Health Act, 1875 (c. 55), s. 158, pull down the building without giving the owner an opportunity of showing cause why it should not be pulled down.—*HOPKINS v. SMETHWICK LOCAL BOARD OF HEALTH* (1890), 24 Q. B. D. 712; 59 L. J. Q. B. 250; 62 L. T. 783; 54 J. P. 603; 38 W. R. 499; 6 T. L. R. 286, C. A.

*Annotations:—Consd. A.-G. v. Hooper, [1893] 3 Ch. 483. Reidd. Hannahan v. Leigh-on-Sea U. D. C. (1908), 7 L. G. R. 199.*

**2585. — Injunction to restrain building.]**—*SUTTON LOCAL BOARD v. HOARE* (1894), 10 T. L. R. 586.

**2586. — Mandatory order to pull down.]**—*A.-G. v. PARISH*, No. 2582, *ante*.

**2587. Compensation—When payable.]**—*A.-G. v. PARISH*, No. 2582, *ante*.

*C. Under Towns Improvement Clauses Act, 1847.*

*See Towns Improvement Clauses Act, 1847 (c. 34), ss. 66, 68; Public Health Act, 1875 (c. 55), s. 100.*

**2588. Regular line—Meaning of.]**—*TEAR v. FREEBODY*, No. 2086, *ante*.

**2589. — — —.]**—*SIMPSON v. SMITH*, No. 2112, *ante*.

**Meaning of "street."]**—*See Part I., Sect. 5, sub-sect. 2, C., ante.*

#### *D. Under Local Acts.*

**2590. Power to prescribe building line—After building commenced.]**—(1) The corpn. of F. had power, under a local Act, to prescribe the line in which any house to be thereafter built or taken down for the purpose of being rebuilt or altered should be erected, on payment of compensation to the owner of any house required to be set back, & it was also provided that no new street to be thereafter laid out should be of less width than 40 feet, inclusive of footways, & in the case of existing streets, houses to be thereafter erected were to be set back so as to allow of a width of 40 feet:—*Held*: a church was a house, & a perpetual curate in whom the freehold of the site was vested under 43 Geo. 3, c. 108, an owner within the Act.

(2) A temporary church fronting to a road within the borough less than 40 feet wide having been pulled down with a view to erecting a permanent church, the corpn. gave notice to the clergyman

**PART XIII. SECT. 2, SUB-SECT. 7.—D.**  
g. "Building"—What included in term—Parapet wall.]—A local road

Act prohibited the erection of "all houses & every other building whatever" within 30 feet of the centre of the road:—*Held*: this prohibition did not

apply to a parapet wall 1 foot in height surmounted by an iron railing 5 feet 3 inches in height.—*PARTICK POLICE COMRS. v. GREAT WESTERN STEAM*

in charge at the time of a resolution passed by them that the road on which the church abutted must be not less than 40 feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, & it appeared that the street might have been widened on the side opposite without removing any buildings. Afterwards, but not till the foundations of the new church had been put in, the corpn. prescribed a line of building which came within the limits of the church as designed:—*Held*: they were too late, & could not restrain the erection of the church in the manner in which it had been commenced.—*FOLKESTONE CORPN. v. WOODWARD* (1872), L. R. 15 Eq. 159; 42 L. J. Ch. 782; 27 L. T. 574; 37 J. P. 324; 21 W. R. 97.

*Annotation*:—As to (2) *Refd.* A.-G. v. Hatch, [1893] 3 Ch. 36.

**2591. Meaning of "house"—Includes church.]**—*FOLKESTONE CORPN. v. WOODWARD*, No. 2590, ante.

**2592. What is taking down part of wall—Window-sill removed.]**—Applts., the owners of a beer-house licensed before 1869, gave orders to a builder to take out the sashes of a window & alter them. The builder, without their instructions or knowledge, removed the stone sill of the window & substituted for it two courses of brickwork. Applt. was convicted by the justices for an offence under Bristol Improvement Act, 1847 (c. cxxix), s. 17, because he had "taken down part of the front or external wall of a house to be rebuilt or repaired," & had not rebuilt the wall in accordance with the provisions of the sect. On appeal to quarter sessions the conviction was quashed by the recorder:—*Held*: whether the stone sill was or was not part of the external wall of the house, it having been removed without the knowledge of applts., it had not been taken down to be "rebuilt or repaired," & the decision of the recorder must be upheld.—*YABBICOM v. BRISTOL BREWERY, LTD.* (1903), 67 J. P. 261; 1 L. (3. R. 477, D. C.

#### SUB-SECT. 8.—IMPROVEMENT LINE IN STREETS.

See Public Health Act, 1875 (c. 71), s. 33.

#### SUB-SECT. 9.—BREAKING UP STREETS.

**Supply of electricity.]**—See ELECTRIC LIGHTING, Vol. XX., p. 201, Nos. 19, 20.

**Supply of gas.]**—See GAS, Vol. XXV., pp. 471 et seq.

**Supply of water.]**—See WATER SUPPLY.

**Construction & working of railways.]**—See RAILWAYS.

**Construction of sewers & drains.]**—See SEWERS & DRAINS.

**Construction of telegraph & telephone lines.]**—See TELEGRAPHS & TELEPHONES.

**Construction of tramways & light railways.]**—See TRAMWAYS & LIGHT RAILWAYS.

*LAUNDRY CO., LTD.* (1886), 13 R. (Ct. of Sess.) 500; 23 Sc. L. J. 318.—SCOT.

**h. "Regular line of the street"—Meaning of.]**—The expression "regular line of the street" in Police & Improvement (Scotland) Act, 1862, s. 162, means the main line of the buildings forming the street, & not a line indicating that part of the street which is dedicated to the public as highway.—*SCHULZE v. GALASHIELS CORPN.*, [1895]

A. C. 666; 22 R. (Ct. of Sess.) 70; 33 Sc. L. R. 94, H. L.—SCOT.

#### PART XIII. SECT. 2, SUB-SECT. 10.

**k. Action for removal—Evidence.]**—Deft., erected a porch to his house without first obtaining the line of the street & its removal was asked for as an obstruction to the street. The original line of the street could not be proved:—*Held*: it was incumbent upon the city to prove where the line

#### SUB-SECT. 10.—PROJECTIONS IN STREETS.

See Towns Improvement Clauses Act, 1847 (c. 34), ss. 69, 70; Public Health Acts Amendment Act, 1907 (c. 53), ss. 7, 10, 22, 33.

**2593. Projection in front of building—Tray for display of goods—Vested right.]**—By a local Act if any person placed, hung up, or otherwise exposed any furniture, goods, produce, wares, merchandise, matter or thing, so that same projected into or over any footway, or beyond the line of any house, shop or building, at which same was or were exposed, he should be liable to a penalty. Justices refused to convict deft., who was charged under this sect.; but they stated, in the case reserved at complainant's request, that deft. exposed greengrocery, in which he dealt, on a cooler or tray of wood, projecting 2 feet 9 inches beyond the line of the brickwork of his building. This tray fell forward from the shop window, & when used was supported by iron stanchions & hinges. The steps of the adjoining house projected three inches further than this tray during the day. At night, & on Sundays, the tray was not beyond the line of deft.'s & the adjoining house; the street was exceptionally wide at this particular part. The deft.'s premises had been erected between thirty & forty years, & during that period the tenants had always used the same cooler or tray, or something of the same description:—*Held*: the Act must be taken to refer to the line of shop existing at the time of its passing, which in this case was the line of the tray; & the justices were right.—*WILSON v. CUNLIFFE* (1874), 29 L. T. 913; 38 J. P. 231, D. C.

**2594. — Oriel window.]**—A local improvement Act prohibited "projections of any kind made in front of any building over or upon the pavement except shop fronts or doorways":—*Held*: this did not apply to an oriel window, the lower part of which was 15 feet above the pavement.—*GOLDSTRAW v. DUCKWORTH* (1880), 5 Q. B. D. 275; 49 L. J. M. C. 73; 42 L. T. 440; 44 J. P. 410; 28 W. R. 504, D. C.

*Annotations*:—*Expld.* St. Mary, Islington, Vestry v. Goodman (1889), 23 Q. B. D. 154. *Refd.* Fortesque v. St. Matthew, Bethnal Green, Vestry (1891), 60 L. J. M. C. 172.

**2595. — Sign attached to pole.]**—Resp. placed an iron pole through a window to which was attached a flag or advertisement on canvas. The pole was bolted to the main portion of the building by a screw-bolt & nut, & could be removed by unscrewing the bolt & nut:—*Held*: the pole & flag could be a "sign" within Liverpool Improvement Act, 1882 (c. Iv), s. 36.—*GOLDSTRAW v. JONES* (1906), 96 L. T. 30; 71 J. P. 22; 4 L. G. R. 1176; 21 Cox, C. C. 350, D. C.

**2596. Removal of obstructions—Power of local authority.]**—The owner in fee of a house abutting on the highway in 1858 wrongfully enclosed a portion of the highway as a garden. In 1873 the Buxton local board of health served a notice on the occupier to remove the obstruction, & stating that in default it would be removed at his expense. On bill filed by the occupier & owner to restrain

of the streets was.—*HALIFAX (CITY) v. REEVES* (1894), 23 S. C. R. 340.—CAN.

**l. — — —.]**—In an action brought to compel the removal of a porch as an encroachment on the street line, reliance should not be placed on such data as conjectures from the length of side lines on the street line elsewhere.—*A.-G. v. NAGLE* (1898), 40 N. S. R. 165.—CAN.

**m. Projection in front of building—**

*Sect. 2.—Extra metropolitan: Sub-sects. 10, 11, 12, 13, 14, 15 & 16.]*

the local board:—*Held*: assuming the enclosure to be wrongful, the board had power under Towns Improvement (Clauses Act, 1847 (c. 34), ss. 69, 70, to remove the garden as an obstruction to the safe & convenient passage along the highways. *Semble*: (1) the body in whom the guardianship of the highway is vested have, by common law, the right of removing obstructions, which individuals may exercise only in case of special injury; (2) if the board had no right by statute or common law, still the ct. would not restrain them in the same suit in which it decided that the enclosure was an obstruction.—*BAGSHAW v. BUXTON LOCAL BOARD OF HEALTH* (1875), 1 Ch. D. 220; 45 L. J. Ch. 260; 34 L. T. 112; 40 J. P. 197; 24 W. R. 231.

*Annotations.—As to (1) Consd. Denny v. Thwaites* (1876), 2 Ex. D. 21. *Refd. Harris v. Northamptonshire County Council* (1897), 61 J. P. 599.

**2597. — Right of owner to be heard by local authority.]—**A local Act of Parliament appointing improvement comrs. for a town, provided that the occupiers of houses in the town should, within fourteen days of receiving notice in writing from the comrs., cause all signs & projections affixed to their houses, & which, in the judgment of the comrs., should be considered public annoyances or nuisances by reason of their projecting into, or encroaching upon, or otherwise annoying or endangering the public passage along any of the streets within the town, to be taken down or otherwise altered; & in case any occupier should neglect or refuse to comply with any such notice, then the comrs. might cause the sign or projection to be taken down or altered forthwith by any person acting under their authority:—*Held*: the comrs., in exercising their discretion under the Act, were not bound to act as a ct., & give the owner of the sign an opportunity of being heard before them previously to serving him with a notice to remove it, & that the proper course of the owner, if he objected to the notice, was to give notice of his objection to the comrs. & require them to hear him upon it.—*A.-G. v. HOOPER*, [1893] 3 Ch. 483; 63 L. J. Ch. 18; 69 L. T. 340; 57 J. P. 504; 9 T. L. R. 632; 37 Sol. Jo. 702; 8 R. 535.

*Annotation.—Refd. Robinson v. Sunderland Corpn.*, [1899] 1 Q. B. 751.

**Obstruction of highways generally.]—**See Part IX., Sect. 1, sub-sect. 1, *ante*.

**Abatement of nuisance on highway.]—**See Part IX., Sect. 3, sub-sect. 1, *ante*.

#### SUB-SECT. 11.—DOORS AND GATES OPENING OUTWARDS ON TO STREETS.

See Towns Improvement Clauses Act, 1847 (c. 34), ss. 71, 72; Public Health Act, 1875 (c. 55), s. 160.

#### SUB-SECT. 12.—WATER SPOUTS TO HOUSES.

See Towns Improvement Clauses Act, 1847 (c. 34), s. 74; Public Health Act, 1875 (c. 55), s. 160.

*Verandah.]—Held*: a verandah of wood, resting on stone pillars, having its own roof, & firmly attached to a house, was an integral part of the house, & not a porch or projection attached to it, & need not be removed.—*WILLIAMS v. CORNWALL MUNICIPAL CORPN.* (1900), 32 O. R. 255.—*CAN.*

**Water from eaves—Flow across footway.]—**See No. 1343, *ante*.

#### SUB-SECT. 13.—VAULTS, CELLARS AND ARCHES UNDER STREETS.

See Towns Improvement Clauses Act, 1847 (c. 34), ss. 24, 31, 160, 171; Towns Police Clauses Act, 1847 (c. 89), s. 28; Public Health Act, 1875 (c. 55), ss. 10, 26, 73; Public Health Acts Amendment Act, 1890 (c. 59), ss. 6, 7, 35.

**2598. Arch—Removal by local authority—Power to remove—Interference with underground cable.]—**R. & Co. were occupiers of land on both sides of F. street within the urban district of which the W.U.D.C. was the urban authority. In Apr. 1901, R. & Co. constructed a tunnel or culvert 12 feet beneath the carriageway of F. street for the purpose of carrying electric cables in connection with their business. The tunnel consisted of a concrete flooring & a brick archway. They subsequently changed their plans, & cutting through the concrete, laid the cables in pipes upon or nearly upon the clay subsoil, & filled in the flooring with fresh concrete. The W.U.D.C. gave them notice to remove the tunnel in accordance with Public Health Act, 1875 (c. 55), s. 26. R. & Co. then removed the keystone of the arch, the tunnel fell in, & the subsidence was made good with ballast. The W.U.D.C. not being satisfied, brought an action claiming a declaration that they as the urban authority might properly cause the arch, vault, or cellar constructed by defts. under the carriageway of F. street to be altered, pulled down, or otherwise dealt with as the W.U.D.C. should think fit. R. & Co. instituted a cross action for an injunction to prevent the W.U.D.C. from cutting, disturbing, or injuring their pipes or electrical wires. The two actions came on together. It was argued on behalf of the W.U.D.C. that they had a right to remove the whole of the structure, including the pipes & wires:—*Held*: on the evidence, the pipes were not in any part of the structure, & therefore it was unnecessary to decide whether the concrete flooring was part of the tunnel; the W.U.D.C. were entitled to remove the structure, which they could & must do without injuring the pipes or wires.

The injunction in the cross action was granted.—*WALKER URBAN DISTRICT COUNCIL v. WIGHAM, RICHARDSON & Co., LTD., WIGHAM, RICHARDSON & Co., LTD. v. WALKER URBAN DISTRICT COUNCIL* (1901), 85 L. T. 579; 66 J. P. 152; 18 T. L. R. 107; 40 Sol. Jo. 85.

**Cellar flaps—Unprotected or defective.]—**See Part IX., Sect. 1, sub-sect. 1, C., *ante*.

#### SUB-SECT. 14.—FENCES, HOARDINGS AND REFUGES.

See Towns Improvement Clauses Act, 1847 (c. 34), ss. 52, 75–78, 80–82; Public Health Act, 1875 (c. 55), ss. 149–160; Public Health Acts Amendment Act, 1890 (c. 59), ss. 5, 7, 11 (3), 34, 39; Public Health Acts Amendment Act, 1890 (c. 53), ss. 7, 13, 29, 32.

#### PART XIII. SECT. 2, SUB-SECT. 11.

**n. How far an obstruction.]—**Edinburgh Municipal & Police Act, 1879, s. 151, forbids the making of, & gives the corpn. power to order the removal of, any "encroachments, obstructions, or projections, in, upon, or over any

street, footpavement or footpath:—*Held*: a door which opened outwards & unless it was opened did not encroach upon, project over, nor obstruct the adjacent footpath, was not within the sect.—*EVANS v. EDINBURGH CORPN.* (1916), 85 L. J. P. C. 200.—*SCOT.*

**2599. Statutory duty to fence—Dangerous places**—**Local Act.**—Rotherham Borough Extension & Sewerage Act, 1879 (c. xci), s. 81, does not apply to fences by the side of a road which has been a turnpike highway, but applies only to new streets, where there are no fences & which in the opinion of the corpn. are dangerous to the public.—**ROTHERHAM CORPN. v. FULLERTON** (1884), 50 L. T. 364, D. C.

**2600. — Land used to annoyance of public**—**Local Act.**—By Willesden Urban District Council Act, 1903 (c. clxxxi), s. 32, it is provided that "If any land in the district . . . adjoining any street is allowed to remain unfenced or the fences thereof are allowed to be or remain out of repair, & such land is in the opinion of the council owing to the absence or inadequate repair of any such fence a source of danger to passengers, or is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public," the council may require the owner of the land to put up a sufficient fence, & on his default may do the work themselves & recover the expenses from him summarily as a civil debt:—**Held**: it is for the justices before whom proceedings for the recovery of the expenses are taken, & not for the council, to determine whether the land "is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public."—**UPJOHN v. WILLESDEN URBAN COUNCIL**, [1914] 2 K. B. 85; 83 L. J. K. B. 736; 109 L. T. 792; 78 J. P. 54; 30 T. L. R. 62; 58 Sol. Jo. 81; 11 L. G. R. 1215, C. A.

**Under Public Health Acts.**—*See* BOUNDARIES, Vol. VII., pp. 293, 294.

**Omission to fence dangerous place.**—*See* Part IX., Sect. 1, sub-sect. 7, *ante*.

**2601. Hoardings—When abutting on street.**—A hoarding for advertisements 60 feet long & 12 feet above a hedge, no part of such hoarding being nearer to the street than 2 feet & having the hedge between it & the street, does not "abut" on the street.—**BARNETT v. COVELL** (1903), 90 L. T. 29; 68 J. P. 93; 20 T. L. R. 134; 2 L. G. R. 215, D. C.

**Annotations.**—**Distd.** **Rockleys v. Pritchard** (1909), 101 L. T. 575. **Expld.** **Stockport Corpn. v. Rollinson** (1910), 102 L. T. 567. **Refd.** **R. v. S. E. Ry.** (1910), 74 J. P. 137.

**2602. —**—**Applts.** were convicted under sect. 31 of a local Act, 1897, which imposed a penalty on any person who erected without the consent of the corpn. a hoarding to be used either partly or wholly for advertising purposes in or abutting on or adjoining any street. The hoarding stood more than 10 feet back from the street, & there was no fence between it & the street:—**Held**: as the hoarding had become for the time

being *de facto* the boundary of the street there was evidence to support the conviction.—**ROCKLEYS, LTD. v. PRITCHARD** (1909), 101 L. T. 575; 74 J. P. 11; 7 L. G. R. 1069, D. C.

**Annotation.**—**Consd.** **Stockport Corpn. v. Rollinson** (1910), 102 L. T. 567.

**2603. — Question of fact.**—The mere fact that a strip of land to which the public have no access happens to be between an advertisement hoarding & a highway, does not prevent such hoarding from being "in or abutting on or adjoining any street." Whether such hoarding is "in or abutting on or adjoining any street" in such circumstances is a question of fact to be decided by the justices.—**STOCKPORT CORPN. v. ROLLINSON** (1910), 102 L. T. 567; 74 J. P. 236; 8 L. G. R. 609, D. C.

#### SUB-SECT. 15.—NAMING OF STREETS.

*See, now*, Public Health Act, 1925 (c. 71), ss. 17–19.

**2604. Alteration of name by local authority—Remedy of landowner.**—A landowner laid out a new street & called it by a certain name, but the local authority shortly afterwards decided that it should be known by a different name & put up that name in the street. The landowner objected & defaced the name so put up, & was convicted under Towns Improvement Clauses Act, 1847 (c. 34), s. 64, which provides that the local authority shall cause to be put up in every street "the name by which such street is to be known," & impose a penalty upon any person who "pulls down or defaces any such name":—**Held**: the landowner had misconceived his remedy, if any, & the conviction was right.—**COLLINS v. HORNSEY URBAN COUNCIL**, [1901] 2 K. B. 180; 70 L. J. K. B. 802; 84 L. T. 839; 65 J. P. 600; 49 W. R. 620; 17 T. L. R. 487; 45 Sol. Jo. 523; 20 Cox, C. C. 8, D. C.

#### SUB-SECT. 16.—VALIDITY OF BYE-LAWS.

**Prohibition of music or noises in streets.**—*See* PUBLIC HEALTH.

**Selling articles in street.**—*See* PUBLIC HEALTH.

**Regulation of street traffic.**—*See* PUBLIC HEALTH; STREET & AERIAL TRAFFIC.

**Regulation of open spaces.**—*See* PUBLIC HEALTH.

**Annoyance of persons in streets.**—*See* PUBLIC HEALTH.

**Street betting.**—*See* GAMING & WAGERING, Vol. XXV., pp. 435, 436.

**Construction of new streets.**—*See* Part XIII., Sect. 2, sub-sect. 6, B., *ante*.

## Part XIV.—Footpaths.

### SECT. 1.—IN GENERAL.

**2605. Footpath ploughed up—Right of public to deviate.**—The public had a right to use a footpath across the field of A., but subject to the right of A. to plough it up when he ploughed the rest of the field. He did so plough it up, & having done so, did not set out or mark the line of the path, but left the public to tread it out. The public continued to walk across the field in the direction in which the path had been, but soon finding the path in a muddy & bad condition, turned out of it, & walked on either side thereof. To prevent them from doing so A. placed hurdles on the parts upon which the public so walked, leaving a space of about 6 feet in width where the path had been. Resp. having thrown down the hurdles, an action was brought against him by A. in a county ct. The judge having given judgment in favour of resp., the ct. reversed such judgment, holding that resp. could not claim a right to go off the line of the footpath or a right to pull down the hurdles. —ARNOLD v. HOLBROOK (1873), L. R. 8 Q. B. 90; 42 L. J. Q. B. 80; 28 L. T. 23; 37 J. P. 229; 21 W. R. 330.

**2606. Form part of highway.**—DERBY COUNTY COUNCIL v. MATLOCK BATH & SCARTHIN NICK URBAN DISTRICT, No. 2609, *post*.

**2607. Liability to repair—Footpaths in urban districts—Alongside main roads—Local Government Act, 1888 (c. 41), s. 11.**—The above sect. imposes upon the county council the duty of maintaining & repairing, in an urban sanitary district, the footways at the sides of disturnpiked roads which were constituted main roads by Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13.—*Re* WARMINSTER LOCAL BOARD & WILTS COUNTY COUNCIL (1890), 25 Q. B. D. 450; 59 L. J. Q. B. 434; 62 L. T. 902; 51 J. P. 375; 38 W. R. 670, D. C.

*Annotations*:—*Dist.* Curtis v. Kesteven County Council (1890), 45 Ch. D. 504. *Apprvd.* *Re* Burslem Corp'n. & Staffordshire County Council, [1890] 1 Q. B. 24; Derby County Council v. Matlock Bath & Searthin Nick U. C., [1896] A. C. 315. *Reid.* Acton U. D. C. v. London United Tramways (1901), Ltd. (1908), 100 L. T. 80.

**2608.** ————]—A county council is liable under sub-sect. 2 of above sect. to contribute towards the cost of maintaining & repairing in an urban district the paved footways upon or at the sides of disturnpiked roads which have become main roads under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13.—*Re* BURSLEM CORPN. & STAFFORDSHIRE COUNTY COUNCIL, [1896] 1 Q. B. 24; 65 L. J. Q. B. 1; 73 L. T. 651; 59 J. P. 772; 44 W. R. 356; 12 T. L. R. 48, C. A.

**2609.** ————]—(1) A county council is liable under sub-sect. 2 of above sect. to make to the urban authority an annual payment

towards the costs of the maintenance & repair in an urban district of the paved footpaths upon or at the sides of disturnpiked roads which have become main roads under Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 13.

(2) A footpath by the side of a road for the use of foot passengers is part of the road (LORD MACNAGHTEN).—DERBY COUNTY COUNCIL v. MATLOCK BATH & SCARTHIN NICK URBAN DISTRICT, [1896] A. C. 315; 65 L. J. Q. B. 419; 74 L. T. 595; 60 J. P. 670; 12 T. L. R. 350, H. L. ————]—*See, generally*, Parts VI. & VII., *ante*.

**2610. Extent of repair—Right to plough up footpath—Repair preventing exercise of right.**—The inhabitants of the parish of P., in the county of S., enjoyed the right to use at all times a footpath across a close, of which pltf. was tenant. The tenant of the close had from time immemorial enjoyed the right to plough up the footpath. Defts., who were surveyors of highways to the parish, so repaired the footpath that pltf. could neither plough through it nor lift his plough over it; pltf. thereupon brought an action of trespass against defts.:—*Held*: the action was maintainable.—ARNOLD v. BLAKER (1871), L. R. 6 Q. B. 433; 40 L. J. Q. B. 185; 35 J. P. 775; 19 W. R. 1090, Ex. Ch.

*Annotations*:—*Reid.* Arnold v. Holbrook (1873), L. R. 8 Q. B. 96. *Mentd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 110.

**2611.** ———— **Alteration of character—Cuttings to improve levels.**—A surveyor of highways has no right at common law, under guise of repairing a public path to improve it into a totally different kind of path & a more commodious path than it used to be. Accordingly he cannot at common law make cuttings to improve the levels, or build bridges, where none formerly existed, to carry the path across streams.—RADCLIFFE v. MARSDEN URBAN DISTRICT COUNCIL (1908), 72 J. P. 475; 6 L. G. R. 1186.

—]—*See, generally*, Part VIII., *ante*.

**2612. Footpath in dangerous condition—Repair by local authority—In default of owner—Public Health Acts Amendment Act, 1907 (c. 53), s. 30.**—A public footway ran along the top of a high bank of the river Mersey. By the action of the weather & by erosion caused by the river eating away the bank, portions of the bank upon which the footpath ran were washed away, portions of the footway fell into the river, & further portions of the bank were threatening to fall into the river. The footway was thus rendered dangerous to persons lawfully using it. Appls. were the owners of parts of the bank & of the site over which the footway ran; but there was no obligation upon them to repair the footway *ratione tenuræ*. The local authority gave appls. notice, under above

J. R. N. S. 38.—N.Z.

**q. Evidence of public footpath.**—The mere passage of persons along a road for the purpose of fishing is not evidence of a public footpath.—SHERIFF v. FERGUSON (1844), 6 Dunl. (Ct. of Sess.) 530; 16 Sc. Jur. 244.—SCOT.

**r. Rights of owner of estate burdened with public right of footpath.**—In reality a public right of footpath is really the same as a servitude right, excepting that the dominant tenement is the whole kingdom, & not a special subject or estate, & no good reason seems to exist why the equitable rights

### PART XIV. SECT. 1.

**c. Footpath in dangerous condition—Repairs by local authority.**—A sidewalk on one of the principal streets of a town, had been laid down for so long a period as to become unsound, the scantling being so rotten as to be unable to hold the nails fastening the boards placed across them & its condition was such as to impose on the corp'n. a constant supervision over it; one of the boards was missing for a week, leaving a hole into which a person fell: *Held*: notice to the corp'n. of such defect in the sidewalk must be assumed,

& liability for the damage occasioned by the accident imposed on them.—MCGARR v. FRESKOTT TOWN (1902), 23 C. L. T. 281; 4 O. L. R. 280; 1 O. W. R. 439.—CAN.

**p. Obstruction on footpath—Crossing part of footpath.**—A. was convicted of obstructing a footpath by leaving his horse & cart standing on a crossing over the footpath while he was loading the cart:—*Held*: a crossing was part of the footpath, & any one allowing a vehicle to remain on a crossing necessarily allowed it to remain across the footpath, & obstructed it.—BRIGGS v. CONN, 2



5. Footpath near golf links—Person on footpath struck by golf ball—Pleading.]—*M'LEOD v. ST. ANDREWS' MAGISTRATES*, [1924] S. C. 960.—SCOT.

*Sect. 3.—Stepping-stones and footbridges. Sect. 4. Part XV. Sects. 1 & 2: Sub-sect. 1, A. (a).]*

a new bridge in the place of the old one. There was no obligation on pltf. or defts. to repair the old bridge. In an action of trespass:—*Held*: defts. had no right to abate the nuisance by rebuilding the bridge.—*CAMPBELL DAVYS v. LLOYD*, [1901] 2 Ch. 518; 70 L. J. Ch. 714; 85 L. T. 59; 49 W. R. 710; 17 T. L. R. 678; 45 Sol. Jo. 670, C. A.

2623. — By surveyor of highways.]—*RADCLIFFE v. MARSDEN URBAN DISTRICT COUNCIL*, No. 2611, *ante*.

2624. — Enlarged bridge—Whether public rights increased—Rights of adjoining owner.]—Deflt. was indicted for obstructing a footway. A bridge which spanned a small stream connected a footway which passed through deflt.'s land. The bridge had been washed away, & a new one was erected, which deflt. objected to, on the ground that it was much larger than the former bridge, & was calculated to give the public enlarged rights to use the footway to his detriment. Deflt. had cut down the new bridge at the point at which it rested on his land. Deflt. was at the trial found guilty, & he now moved for a new trial on the ground that the verdict was against the evidence:—*Held*: deflt. had not been injured by the enlargement of the new bridge, & he was able to prevent, if he so wished, cattle crossing over into his land by the erection of a stile. Rule refused.—*R. v. BARNES* (1884), 1 T. L. R. 24, D. C.

Bridges generally.]—See Part XV., *post*.

#### SECT. 4.—GUARD POSTS.

2625. Erection by highway authority—Duty to erect—At extremities of path—Highway Act, 1835 (c. 50).]—In an information under above Act, against the surveyor of a parish for not putting up posts across a public bridleway & footway at its extremities:—*Held*: he was not bound by above Act to do so.—*ELLIS v. WOODBRIDGE* (1860), 8 C. B. N. S. 290; 29 L. J. M. C. 183; 2 L. T. 237; 25 J. P. 231; 6 Jur. N. S. 1017; 8 W. R. 437; 141 E. R. 1177.

2626. — Duty to attach lights—Prevention of accidents—Public Health Act (1875), c. 55.]—Defts., the highway & lighting authority, had erected a post at the entrance & in the centre of a footpath to prevent cattle straying up the footpath, & near the post they placed a lamp, which they were in the habit of lighting at nights. Pltf.

was passing along the footpath at night, when the lamp was out or not lighted, & in consequence of the darkness came against the post & suffered injuries:—*Held*: an action lay against defts.—*LAMLEY v. EAST RETFORD CORPN.* (1891), 55 J. P. 133, C. A.

*Annotations*:—*Apld.* *McClelland v. Manchester Corpn.*, [1912] 1 K. B. 118. *Expld.* *Carpenter v. Finsbury B. C.*, [1920] 2 K. B. 195. *Consd.* *Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132. *Refd.* *Sheringham U. D. C. v. Halsey* (1904), 68 J. P. 395. *Mentd.* *Papworth v. Battersea B. C.* (1913) 12 L. G. R. 308.

2627. — Prevention of user by wheeled traffic—Path set out under inclosure award.]—A lane in the seaside town of S., which ran from the High Street to the top of the cliff, & varied from 6 feet to 4 feet 4 inches in width, had in 1811 been set out under an award by the inclosure comrs. under a local Act as a public footpath. In 1903 the S. urban district council erected in the centre of the footpath an iron post to prevent the lane being used for wheeled vehicles. Deflt. having overthrown the post, the district council brought an action against him in respect of the alleged trespass, claiming damages & an injunction; & claiming further a declaration that the lane was a public footpath vested in the council & under the council's control, & that it was not a carriageway. Deflt. contended that the land was a public highway for all persons to go & return on foot, & with all manner of beasts & vehicles, & alleged that since the award of the comrs. there had been a dedication of the way as a cart road. Alternatively, he contended that before or since the award there had been a private right for the class consisting of the owners & occupiers of S. to use the way for carts. The evidence showed, on the one hand, that when carts were driven through the land the foot passengers were obstructed, & had to wait until the carts had completed their passage, & on the other hand, that for more than forty years past barrow carts, sometimes drawn by donkeys or ponies, had been continuously used in the lane:—*Held*: (1) the action, being in substance one for damages for interference with pltf.'s property could be maintained without the A.-G. being made a party; (2) the user for wheeled traffic was in its inception & all along a public nuisance, & no length of time could legalise it, & as regards dedication, no one had the power to dedicate even with the consent of the local authority. Damages & an injunction accordingly.—*SHERINGHAM URBAN DISTRICT COUNCIL v. HOLSEY* (1904), 91 L. T. 225; 68 J. P. 395; 20 T. L. R. 402; 48 Sol. Jo. 416; 2 L. G. R. 744.

*Annotation*:—As to (1) *Consd.* *A.-G. & Spalding R. D. C. v. Garner*, [1907] 2 K. B. 430.

## Part XV.—Bridges and Approaches thereto.

### SECT. 1.—IN GENERAL.

**2628. Bridge as "public passage or place built upon"**—Within local paving Act.]—By a local paving Act, the comrs. were to inspect "any street, square, or other public passage or place which now is or hereafter may be built upon, or in building," & if, upon inspection, they should be of opinion that the foot or carriageways required paving, etc., they were to "give notice to the owners, etc., of any such land, tenement, etc., situate in any such street, square, or other passage or place," & to compel them to pay the expenses of paving, etc.:—*Held*: a bridge, which formed part of a public highway through streets communicating with each end of the bridge, & which was built of brick over a canal & had brick walls from four to five feet high on either side, was not "a passage or place built upon" within the Act.—*ARNELL v. REGENT'S CANAL CO.* (1854), 14 C. B. 504; 23 I. J. C. P. 155; 18 Jur. 632; 2 W. R. 457; 130 E. R. 232.

**2629. Bridge as street.**—A bridge may be so situate as to be a street within the meaning of a statute.—*BEAVER v. MANCHESTER CORPN.* (1857), as reported in 26 L. J. Q. B. 311.

**2630. Approach to new bridge—Bridge substituted for ferry—Whether approach a highway.**—Before 1791 an old highway from London to York crossed the Ouse at Selby by means of a ferry. In 1791 the Selby Bridge Act was passed. After reciting that the building of a bridge near the ferry would be of great public utility, & that the persons named were willing to build a bridge at their own expense & to compensate the owner of the ferry rights, the Act authorised the incorporation of the said persons as the Co. of Proprietors of Selby Bridge, empowered them to build a bridge near the ferry with proper approaches, which were to all intents & purposes to be considered part of the bridge, & to charge tolls to all persons crossing the bridge. Under the Act the ferry rights & the soil of the approaches were vested in the co. The co. claimed that the approaches were their private property & that without their permission no one was entitled to be on them except for the purpose of crossing the bridge:—*Held*: the Act substituted one highway for another; the old highway consisted of the approaches to the ferry plus the passage across the river; the new highway consisted of the approaches to the bridge plus the bridge; & *plfss.*, being owners of land adjoining an approach, & all persons lawfully entering upon or leaving such land were entitled to free access to it over the approach.—*YORKSHIRE, EAST RIDING, COUNTY COUNCIL v. SELBY BRIDGE PROPRIETORS*, [1925] 1 Ch. 841; 133 L. T. 628; 41 T. L. R. 802; 69 Sol. Jo. 775; 23 L. G. R. 547.

### PART XV. SECT. 1.

**t. What is a bridge.**—A bridge which crosses a river, except at certain seasons when the water cuts off communication between the bridge & the dry land, is none the less a bridge within Public Works Act, 1884, ss. 11 & 12.—*RANGIORA (MAYOR, ETC.) v. ASHLEY ROAD DISTRICT* (1887), 6 N. Z. L. R. 119.—N.Z.

### PART XV. SECT. 2, SUB-SECT. 1.—A. (a).

**a. What is a county bridge—Length**

*fixed by statute.*—A structure for crossing a lake, with a wooden section 243 feet long spanning the waters at low water, & embankments at either end of 140 feet & 260 feet respectively, the whole width being covered at high water, is a bridge over 300 feet in length, within Consolidated Municipal Act, 1903, s. 617 (a), whereby bridges over that length may be declared county bridges.—*Re MUD LAKE BRIDGE* (1906), 12 O. L. R. 159.—CAN.

**b. ———.**—A bridge held not to be a bridge over 300 feet in length, within Consolidated Municipal Act,

*Liability to repair new or improved bridges.]—See Part XV., Sect. 3, post*

### SECT. 2.—REPAIR OF BRIDGES.

#### SUB-SECT. 1.—LIABILITY TO REPAIR.

##### A. County Council.

##### (a) In General.

*See Statute of Bridges, 1530–31 (c. 5); Bridges Act, 1803 (c. 59); Bridges Act, 1814 (c. 90), s. 2; Highway Act, 1835 (c. 50), s. 5; Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 20; Local Government Act, 1888 (c. 41), ss. 3, 6, 11, 79; County of Sussex Act, 1865 (c. 37), s. 13; Annual Turnpike Acts Continuance Act, 1875 (c. xciv), s. 10.*

**2631. What is a county bridge.**—Highway Act, 1835 (c. 50), provides for the repair of highways in a specified manner not at the expense of the hundreds. By sect. 5, "highways," in the construction of the statute, "shall be understood to mean all roads, bridges, except county bridges, carriageways, cartways," etc.:—*Held*: "county bridges" includes hundred bridges, & consequently hundred bridges are not highways under Highway Act, 1835, & therefore, hundreds are not relieved by that Act from liability to repair hundred bridges.

*Semble*: even if hundred bridges were not included in "county bridges" hundreds would not be relieved by Highway Act, 1835, from their liability to repair hundred bridges, as there are no negative words in the statute to relieve hundreds from that liability.

County bridge is an expression not known to the law. It is merely a compendious way of speaking of a public bridge the county is liable to repair (*BOVILL, C.J.*).—*R. v. CHART & LONGBRIDGE (INHABITANTS)* (1870), L. R. 1 C. C. R. 237; 39 L. J. M. C. 107; 22 L. T. 416; 34 J. P. 454; 18 W. R. 791; 11 Cox, C. C. 502, C. C. R.

**2632. ——— Whether every bridge in a highway.**—The inhabitants of a county are bound to repair every public bridge within it, unless when indicted for the non-repair of it, they can show by their plea that some other person, or body politic or corporate, is liable; & every bridge in a highway is, by Statute of Bridges, 1530–31 (c. 5), taken to be a public bridge for this purpose. Therefore where Queen Anne, in 1708, for her greater convenience in passing to & from Windsor Castle, built a bridge over the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, with a toll, which belonged to the Crown; & she & her

1903, s. 617 (a), the ct. being of the opinion that the embankments at the ends of the 44 feet long wooden structure which spanned the creek were not part of the bridge.—*Re WILLIAMSBURG TOWNSHIP & UNITED COUNTIES OF STORMONT, DUNDAS & GLENGARRY* (1908), 15 O. L. R. 586; 11 O. W. R. 235.—CAN.

**c. ———.**—A county judge has no jurisdiction to declare a bridge to be a county bridge unless it is of the greater length than 300 feet; that means an existing bridge.—*Re MALAHIDE TOWNSHIP & ELGIN COUNTY*

**Sect. 2.—Repair of bridges: Sub-sect. 1, A. (a), (b) & (c).]**

successors maintained & repaired the bridge till 1790, when, being in part broken down, the whole was removed, & the materials converted to the use of the King, by whom the ferry was re-established as before:—*Held*: the inhabitants of the county of Bucks, who, in answer to an indictment for the non-repair of that part of the bridge thirteen years afterwards, pleaded these matters, & traversed that the bridge was a common public bridge, were bound to rebuild & repair it.—*R. v. BUCKS (INHABITANTS)* (1810), 12 East, 192; 104 E. R. 76.

*Annotation*:—*Refd.* *R. v. Southampton* (1886), 17 Q. B. D. 424.

**2633.** — — — — —.]—The inhabitants of the county, being *prima facie* liable to repair all public bridges within it, are therefore, as it seems, bound to repair an ancient horse bridge, unless they show that others are bound to repair the same.

All public bridges are *prima facie* repairable by the inhabitants of the county without distinction of foot, horse, or carriage bridge (*LORD ELLENBOROUGH, C.J.*). *R. v. SALOP COUNTY (INHABITANTS)* (1810), 13 East, 95; 104 E. R. 303.

*Annotation*:—*Mentd.* *R. v. Sutton Coldfield* (1874), L. R. 9 Q. B. 153.

**2634.** — — — — —.]—*R. v. SOUTHAMPTON COUNTY (INHABITANTS), BLACK BRIDGE, SANDOWN BRIDGE & TINKER'S BRIDGE CASES*, No. 2787, *post*.

**2635.** — — — — — **Bridge alongside highway—Alternative way in time of flood.**—A bridge used only on occasion of floods, & lying out of & alongside the road commonly used:—*Held*: a public bridge, & the county liable to repair.—*R. v. DEVON (INHABITANTS)* (1824), 1 Ky. & M. 114, N. P.

**2636. Liability of county—Unless contrary proved.**—(1) County liable to repair a bridge, unless they can charge a particular person.

(2) If a private person build a private bridge, which afterwards becomes a public convenience the whole county is bound to repair it.

(3) The sessions cannot make an order for the repair of a highway; for they have no jurisdiction but on presentment.

(4) The inhabitants of the whole county cannot of their own authority change the bridge or highway from one place to another if it cannot be without Act of Parliament (*per CUR.*).

(5) If it [a rule of ct.] be not obeyed an attachment may go against the inhabitants of the whole county & catch as many as one can of them (*HOLT, C.J.*).

(6) This matter concerning the whole county, suggestion may be of any other county's being

next adjacent, & the venue shall come from thence for the necessity of an indifferent trial (*per CUR.*).—*R. v. WILTS (INHABITANTS)* (1704), 6 Mod. Rep. 307; 1 Salk. 359; 3 Salk. 381; Holt, K. B. 339; 87 E. R. 1046.

*Annotations*:—*As to* (2) *Fold.* *R. v. Kent* (1814), 2 M. & S. 513. *As to* (4) *Refd.* *Blisset v. Har* (1744), Willes, 508. *As to* (6) *Apld.* *R. v. Cumberland* (1795), 6 Term Rep. 194.

**2637.** — — — — — **By prescription in tenure.**—If no one be bound by tenure or prescription to repair a bridge, it shall be repaired by the inhabitants of the county wherein it is situate.—*R. v. OXFORDSHIRE (INHABITANTS)* (1827), 1 B. & Ad. 297, n.; 5 L. J. O. S. M. C. 127; 109 E. R. 797. *Annotation*:—*Consd.* *lt. v. Derbyshire* (1842), 2 Q. B. 745.

**2638.** — — — — —.]—Where a bridge has been built over a public highway, prior to Bridges Act, 1803 (c. 59), a county council can only avoid their common law liability to repair the bridge by proving that the liability to repair it is cast on some other person than themselves.—*A.-G. & DONCASTER RURAL DISTRICT COUNCIL v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL* (1903), 67 J. P. 173; 19 T. L. R. 192; 1 L. G. R. 223.

**2639.** — — — — —.]—*R. v. BUCKS (INHABITANTS)*, No. 2632, *ante*.

**2640.** — — — — —.]—*R. v. SALOP COUNTY (INHABITANTS)*, No. 2633, *ante*.

**2641.** — — — — —.]—*R. v. NEW SARUM (INHABITANTS)*, No. 2677, *post*.

**2642.** — — — — — **Bridge included in extended borough.**—*R. v. NEW SARUM (INHABITANTS)*, No. 2677, *post*.

**2643.** — — — — — **Division of a county—Isle of Ely.**—*R. v. ISLE OF ELY (INHABITANTS), OLD BEDFORD BRIDGE & NEW BEDFORD BRIDGE CASES*, No. 2705, *post*.

**2644.** — — — — — **Isle of Wight.**—*R. v. SOUTHAMPTON COUNTY (INHABITANTS), BLACK BRIDGE, SANDOWN BRIDGE & TINKER'S BRIDGE CASES*, No. 2787, *post*.

**Alteration of boundaries.**—*See* Sub-sect. 1, G., *post*.

**Powers of county surveyor.**—*See* Sect. 6, *post*.

**(b) Bridges super flumen vel cursum aqua.**

**2645. General rule.**—(1) The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of *flumen vel cursum aqua*, that is, water flowing in a channel between banks more or less defined, although such channel may be occasionally dry, & therefore, where the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, & for convenient access to the bridge a raised causeway had been made, having arches or culverts at intervals, for the passage of the

(1817), 38 O. L. R. 600; 34 D. L. R. 559.—**CAN.**

**d.** — — — — — **Independent of approaches.**—The approaches to a bridge are independent of the bridge itself, & should not be considered for determining the length of the bridge for the purposes declaring it a county bridge.—*Re ASHFIELD TOWNSHIP & HURON COUNTY (1817)*, 38 O. L. R. 538; 34 D. L. R. 338.—**CAN.**

**e. Liability of county—Appeal from award—Repeal of statute—“Arbitration pending.”**—A township corpn. obtained an award against a county corpn. under Consolidated Municipal Act, 1892, s. 533a, for part of the cost & maintenance of certain bridges, & while an appeal against the award was pending, 57 Vict. c. 50 (O.), repealing s. 533a, was passed:—*Held*: there was no “arbitration pending” by reason

of the appeal at the time of the passing of the repealing Act. *Pltfs.* were entitled, notwithstanding the repeal of s. 533a, to recover the proportionate amount paid or agreed to be paid by them, to the date of the passing of the repealing Act.—*MORRIS TOWNSHIP CORPN. v. HURON COUNTY CORPN.* (1896), 27 O. R. 341.—**CAN.**

**f. Township bridge—User by neighbouring municipalities.**—*Re MCNAB TOWNSHIP & RENFREW COUNTY* (1905), 11 O. L. R. 180; 6 O. W. R. 523.—**CAN.**

**g.** — — — — — **Bridge situate in more than one county.**—Roads & Bridges (Scotland) Act, 1878, s. 88, applies to bridges locally situate in more than one county or burgh.—*GLASGOW (PROVOST) v. HILLHEAD POLICE COMRS.* (1886), 11 App. Cas. 699.—**SCOT.**

**PART XV. SECT. 2, SUB-SECT. 1.—A. (b).**

**h. Abandonment by company—Assumption by county.**—A bridge built in 1857, by a joint stock co. over the Grand river, which separates two townships was destroyed by a storm, rebuilt in 1863, & kept in repair since by tolls collected upon it. In 1873 it became out of repair & dangerous, & the secretary of the co. wrote to the county council that the co. abandoned the bridge. The county having been indicted for not repairing it:—*Held*: they were not liable; for by the statute then in force, 35 Vict. c. 33, s. 9, the abandonment by the co. could only be by bye-law; & there having been no bridge there before, there was nothing for the county council to resume, & they had refused to assume this bridge, which had become a public

flood water, which were equally necessary to the safety of the main bridge & the causeway:—*Held*: the inhabitants of the county were not bound to repair such arches being at the distance of more than 300 feet from the end of the main bridge.—*R. v. OXFORDSHIRE (INHABITANTS)* (1830), 1 B. & Ad. 289; 8 L. J. O. S. K. B. 354; 109 E. R. 794.

**2646.** —[*R. v. WHITNEY (INHABITANTS)*, No. 2650, *post*.]

**2647.** —[A structure, 1275 feet in length, consisted of forty-two arches, divided, at some points, by a stone causeway, at others by the piers only. A common highway passed over it. A river flowed constantly under five of the arches at one end of the structure; a brook flowed constantly under an arch at the opposite end. The other arches lay across meadow land; the water flowed under all of them in times of flood; & under most of them there was stagnant water at all times. The county had immemorially repaired the whole structure, & had rebuilt & widened several of the arches under which there was no constant stream. Parts of the whole structure, other than the five arches, had been presented at different times, under the name of S. Bridge, by the grand jury, as out of repair, & repaired thereupon by the county:—*Held*: upon these facts, the whole structure must be deemed a bridge, repairable by the county: there being no general rule of law that arches, under which there is not a constant running stream, cannot form a part of a county bridge.—*R. v. DERBYSHIRE (INHABITANTS)* (1842), 2 Q. B. 745; 2 Gal. & Dav. 97; 11 L. J. M. C. 51; 6 Jur. 483; 114 E. R. 290.

**2648.** Channel must be defined—Channel occasionally dry.—[*R. v. OXFORDSHIRE (INHABITANTS)*, No. 2645, *ante*.]

**2649.** Repair of culverts—Not forming main part of bridge—Three hundred feet distant.—[*R. v. OXFORDSHIRE (INHABITANTS)*, No. 2645, *ante*.]

**2650.** Whether structure bridge or culvert—Question of fact.—[If a judge *ad nisi prius*, being pressed to say whether, upon the evidence before him, a particular structure comes within the description of a bridge, gives his opinion on that point, as upon a question of fact, the alleged inaccuracy of such opinion is no ground for moving to set aside the verdict on account of misdirection. Upon a question, whether a particular structure be a bridge or a culvert, the fact of its being without parapets is not decisive. Nor the fact that it is built over water flowing in a channel between banks; though nothing can be a bridge which is not built over such a flow of water.—*R. v. WHITNEY (INHABITANTS)* (1835), 3 Ad. & El. 69; 4 Nev. & M. K. B. 594; 3 Nev. & M. M. C. 56; 1

Har. & W. 147; 4 L. J. M. C. 86; 111 E. R. 339.

*Annotations*:—*Reld. R. v. Haughton* (1853), 1 E. & B. 501; *Cornwell v. Metropolitan Sewers Comrs.* (1855), 10 Exch. 771; *R. v. Lancaster County* (1868), 32 J. P. 711.

**2651.** —[A bridge has been built before Bridges Act, 1803 (c. 59), over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged 2½ feet. It was part of a sheet of water crossing low land, & at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. The judge left it to the jury whether this structure were a bridge over a stream of water, for, if so, it was not necessary that it should be for the convenience of the public under sects. of the Act, but the county were liable to repair it.—*R. v. GLOUCESTER (INHABITANTS)* (1842), Car. & M. 506.

**2652.** —Absence of parapets.—[*R. v. WHITNEY (INHABITANTS)*, No. 2650, *ante*.]

**2653.** —Question of degree.—[A certain cutting was made in a moss to drain off the water in the reign of Elizabeth, by arrangement between the owners. Before 1812 a highway crossed it, & the water was conveyed in a wooden trunk two feet wide & deep under the surface. In 1812 the highway was improved, & the wooden trunk converted into a solid culvert made of stone, & in 1840 this again was replaced with a larger opening, square at the top, but similarly formed under & across the highway. The parish repaired the highway & structure, but latterly a structure had been again made, enlarging the capacity so as to admit more water, & it was sought to make the county liable for repairs:—*Held*: it was a question of degree whether it was a culvert or a bridge, & it was not a bridge.—*R. v. LANCASTER COUNTY (INHABITANTS)* (1868), 32 J. P. 711.

(c) *Bridges built or repairable by Turnpike Trustees.*

**2654.** County liable for repair—Funds of trustees for repair—Power to levy tolls.—[*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)*, No. 2666, *post*.]

**2655.** —Funds in hand.—[Indictment against a county for not repairing a bridge in a public highway. Plea, that by a certain Act of Parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, & were empowered to make & repair bridges; that the bridge in question was erected by the trustees under & by virtue of that Act, & that the trustees were liable & ought to repair. Replication, that the trustees were not liable to repair:—*Held*: the bridge being built for public purposes in a public highway, the common law liability to repair attached upon

highway by dedication, tolls having been imposed upon it.—*R. v. HALDIMAND COUNTY CORPN.* (1876), 38 U. C. R. 396.—CAN.

**b.** —[OTTAWA & GLOUCESTER ROAD CO. v. OTTAWA (CITY) (1913), 24 O. W. R. 344; 4 O. W. N. 1015; 10 D. L. R. 218.—CAN.

**1.** Bridge between two counties.—[Where a bridge is constructed over navigable waters, & connects two opposite shores lying in different counties, such bridge is between such two counties, & they are jointly answerable for its maintenance.—*HAROLD v. SIMCOE COUNTY* (1868), 18 C. P. 9.—CAN.

**m.** River crossing boundary between two municipalities.—[A stream called Black Creek crosses the road forming the boundary line between the

townships of E. & D., & is crossed by a bridge on that road:—*Held*: Black Creek is a river, within Municipal Act, s. 413; & the county corpn. were liable for the bridge being out of repair.—*McHARRY v. ELLICE TOWNSHIP* (1877), 1 A. R. 628; 39 U. C. R. 546.—CAN.

**n.** —[NORTH DORCHESTER TOWNSHIP v. MIDDLESEX COUNTY (1889), 16 O. R. 658.—CAN.

**o.** Bridge wholly within county—On former county boundary.—[The duty of maintaining a bridge over a river crossing the road on the former boundary line or deviation therefrom, & which is wholly in a county is cast upon that county alone.—*VICTORIA COUNTY v. PETERBOROUGH COUNTY* (1888), 15 A. R. 617.—CAN.

**p.** —Width of river—How de-

termined.—[The width of a river at the level attained after heavy rain & freshets each year, should be taken into consideration in determining the liability under R. S. O. (1887) c. 184, s. 532; the width at ordinary high-water mark is not the test of such liability.—*NEW HAMBURG VILLAGE CORPN. v. WATERLOO COUNTY CORPN.* (1893), 22 S. C. L. 296.—CAN.

**q.** —Bridge between town & township.—[A bridge crossing a river, the boundary between a town & township, became out of repair:—*Held*: Municipal Act (1903), s. 618, as amended by 9 Edw. VII. c. 73, s. 29, imposed upon the county the duty to maintain such bridge.—*Re PEMBROKE TOWNSHIP & RENFREW COUNTY* (1910), 16 O. W. R. 454; 21 O. L. R. 366; 1 O. W. N. 927.—CAN.

*Sect. 2.—Repair of bridges: Sub-sect. 1, A. (c) & (d) i., ii. & iii.]*

the inhabitants of the county as soon as it was built, & the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge. *Semble*: if that fact had been averred & proved, still the county would have been primarily liable, & must have taken their remedy against the trustees.

—*R. v. OXFORDSHIRE (INHABITANTS)* (1825), 4 B. & C. 194; 6 Dow. & Ry. K. B. 231; 3 Dow. & Ry. M. C. 79; 3 L. J. O. S. K. B. 198; 107 E. R. 1031.

*Annotations*:—*Distd. R. v. Isle of Ely* (1850), 15 Q. B. 827. *Refd. Little Bolton v. R.* (1843), 12 L. J. M. C. 104.

**2656. — Replacement of old bridge by new—Increased user by public.**—A particular parish was bound by prescription to repair an old wooden footbridge used by carriages only in times of flood. About forty years ago the trustees of the turnpike road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way. To an indictment against the county for not repairing this bridge:—*Held*: a plea that the parish had immemorially repaired & still ought to repair the said bridge was not supported by evidence of the above facts; & the burden of repairing the new bridge must be borne by the county at large.—*R. v. SURREY (INHABITANTS)* (1810), 2 Camp. 455.

*Annotation*:—*Distd. R. v. Kent* (1811), 13 East, 220.

**2657. County not liable for repair—Bridge not erected to satisfaction of county surveyor.**—Trustees appointed by a local Turnpike Act are individuals or private persons within Bridges Act, 1803 (c. 59), s. 5; & a bridge erected by such trustees after the passing of the Act, but not under the direction or to the satisfaction of the county surveyor, etc., is not a bridge which the inhabitants of the county are liable to repair.—*R. v. DERBY COUNTY (INHABITANTS)* (1832), 3 B. & Ad. 147; 1 L. J. M. C. 15; 110 E. R. 55.

*Annotation*:—*Fold. North Staffordshire Ry. v. Hanley Corpn.* (1909), 73 J. P. 477.

**2658. Expiry of turnpike trust—Annual Turnpike Acts Continuance Act, 1870 (c. 73)—No actual repair by trustees.**—By a local Act of 1827 a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local Act of the same year a canal co. was empowered to make, maintain, & support bridges across their navigation, provided no existing liability to repair a bridge not erected or altered by the co. should be affected. The co. raised the surface of this bridge, without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their Act. They did this without reference to the county surveyor or justices. By Annual Turnpike Acts Continuance Act, 1870 (c. 73), s. 12, where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, & shall be kept in repair accordingly:—*Held*: by this alteration this bridge had not become repairable by the canal co., & this general provision of the last Act was not limited to those bridges erected by private expense, which alone were repairable by a county under Bridges Act, 1803 (c. 59), s. 5; nor to bridges which had been actually repaired by trustees.—*R. v. SOMERSET* (1878), 38 L. T. 452; 42 J. P. 501, D. C.

*Annotation*:—*Refd. North Staffordshire Ry. v. Hanley Corpn.* (1909), 73 J. P. 477.

**2659. — Addition to old bridge.**—An ancient bridge existed between county B. & county C., & H. was bound *ratione tenuræ* to repair it. Afterwards a turnpike trust was created, & the trustees repaired the road & approaches. The trustees finding floods on the B. side, added, apparently without authority, two new arches, thereby extending the bridge & approaches & improving the road. The new arches were wholly on the B. side, & within the county of B., the turnpike trust having ceased:—*Held*: under sect. 12 of above Act, the burden of repairing the new portion of the bridge was now on the county of B.—*R. v. BUCKINGHAM COUNTY* (1878), 43 J. P. 175, D. C.

**2660. — Bridge situated within borough—Separate trusts for road & bridge.**—Where a toll bridge has been built, & a turnpike road made in connection with it under a local Act, on the termination of the period of the trust, though the bridge is within the boundaries of a municipal borough, it becomes such a county bridge under sect. 12 of above Act, as to make it repairable by the inhabitants of the county, unless there is some immemorial usage imposing a liability on the inhabitants of the borough to repair all bridges within its boundaries.

A toll bridge was made over the B. river at W. for the purpose of connecting the back streets of W. with the county districts on the other side of the river. A turnpike road was made in connection with the bridge; both the road & the bridge were constructed under one Act. There were separate trusts of the bridge & the road, but the trustees of the one were trustees of the other. This bridge was within the municipal boundaries of the borough of W. On the expiration of the trust the county repaired the road, but the bridge was allowed to fall into disrepair. The county of D., in which the bridge was situated, was thereupon indicted for its non-repair, & was found guilty:—*Held*: the county was rightly convicted; & as there was nothing shown in the case to cast the liability to repair on the borough in which the bridge was situated, on the expiration of the period of the trust affecting the bridge, it became a county bridge repairable by the inhabitants of the county under sect. 12 of above Act.—*R. v. DORSET (INHABITANTS)* (1881), 45 L. T. 308, D. C.

**2661. — Reconstructed bridge.**—About the year 1835, under the powers of a local Turnpike Act, a new turnpike road was constructed & was carried over a canal, now owned by plffs., by a bridge erected by the road trustees. This road ceased to be a turnpike road in 1875. The bridge, which was situate in a county borough, of which defts. were the highway authority, replaced an accommodation bridge erected by plffs.' predecessors in title. Owing to mining operations the bridge & the canal subsided, & plffs., acting reasonably for the protection of the canal, raised the banks, with the result that the level of the water came so near to the under-surface of the bridge that the latter became an obstruction to the navigation; the bridge was also dangerous to traffic passing over it. In an action by plffs. in effect to compel defts. to abate the nuisance, it was agreed between the parties that the bridge should be reconstructed at its original level, the cost of the work to be ultimately borne by the parties according to their respective legal liabilities:—*Held*: (1) upon the construction of the local Turnpike Act, the road & the bridge were repairable by the road trustees, consequently by virtue of above Act the bridge had become a county bridge & was repairable by defts., & repair involved

reconstruction; (2) inasmuch as the obligation to reconstruct did not authorise debts. to create a nuisance, they were liable for the cost of raising the bridge to its original level as well as for the cost of reconstruction; (3) a report & an estimate prepared by the then surveyor to the road trustees with reference to the construction of the turnpike road were in the circumstances admissible in evidence as entries made by a deceased official in the discharge of his duty.—*NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN.* (1909), 73 J. P. 477; 26 T. L. R. 20; 8 L. G. R. 375, C. A.

(d) *Bridges built by Private Individuals.*

i. *In Existing Highway.*

**2662. Public user & utility.**—*R. v. WILTS (INHABITANTS)*, No. 2636, *ante*.

**2663.** —[—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)*, No. 2785, *post*.

**2664.** — **Dedication to public.**—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)*, No. 2683, *post*.

**2665.** — **Bridge built prior to Bridges Act, 1803 (c. 59).**—*R. v. ISLE OF ELY (INHABITANTS)*, *OLD BEDFORD BRIDGE & NEW BEDFORD BRIDGE CASES*, No. 2705, *post*.

**2666.** — **Erection for private benefit.**—(1) The county or riding is liable to the repair of a bridge built by trustees under a Turnpike Act, there being no special provision for exonerating them from the common law liability, or transferring it to others, though the trustees were enabled to raise tolls for the support of the roads.

(2) If a bridge be of public utility, & used by the public, the public must repair it, though built by an individual: *aliter* if built by him for his own benefit, & so continued, without public utility, though used by the public.—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)* (1802), 2 East, 342; 102 E. R. 399.

*Annotations*:—*As to* (1) *Consd. R. v. Oxfordshire* (1825), 4 B. & C. 194; *R. v. Derby* (1832), 3 B. & Ad. 147. *As to* (2) *Consd. R. v. Isle of Ely* (1850), 15 Q. B. 827; *R. v. Southampton* (1887), 19 Q. B. D. 590. *Refd. R. v. St. Benedict, Cambridge* (1821), 4 B. & Ald. 447. *Generally, Refd. R. v. New Sarum* (1845), 7 Q. B. 941.

**2667.** — **Access to works.**—*R. v. GLAMORGAN (INHABITANTS)* (1788), 2 East, 356, n.; 102 E. R. 405.

*Annotations*:—*Consd. R. v. Southampton* (1887), 19 Q. B. D. 590. *Refd. R. v. Cumberland* (1795), 6 Term Rep. 191.

**2668.** — **Substitution of bridge for ferry.**—*R. v. BUCKS (INHABITANTS)*, No. 2632, *ante*.

**2669.** — **Bridge over ford.**—Where a person about forty-five years back erected a mill & dam thereto for his own profit, *per quod*, he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, & the miller, afterwards built a bridge over it, which the public had ever since used:—*Held*: the county & not the miller were chargeable with the reparation.—*R. v. KENT (INHABITANTS)* (1814), 2 M. & S. 513; 105 E. R. 472.

*Annotations*:—*Distd. R. v. Kerrison* (1815), 3 M. & S. 526. *Distd. R. v. Isle of Ely* (1850), 15 Q. B. 827. *Consd. R. v. Southampton* (1887), 19 Q. B. D. 590.

**2670.** — [—(1) Upon not guilty to an indictment against the inhabitants of a county for not repairing a public bridge, it is competent to debts. to give evidence of the bridge having been repaired by private individuals.

(2) A bridge may be a public bridge, which is used by the public at all such times as are dangerous to pass through the river.

The bridge, like many others, may have

originated in the convenience & for the protection of the individual, but it still may be for public right (LORD ELLENBOROUGH, C.J.).—*R. v. NORTHAMPTON (INHABITANTS)* (1814), 2 M. & S. 262; 105 E. R. 379.

*Annotation*:—*As to* (2) *Consd. Mercer v. Woodgate* (1869), L. R. 5 Q. B. 26.

**2671.** — [—(1) A bridge made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, & not by the builder (*per Cur.*).

(2) The liability to repair a highway has not been made to depend upon the quantum of benefit (*per Cur.*).—*ROBBINS v. JONES* (1863), 15 C. B. N. S. 221; 3 New Rep. 85; 33 L. J. C. P. 1; 9 L. T. 523; 10 Jur. N. S. 239; 12 W. R. 248; 143 E. R. 768.

*Annotations*:—*Generally, Mentd. Gautret v. Egerton* (1867), L. R. 2 C. P. 371; *Hamiton v. St. George, Hanover Square* (1873), L. R. 9 Q. B. 42; *Silverton v. Marriott* (1888), 59 L. T. 61; *Lane v. Cox* (1896), 66 L. J. Q. B. 193; *Cavalier v. Pope*, [1906] A. C. 428; *Ryall v. Kidwell*, [1914] 3 K. B. 135; *Dobson v. Horsley*, [1915] 1 K. B. 634; *Horridge v. Makinson* (1915), 84 L. J. K. B. 1294; *Bromley v. Mercer*, [1922] 2 K. B. 126; *Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74.

ii. *Not in Existing Highway.*

**2672. Dedication & adoption—Question for jury.**

—(1) Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to & the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility & is used by the public is not necessarily conclusive against the county on the question of liability, user & utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user & public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing & binding the county.

(2) Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted; but under very special circumstances the ct. may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment.—*R. v. SOUTHAMPTON COUNTY (INHABITANTS)* (1887), 19 Q. B. D. 590; 56 L. J. M. C. 112; 57 L. T. 261; 16 Cox, C. C. 271; *sub nom. R. v. HAMPSHIRE (INHABITANTS)*, 52 J. P. 52; 3 T. L. R. 712, D. C.

*Annotations*:—*As to* (1) *Refd. Campbell-Davys v. Lloyd* (1901) 85 L. T. 59. *As to* (2) *Consd. R. v. N. E. Ry.* (1901), 70 L. J. K. B. 548.

**2673. Public user & utility—How far conclusive.**—*R. v. SOUTHAMPTON COUNTY (INHABITANTS)*, No. 2672, *ante*.

iii. *Bridges built before or after 1803.*

*See Bridges Act, 1803 (c. 59), s. 5; Bridges Act, 1814 (c. 90), s. 2; Annual Turnpike Acts Continuance Act, 1870 (c. 73), s. 12; Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 21; Local Government Act, 1888 (c. 41), ss. 6, 109 (1).*

**2674. Bridges Act, 1803 (c. 59)—Bridge built after Act—Approval of county authority.**—By above Act no bridge thereafter to be erected or built, is to be repairable at the expense of the county, unless erected under the direction of the county surveyor, etc. This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the Act. Trustees under a turnpike Act having built a bridge across



*Sect. 2.—Repair of bridges: Sub-sect. 1, A. (d) iii., & B., C., D. & E. (a).]*

a stream, where a culvert would have been sufficient, but a bridge is better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary.—*It. v. LANCASHIRE (INHABITANTS) (1831), 2 B. & Ad. 813; 1 L. J. M. C. 1; 109 E. R. 1344.*

*Annotation.—Reid. It. v. Southampton (1852), 16 J. P. 438.*

**2675.** ————*—R. v. DERBY COUNTY (INHABITANTS), No. 2657, ante.*

**2676.** ————**Bridge built before Act—Bridge repaired & widened.**—Before above Act there had been a public county bridge, which was of wood, resting on stone abutments. After that Act passed, the wooden part of the bridge was, during a flood, carried some distance down the river, but the stone abutments remained. Part of the wooden materials being afterwards collected together, were, with new materials formed into the upper part of a bridge, which was wider than it had been before the flood, & placed upon the old abutments. This was done at the expense of the parish, & not under the direction of the county surveyor:—*Held:* this was not a bridge “erected or built” after the passing of above Act; & the inhabitants of the county were bound to repair it.—*R. v. DEVON (INHABITANTS) (1833), 5 B. & Ad. 383; 2 Nev. & M. K. B. 212; 1 Nev. & M. C. 223; 2 L. J. M. C. 74; 110 E. R. 832.*

**Bridges built or repairable by turnpike trustee — Expiry of turnpike trust.**—*See Sub-sect. 1, A. (c), ante.*

#### *B. Borough Council.*

*See Municipal Corporations Act, 1882 (c. 50), s. 119; Local Government Act, 1888 (c. 41), ss. 32 (2), 34 (2), 35 (2), 72.*

**2677. Enlargement of borough — Bridge previously repairable by county.**—A borough, incorporated by charter with a *non intransmittant* clause, was enlarged, under 2 & 3 Will. 4, c. 64, s. 35, & 5 & 6 Will. 4, c. 76, s. 7, by the addition of a parish in the same county, containing a bridge, which, until that time, the county had repaired. There was no evidence that the borough had been used to maintain any bridges:—*Held:* the transfer of the new district did not render the borough liable to repair the bridge.—*R. v. NEW SARUM (INHABITANTS) (1845), 7 Q. B. 941; 1 New Mag. Cas. 372; 2 New Sess. Cas. 133; 15 L. J. M. C. 15; 5 L. T. O. S. 369; 10 J. P. 55; 10 Jur. 176; 115 E. R. 742.*

*Annotations.—Reid. It. v. Broom (1849), 15 Q. B. 813; It. v. New Windsor (1875), 34 L. T. 172; R. v. Monck (1877), 2 Q. B. 544; R. v. Dorset (1881), 45 L. T. 308. **Mentd.** It. v. Wilts JJ. (1848), 2 New Mag. Cas. 410.*

**2678. Quarter sessions borough—Contribution to cost of non-county bridges—Local Government Act, 1888 (c. 41), ss. 6, 35.**—The exercise by a county council of the powers conferred on them by sect. 6 of above Act of purchasing or taking over existing bridges not then being county bridges, or erecting

new bridges, or maintaining, repairing, or improving any bridges so purchased, taken over, or erected, is a “purpose for which the quarter sessions of the county” were “authorised to incur cost” within sect. 35 (2); & consequently a quarter sessions borough, not being a county borough, but containing a population of ten thousand or upwards, which, by reason of its liability to repair the bridges within the borough, was at the passing of the Act exempt from contributing to the costs of the then existing county bridges, cannot be assessed to county contributions in respect of costs incurred by the county council in the exercise of any of the above-mentioned powers.—*BURY ST. EDMUNDS CORPN. v. WEST SUFFOLK COUNTY COUNCIL, [1898] 2 Q. B. 246; 67 L. J. Q. B. 750; 78 L. T. 624; 62 J. P. 486; 47 W. R. 16; 14 T. L. R. 436; 42 Sol. Jo. 523, D. C.*

#### *C. Urban and Rural Highway Authorities.*

*See Public Health Act, 1875 (c. 55), ss. 147, 148; Local Government Act, 1888 (c. 41), s. 70 (3); Local Government Act, 1894 (c. 73), s. 25.*

**2679. Agreement with railway company—Repair of road over bridge—Bridge widened by tramway company—Liability of railway company.**—Under statutory powers conferred in 1859, resps. constructed a railway through the parish of T., certain highways being carried over the railway by a bridge constructed by resps. The roadways over the bridge & the approaches became repairable by resps. under Railways (Consolidation) Act, 1815 (c. 20), s. 46. In 1877 appls.’ predecessors agreed with resps. to keep in repair the roads over the bridge & the approaches for a payment by resps. of £10 a year. Appls.’ predecessors & appls. kept them in repair down to 1903. In 1900 a tramway co. promoted a Bill for power to construct a tramway over the bridge & approaches. Resps. entered into an agreement with the tramway co. that the latter should take over resps.’ liability with reference (*inter alia*) to the bridge & the approaches & should widen the bridge & keep in repair the road when so widened. Appls. also made an agreement with the tramway co. that the tramway co. should not construct the tramway over the bridge or the approaches until the widening of the bridge had been carried out in such manner as resps. might approve. After both these agreements had been entered into, the tramway co.’s Bill was passed & under the Act of Parliament the bridge was taken down by & at the expense of the tramway co., & a new, larger, & wider bridge was erected, & the approaches widened by the tramway co. to the satisfaction of resps., the new bridge being capable of taking four railway tracks below it, instead of two tracks as previously. The tramway was duly constructed & was opened on Apr. 1, 1903, & the road forming part of the highway before the widening took place became repairable by the tramway co. under Tramways Act, 1870 (c. 78).

#### **PART XV. SECT. 2, SUB-SECT.**

**r. Bridge dedicated to public—In public use for long period.**—Where a bridge connecting two highways was dedicated to the public & in public use for a number of years, forming part of a thoroughfare on which houses had been built, for which it was the only direct mode of communication to the south, & for nine or ten years had been repaired by the municipality out of the public funds, although no bye-law had been passed establishing or assenting it:—*Held:* the municipality were bound to keep it in a proper state

of repair.—*R. v. YORKVILLE VILLAGE (1872), 22 C. P. 431.—CAN.*

**s. Bridge crossing drainage work.**—*PARSON v. BROKENHEAD MUNICIPALITY, [1922] 3 W. W. R. 133; 70 D. L. R. 294.—CAN.*

**t. Whether liable to build new bridge to replace bridge destroyed.**—There is nothing at common law or in Municipal Act, 1914, which imposes an obligation on the municipality to build a new bridge in the place of a bridge destroyed.—*FISHER v. TOWNSHIP OF EGREMONT, [1923] 4 D. L. R. 1180; 53 O. L. R. 238.—CAN.*

**u. Approach—Failure to provide guard.**—The failure of a municipal corp. to provide an adequate guard for the approach to a bridge at a place where the narrowing of the road & other conditions make such approach dangerous is a breach of its statutory duty to keep the highway in repair.—*HASTINGS COUNTY v. CLINTON, [1924] 2 D. L. R. 217; [1921] S. C. R. 195; affg. 53 O. L. R. 266.—CAN.*

**b. Road Boards substituted for county council.**—When a proportion of the cost of maintaining a bridge falls on

On Dec. 1, 1903, applts. in consequence of the substitution of a new bridge & the increase in the surface of the road declined to continue to repair the road under the agreement of 1877 & gave notice to resps. to repair the road over the bridge under Railways Clauses Consolidation Act, 1845, s. 46. Resps. annually tendered to applts. £10 & all arrears under the agreement of 1877. Applts. summoned resps. for neglecting to repair the road over the bridge & the approaches:—*Held*: in the circumstances the rebuilding & widening of the bridge was, so far as resps. were concerned, the act of a paramount authority, namely, the tramway co., under their statutory powers; resps.' obligation so far as it had reference to the old roadway, was not altogether done away with; the agreement of 1877 still stood; any extra burden occasioned by the widening thrown upon the railway co. had to be borne by the tramway co.; & the justices were right in dismissing the summons.—*TEDDINGTON URBAN DISTRICT COUNCIL v. LONDON & SOUTH WESTERN RY. CO.* (1910), 102 L. T. 328; 74 J. P. 119; 8 L. G. R. 253. D. C.

#### D. Hundred, Township and Parish.

See Bridges Act, 1814 (c. 90), s. 2; Local Government Act, 1888 (c. 41), s. 3 (1).

**2680. Hundred—Prescription—Increase of area.]**—A hundred may be charged by prescription with the reparation of a bridge; & this, although it appears that, by a statute within time of legal memory, one of the townships parcel of the hundred was then annexed to it.—*R. v. OSWESTRY (INHABITANTS)* (1817), 6 M. & S. 361; 105 E. R. 1278.

*Annotation*:—*Mentd.* R. v. St. Martin, New Sarum (1846), 9 Q. B. 241.

**2681. — Custom & usage.]**—A hundred or parish may be usage & custom be chargeable to the repair of a bridge erected within it (*LORD ELLENBOROUGH, C.J.*).—*R. v. ECCLESFIELD (INHABITANTS)* (1818), 1 B. & Ald. 348; 106 E. R. 128.

*Annotations*:—*Consd.* R. v. West Riding of Yorkshire (1821), 4 B. & Ald. 623. *Refd.* R. v. New Sarum (1845), 7 Q. B. 941. *Mentd.* G. W. Ry. v. Denchworth Surveyors of Highways (1861), 25 J. P. 342; Freeman v. Read (1863), 4 B. & S. 174; R. v. Ashby Polyville (1866), L. R. 1 Q. B. 213; R. v. Rollett (1875), L. R. 10 Q. B. 469; R. v. Central Wingham (1877), 36 L. T. 798; Brocklebank v. Thompson, [1903] 2 Ch. 344.

**2682. — Effect of Highway Act, 1835 (c. 50), s. 5—Liability of parish.]**—*R. v. CHART & LONGBRIDGE (INHABITANTS)*, No. 2631, *ante*.

**2683. Townships—Prescriptive liability—Old bridge enlarged.]**—Where to an indictment against a riding for not repairing a public carriage bridge, the plea alleged that certain townships had immemorially used to repair the said bridge: evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, will not support the plea. Where townships have so enlarged a bridge which they were before bound to repair as a foot bridge, they shall still be liable *pro rata*. Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county are bound to repair it.—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)* (1787), 2 East, 353, n.; 102 E. R. 403.

*Annotations*:—*Consd.* R. v. Surrey (1810), 2 Camp. 455. *Apld.* R. v. Middlesex (1832), 3 B. & Ald. 201. *Refd.* R. v. Adderbury East (1813), 5 Q. B. 187.

**2684. — — —.]**—(1) An indictment charged that there was, in township A., an im-

memorial public bridge, & that the inhabitants of A. had been used, etc., from time whereof, etc., to repair the said bridge. Plea, not guilty. On the trial it appeared that the inhabitants had repaired an immemorial public bridge, but that, in one year, within memory, they had widened the roadway of the bridge from 9 to 16 feet:—*Held*: whether the added part were repairable by the township or not, there was no variance between the indictment & the evidence.

(2) *Semhle*: the township was liable to repair the added part.

(3) In an indictment against inhabitants, every inhabitant is a party, whether rated or not, & a parish cannot relieve a party from his liability in a case of this sort, by not putting him upon the rate (*PATESON, J.*).—*R. v. ADDERBURY EAST (INHABITANTS)* (1843), 5 Q. B. 187; 1 Dav. & Mer. 324; 13 L. J. M. C. 9; 2 L. T. O. S. 118; 8 J. P. 375; 7 Jur. 1035; 114 E. R. 1219.

*Annotation*:—*Generally*, *Mentd.* R. v. Vickery (1818), 3 New Ross, Cas. 193.

**2685. — Consideration.]**—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)*, No. 2785, *post*.

**2686. — Ratione tenuræ.]**—An indictment stated that an ancient bridge, situate within the parishes of Machynlleth & Penngog, was out of repair, & that the inhabitants of the said parish of Penngog & town of Machynlleth aforesaid, from time immemorial, by reason of the tenure of certain lands in the said parish of Penngog & town of Machynlleth, have repaired the bridges:—*Held*: upon error, the indictment was bad, because it did not appear that the bridge was situate within the town, & therefore the inhabitants of the town were not liable, unless a special consideration was shown; & here no sufficient consideration was shown, inasmuch as the inhabitants could not hold land, & therefore could not be liable by reason of tenure.—*R. v. MACHYNLLETH (INHABITANTS)* (1823), 2 B. & C. 166; 3 Dow. & Ry. K. B. 388; 2 Dow. & Ry. M. C. 91; 107 E. R. 345.

*Annotation*:—*Consd.* R. v. Bishop Auckland (1834), 1 Ad. & El. 744.

**2687. Parish—Custom & usage.]**—*R. v. ECCLESFIELD (INHABITANTS)*, No. 2681, *ante*.

**2688. — — —.]**—A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage.—*R. v. HENDON (INHABITANTS)* (1833), 4 B. & Ad. 628; 2 L. J. M. C. 55; 110 E. R. 592.

*Annotation*:—*Mentd.* Bradley v. James (1853), 13 C. B. 822.

**2689. — — —.]**—*R. v. ELY (INHABITANTS)* (1871), 35 J. P. Jo. 277.

**2690. — Highway Act, 1835 (c. 50), s. 5.]**—*R. v. CHART & LONGBRIDGE (INHABITANTS)*, No. 2631, *ante*.

#### F. Individuals.

##### (a) In General.

**2691. Prescriptive liability—Corporate body.]**—Though a charter of Edward VI., granted upon the recited prayer of the inhabitants of the borough of Stratford-upon-Avon, "that the King would esteem them, the inhabitants, worthy to be made, reduced, & erected into a body corporate & politic"; & thereupon proceeding to "grant," without any word of confirmation, "unto the inhabitants of the borough, that the same borough should be a free borough for ever thereafter"; & then proceeding to incorporate them by the name of the bailiffs & burgesses, etc.; would, without

a county where Counties Act, 1876, is suspended, the Minister for Public Works can apportion the cost among the various Road Boards substituted in place of the County Council, but cannot charge any of the cost upon Borough Councils.—*RANGIORA (MAYOR, ETC.) v. ASHLEY ROAD DISTRICT* (1887), 6 N. Z. L. R. 119.—N.Z.

*Sect. 2.—Repair of bridges: Sub-sect. 1, E. (a) & (b).]*

more, imply a new incorporation: yet where the same charter recited that it was an ancient borough in which a guild was theretofore founded & endowed with lands, out of the rents, revenues, & profits of which a school & an alms-house were maintained, & a bridge was from time to time kept up & repaired; which guild was then dissolved, & its lands lately come into the King's hands; & further reciting that the inhabitants of the borough, from time immemorial, had enjoyed franchises, liberties, free customs, jurisdictions, privileges, exemptions, & immunities, by reason & pretence of the guild & of charters, grants, & confirmations to the guild, & otherwise, which the inhabitants could not then hold & enjoy by the dissolution of the guild & for other causes, by means whereof it was likely that the borough & its government would fall into a worse state without speedy remedy; & thereupon the inhabitants of the borough had prayed the King's favour for bettering the borough & govt. thereof, & for supporting the great charges which from time to time they were bound to sustain, to be deemed worthy to be made, etc., a body corporate, etc., & thereupon the King, after granting to the inhabitants of the borough to be a corp., as before stated, granted them the said bounds & limits as the borough & the jurisdiction thereof from time immemorial had extended to: & then the King, "willing that the alms-house & school should be kept up & maintained as theretofore," without naming the bridge, " & that the great charges to the borough & its inhabitants from time to time incident, might be thereafter the better sustained & supported, granted to the corp. the lands of the late guild: & it further appearing by parol testimony, as far back as living memory went, that the corp. had always repaired the bridge:—*Held*: taking the whole of the charter & the parol testimony together, (1) this was a corp. by prescription, though words of creation only were used in the incorporating part of the charter of Edward VI.; (2) the burden of repairing the bridge was upon such prescriptive corp., during the existence of the guild before that charter; (3) though the guild, out of their revenues, had in fact repaired the bridge; which was only in case of the corp., & not *ratione tenuræ*; & the corp. were still bound by prescription, & not merely by tenure; & therefore a verdict against them upon an indictment for the non-repair of the bridge, charging them as immemorably bound to the repair of it, was sustainable.—*R. v. STRATFORD-UPON-AVON CORPN.* (1811), 14 East, 348; 104 E. R. 636.

*Annotations.—As to (1) Held.* Newcastle-upon-Tyne, Master Pilots & Seamen v. Hamond (1848), 12 L. T. O. S. 151. *As to (2) Held.* Topper v. Nichols (1864), 18 C. B. N. S. 121. *As to (3) Consd.* *R. v. Birmingham & Gloucester Ry.* (1842), 3 Q. B. 223.

**2692. Toll bridge—Right to toll for maintenance of bridge—Bridge out of repair—Ferry established.**—An Act of 20 Geo. 2, after reciting that it would be for the convenience of the inhabitants of the counties of Surrey & Middlesex that a bridge should be built across the Thames from W. to S., enacted that it "shall & may be lawful for S., his heirs & assigns, to build the said bridge." & it was further enacted, "that for & in consideration of the great charges & expenses S. his heirs, or assigns, would be at, not only in building the bridge, but also in erecting & maintaining, other matters necessary to be erected, etc., it shall & may be lawful for the said S., his heirs & assigns, from time to time to take" certain tolls by way

of pontage for every person, carriage or horse passing the bridge. & after reciting that it may happen that the bridge may receive such damage as to be dangerous or impassable, it further enacted that it such case "it shall & may be lawful" to S., his heirs & assigns, to set up a ferry across the river as near the bridge as conveniently may be, & take for the passage over the ferry the pontage granted by the Act, "provided that the ferry shall not continue longer than is necessary for repairing or rebuilding the bridge." The bridge was made extra-parochial, & was not to be deemed a county bridge so as to make either Surrey or Middlesex liable to repair it. A subsequent Act of 20 Geo. 3, after reciting that by the former Act certain tolls & powers had been granted to S. to build the bridge, & that it had been accordingly built & passable for many years, & that it is now in a ruinous condition, & if not effectually repaired or rebuilt would be manifestly to the inconvenience of the public, & that M. was the sole proprietor, & had proposed to effectually repair or rebuild it, & that the pontage granted under the former Act had been found by experience greatly inadequate to the expense of building & keeping in repair the same, enacted that it should be lawful to M., his heirs & assigns, to take, under this & the former Act, certain increased tolls. The bridge having been built under the first Act, the public constantly used it, & the proprietors for the time being took the tolls & exercised the powers of the two Acts, & did all the necessary repairs until the year 1859, when the principal arch fell in, & the bridge became impassable. On this deft., the present proprietor of the bridge, set up a ferry, & took, & continues to take, the tolls authorised by the two Acts:—*Held*: upon the true construction of the two statutes, although there was no duty expressly imposed, yet, inasmuch as the taking of the tolls was on condition & in consideration of building & maintaining the bridge, deft., at least as long as he remained proprietor & took the tolls, was bound to reinstate the bridge & maintain it in a state practicable for passage. When the parties agree that if judgment be given for pltf., a *mandamus* may issue, this means if the ct. think fit that it shall do so.—*NICHOLL v. ALLEN* (1862), 1 B. & S. 934; 31 L. J. Q. B. 283; 6 L. T. 699; 10 W. R. 741; 121 E. R. 962, Ex. Ch.

*Annotations.—Consd.* *Winch v. Thames Conservators* (1872), L. R. 7 C. P. 458. *Refd.* *Guest v. Poole & Bourne-mouth Ry.* (1870), L. R. 5 C. P. 553; *R. v. Maidenhead Corp.* (1882), 51 L. J. Q. B. 444.

**2693. Charity fund for repair—Repair by public authority—Reimbursement from charity trustees.]**—By a deed of feoffment of Mar. 4, 1576, one H. conveyed certain land to feoffees to the use & behoof of the reparation of, among other things, U. Bridge, & by an order of May 7, 1851, it was declared that the trustees were bound to set apart a third of the annual rents & profits of the charity estate for this purpose, any surplus to be accumulated. As the result of two private Acts of Parliament of 1846 & 1881, & an agreement between the justices & the S. comrs., part of the existing U. Bridge was a swing bridge, constructed to open to allow traffic on the river to pass to & fro. By virtue of these Acts & this agreement the comrs. were bound to keep in repair the opening portion of the bridge. Having spent a sum of over £200 in 1909 on these repairs the comrs. claimed to be reimbursed by the trustees of the charity out of the funds accumulated in their hands. The county council objected to the fund being applied for the benefit of the comrs. on the ground that

the swing bridge was on a different footing to the rest of the bridge :—*Held* : (1) the repairs done by the comrs. were reparations of the bridge & the fund was by the terms of the feoffment applicable to such reparations, though the burden of repair had been cast by the legislature on a public body ; (2) the opening portion of the bridge was part of a bridge of special construction & the trustees were bound to keep the whole bridge in repair so far as the charity funds applicable for the purpose sufficed.—*Re HALL'S CHARITY, SEVERN COMRS. v. CHARITY TRUSTEES & WORCESTERSHIRE COUNTY COUNCIL* (1911), 76 J. P. 9 ; 28 T. L. R. 32 ; 10 L. G. R. 11.

**2694. Bridge under control of drainage commissioners—Repair of bridge not "drainage work."**

—By Somersetshire Drainage Act, 1877 (c. xxxvi), appts. exercised an exclusive jurisdiction over the arterial drainage of separate & distinct river valleys in Somersetshire, including the valley of the river P. Resps. were a drainage district board & had exclusive jurisdiction over the non-arterial drainage of the lands in the district of the P. reaching to & including the L. Bridge. That bridge had existed from early times & carried the high road connecting Exeter, Taunton, Bath, & other populous places. Before 1839 the bridge consisted of nine arches so constructed as to impede the flow of water down stream, & until 1839, the bridge & the roadway over it were repaired by the L. corpn. In Mar. 1839, an agreement was made between that corpn. & the "Company of Proprietors of the P. Navigation," a co. which was incorporated by Parrett Navigation Act, 1836 (c. ci), hereinafter called "the co.," whereby the corpn. agreed to pay £500 towards the expenses to be incurred by the co. in building a new bridge over the P. The co. erected the new bridge, & the money was duly paid. Sect. 10 of Parrett Navigation Act, 1839 (c. xxxvii), empowered the co. to make & levy certain tolls on all goods carried to or through or beyond L. Bridge if the co. pulled down the old bridge & rebuilt it with not more than three arches, so as to allow a freer & easier passage of the water & so as to give a carriageway & a footway of a certain width, provided that "after the completion of the said bridge the said co. shall at all times thenceforth, at their own costs & charges, keep the same bridge & the roadway over the same in good & sufficient repair." By Somersetshire Drainage Act, 1877 (c. xxxvi), ss. 117, 118, the whole undertaking of the co., together with all its powers & liabilities, was transferred to appts., & by sect. 121 they were empowered to use the undertaking for the drainage of lands within their jurisdiction & to abandon the user of the undertaking for the purpose of navigation together with the power of levying tolls. By s. 2, the expression "drainage work" was defined as including "all works which the comrs. or district board have power to execute or acquire authority over under the Act." By s. 32, the powers of the comrs. & of the district board extended to "maintenance of existing works" & included the repairing of all bridges :—*Held* : the repair of the roadway over the bridge was not "drainage work" within the Act of 1877, & appts. were not entitled to recover the cost of repairing it from resps.—*SOMERSETSHIRE DRAINAGE COMRS. v. LANGPORT DRAINAGE DISTRICT BOARD* (1919), 89 L. J. K. B. 273 ; 122 L. T. 378 ; 84 J. P. 10 ; 18 L. G. R. 87, D. C.

**2695. Bridge over fen drain—Discretion of commissioners to repair.**—Certain comrs. for draining of fen land were appointed under a local Act of the reign of George II., & their powers extended by

an Act of the reign of George III., passed in 1801. In 1873 they sold certain land adjoining a bridge which crossed one of the drains forming part of their drainage system, but not, as was found as a fact, any part of the soil of the bridge. In that year they repaired the bridge, & they again repaired it in 1902. *Pltf.* was the present owner of the land sold in 1873, & in 1902 the then owner was the sole comr. :—*Held* : *pltf.* had failed on the facts to prove any liability in the comrs. to keep the bridge in repair if in their discretion they no longer thought it necessary to do so.—*TUCK v. UPWELL, OUTWELL, DENVER & WELNEY DRAINAGE COMRS.* (1922), 87 J. P. 97 ; 21 L. G. R. 17.

**2696. Covenant to repair—Until bridge "taken over" by local authority—What amounts to "taking over."**—Public Health Act, 1875 (c. 55), s. 4, defines "street" as including "any highway . . . & any public bridge, not being a county bridge, & any road. . . ."

By a deed made in 1900 one G. obtained liberty to construct a bridge over a watercourse belonging to two canal cos. & to carry a road thereover, & he covenanted to repair & maintain the bridge until the road & bridge were "taken over" by the local authority. In 1915 the local authority by a notice under sect. 152 of the above Act, declared the road which passed over the bridge to be a highway repairable by the inhabitants at large & the road thereupon, by sect. 149, became vested in the local authority. No steps were taken by the local authority to declare the bridge to be a county bridge :—*Held* : the local authority had "taken over" within the meaning of the covenant not only the road but the fabric of the bridge, & therefore that no obligation now rested upon G. or his representatives to repair & maintain the bridge.—*REGENT'S CANAL & DOCKS CO. v. GIBBONS*, [1925] 1 K. B. 81 ; 94 L. J. K. B. 46 ; 132 L. T. 631 ; 89 J. P. 4 ; 41 T. L. R. 12 ; 69 Sol. Jo. 195 ; 22 L. G. R. 759.

**Bridge built by individuals—Adopted by county.**—*See* Sect. 2, sub-sect. 1, A. (d), *ante*.

(b) *Liability ratione tenuræ.*

**2697. Grant of land by Crown.**—*STRATFORD BRIDGE CASE* (1316), 2 M. & S. 520, n. ; 1 Roll. Abr. 388 ; 105 E. R. 474.

*Annotations* :—*Distd. R. v. Yorkshire West Riding* (1770), 5 Burr. 2591. *Consd. R. v. Kent* (1814), 2 M. & S. 513 ; *R. v. Isle of Ely* (1850), 4 New Sess. Cas. 222 ; *Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309.

**2698. —**—*R. v. STRATFORD-UPON-AVON CORPN.*, No. 2091, *ante*.

**2699. Divided estate.**—Indictment against a county for not repairing a bridge. Plea, that J. is liable *ratione tenuræ*. The plea not sustained by evidence that the estate of J. was part of a larger estate, which part J. purchased of the former owner, who retained the rest in his own hands, & as well before the purchase as since has repaired the bridge. But where in such case the county was found guilty, the ct. gave leave to stay the judgment upon payment of costs until another indictment was preferred in order to try the liability.—*R. v. OXFORDSHIRE (INHABITANTS)* (1812), 16 East, 223 ; 104 E. R. 1073.

*Annotation* :—*Mentd. R. v. Wandsworth* (1817), 1 B. & Ald. 63.

**2700. Unincorporated inhabitants—Parish.**—*R. v. MACHYNLETH (INHABITANTS)*, No. 2686, *ante*.

**2701. Must be immemorial.**—An indictment for non-repair of a road or bridge on a liability *ratione tenuræ*, cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory.

**Sect. 2.—Repair of bridges: Sub-sect. 1, E. (b) & (c) i. & ii.]**

It is essential to prove the liability from time out of memory (TINDAL, C.J.).—*R. v. HAYMAN* (1829), Mood. & M. 401, N. P.

*Annotations:—*Consd. *R. v. Turweston* (1850), 16 Q. B. 109. *Reid. R. v. Isle of Ely* (1850), 19 L. J. M. C. 223.

**2702. Enlarged bridge—Footbridge added.]**—To an indictment against the inhabitants of a county, for the non-repair of a footbridge, they pleaded that it was parcel of a carriage bridge, which A. was bound to repair *ratione tenuræ*. Replication admitted the liability of A. to repair the carriage bridge, but denied that the footbridge was parcel of the same; whereupon issue was joined. The evidence was, that the carriage bridge mentioned in the pleadings had been built before 1119, & that certain abbey lands had been ordained for the repairs of the same, & the proprietors of those lands, of which those mentioned to be held by A. were part, had always repaired the bridge so built. In 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden footbridge along the outside of the parapet of the carriage bridge, partly connected with it by brick work & iron pins, & partly resting on the stone work of the bridge:—*Held*: this (being the footbridge mentioned in the indictment) was not parcel of the carriage bridge which A. was bound by tenure to repair, & the county was liable to repair the footbridge.—*R. v. MIDDLESEX (INHABITANTS)* (1832), 3 B. & Ad. 201; 1 L. J. M. C. 16; 110 E. R. 75.

*Annotations:—*Expld. *R. v. Adderbury East* (1843), 5 Q. B. 147. *Distd. R. v. Southampton* (1852), 16 J. P. 438.

**2703. Liability of owner or occupier—Infant owner—Guardian occupier.]**—An infant, whose guardian is in the occupation of the estate, & in receipt of the rents & profits, is not liable to the repair of a bridge *ratione tenuræ*, either as owner or occupier. The guardian in socage is such an owner & occupier as to be liable to the discharge of that & other obligations to which the land is subject. *Qu.*: whether the owner of an estate, in respect of which a liability to repair arises, not being in the occupation, is liable to be indicted, or whether the indictment must be against the occupiers.—*R. v. SUTTON* (1835), 3 Ad. & El. 507; 1 Har. & W. 428; 5 Nev. & M. K. B. 353; 4 L. J. K. B. 215; 111 E. R. 540; *subsequent proceedings* (1838), 8 Ad. & El. 516.

*Annotation:—*Reid. Russell v. Shenton (1842), 3 Q. B. 449.

**2704. — Covenant by lessee.]**—At common law, the liability to repair bridges *ratione tenuræ* is thrown ultimately on the owner, as between him & the occupier of the land.

Where a lessee of lands, of which the owners were liable to the repair of a bridge *ratione tenuræ*, covenanted to pay his rent "free & clear of all taxes & deductions, parliamentary or parochial," & by certain local Acts it was provided, that the owners of these lands might hold meetings, & make at such meetings rates & assessments on the lands, for the purpose of such repair:—*Held*: such a rate was not a parliamentary or parochial tax; & the occupier was not liable to pay it, in addition to his rent.—*BAKER v. GREENHILL* (1842), 3 Q. B. 148; 2 Gal. & Dav. 435; 11 L. J. Q. B. 161; 6 Jur. 710; 114 E. R. 463.

*Annotations:—*Consd. Cuckfield R. D. C. v. Goring, [1898] 1 Q. B. 865. *Mentd. R. v. Aylesbury-with-Walton* (1846), 9 Q. B. 261; *R. v. Kent J.J.* (1860), 24 J. P. 710; *Thompson v. Lapworth* (1868), L. R. 3 C. P. 149; *Jeffrey v. Neale* (1871), L. R. 6 C. P. 240.

**Lord of the manor—Division of manor.]**—*See* COPYHOLDS, Vol. XIII., p. 18, Nos. 99, 100.

**(c) Bridges necessitated by Interference with Highway.**

**i. In General.**

**2705. Private purpose interfering with public right—Liability for maintenance.]**—The Isle of Ely is included in Statute of Bridges, & therefore its inhabitants are *prima facie* liable at common law to repair the bridges situate within it; & may be indicted in the same form as ordinary counties. The general rule as to bridges built prior to Bridges Act, 1803 (c. 59), is, that if a private person erects a bridge, & it becomes useful to the county in general, the county shall repair it.—But where an act rendering a bridge necessary, though authorised to be done, is done primarily for private purposes, & interferes with the public right, & the public user, from which public benefit is inferred, is referable only to that act, because made necessary by it, the authority to do the act in question is conditional only on the party maintaining the public right in the same state as before it was interfered with.—*R. v. ISLE OF ELY (INHABITANTS), OLD BEDFORD BRIDGE & NEW BEDFORD BRIDGE CASES* (1850), 15 Q. B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L. J. M. C. 223; 15 L. T. O. S. 412; 14 J. P. 512; 14 Jur. 950; 4 Cox, C. C. 281; 117 E. R. 671.

*Annotations:—*Consd. *R. v. Southampton County* (1886), 17 Q. B. D. 424. *Distd. A.-G. v. Oxford Canal Navigation* (1903), 72 L. J. Ch. 285. *Consd. Hertfordshire County Council v. New River Co.*, [1904] 2 Ch. 513. *Expld. Hertfordshire County Council v. G. E. Ry.*, [1909] 2 K. B. 403; *Macclesfield Corp. v. G. C. Ry.* (1911), 104 L. T. 728. *Consd. Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.*, [1915] A. C. 654. *Expld. A.-G. v. G. N. Ry.*, [1916] 2 A. C. 356. *Reid. R. v. G. W. Ry.* (1867), 32 J. P. 21; *R. v. Kitchener* (1873), L. R. 2 C. C. R. 88.

**2706. — — — — —.]**—*HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RY. CO.*, No. 2778, *post*.

**2707. — — — — — Bridge over mill stream.]**—*STRATFORD BRIDGE CASE* (1316), 2 M. & S. 520, n.; 1 Roll. Abr. 308; 105 E. R. 474.

*Annotations:—*Distd. *R. v. Yorkshire West Riding* (1770), 5 Burr. 2594. *Consd. R. v. Kont* (1814), 2 M. & S. 513; *R. v. Isle of Ely* (1850), 4 New Sess. Cas. 222; *Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309.

**2708. — — — — —.]**—*R. v. KENT (INHABITANTS)*, No. 2669, *ante*.

**ii. Railway and Canal Bridges.**

**2709. Presumption of liability.]**—When there is a public duty to be done for the benefit of the public at the cost of some one, the fact that there is a public body found for a long period doing that duty gives rise to a presumption that the body were rightly so doing it (POLLOCK, B.).—*Re IPSWICH & STOWMARKET NAVIGATION & EAST SUFFOLK COUNTY COUNCIL* (1897), 13 T. L. R. 190; 41 Sol. Jo. 257, D. C.

**2710. Canal or navigation bridge—In place of ford.]**—*R. v. KENT (INHABITANTS)*, No. 2669, *ante*.

**2711. — — — — —.]**—A canal co. authorised by an Act of Parliament to make the river Bain navigable, & to make & enlarge certain navigable cuts, & build bridges & other works connected with the navigation, having for their own benefit made a navigable cut & deepened a ford which crossed the highway, & thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the co. in the first instance, are bound to maintain the same; & the burden of repair cannot be thrown upon the inhabitants of the county parts of Lindsey, in the county of Lincoln.—*R. v. LINDSEY (INHABITANTS)* (1811), 14 East, 317; 104 E. R. 623.

*Annotations:—*Distd. *R. v. Oxfordshire* (1825), 4 B. & C. 194. *Consd. R. v. Isle of Ely* (1850), 15 Q. B. 827. *Appld.*

Hertfordshire County Council v. G. E. Ry., [1909] 2 K. B. 403. **Consd.** Macclesfield Corp'n. v. G. C. Ry., [1911] 2 K. B. 528; A.-G. v. G. N. Ry., [1916] 2 A. C. 356. **Refd.** Lyne Regis Corp'n. v. Henley (1832), 3 B. & Ad. 77; Anon. (1843), 7 J. P. 498; R. v. G. W. Ry. (1867), 32 J. P. 21; Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654. **Mentd.** Parnaby v. Lancaster Canal Co. (1838), 7 L. J. K. B. 258; R. v. Bristol Dock Co. (1841), 2 Ry. & Can. Cas. 599.

**2712. — Over cut in highway.]**—Where certain persons & their successors were authorised, by Act of Parliament, to make a river navigable, & to cut the soil of any persons for making any new channel, etc., by virtue of which they cut through a highway, & rendered it impassable, & a bridge was built over the cut, over which the public passed, & which had been repaired by the proprietors of the navigation:—**Held:** the proprietors, & not the county, were liable to repair.—**R. v. KERRISON** (1815), 3 M. & S. 526; 105 E. R. 708.

**Annotations:—Consd.** R. v. Isle of Ely (1850), 15 Q. B. 827. **Apld.** Oliver v. N. E. Ry. (1874), L. R. 9 Q. B. 409. **Consd.** Hertfordshire County Council v. New River Co., [1904] 2 Ch. 513; Hertfordshire County Council v. G. E. Ry., [1909] 2 K. B. 403; Macclesfield Corp'n. v. G. C. Ry., [1911] 2 K. B. 528; Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654; A.-G. v. G. N. Ry., [1916] 2 A. C. 356. **Refd.** Lyne Regis Corp'n. v. Henley (1832), 3 B. & Ad. 77; R. v. Wilson (1852), 18 Q. B. 348; R. v. Chart & Longbridge (1870), 39 L. J. M. C. 107; Tuck v. Upwell, Outwell, Denver & Welney Drainage Comrs. (1922), 87 J. P. 97. **Mentd.** R. v. Bristol Dock Co. (1841), 2 Ry. & Can. Cas. 599; Holford v. Bailey (1849), 13 Q. B. 426.

**2713. — — — Recovery of cost of repair.]**—A canal co., the predecessors in title of defts., acting under powers conferred upon them by a private Act of Parliament, made a canal, & in so doing cut through an old highway, which they carried by a new bridge over the canal. The roadway of the bridge having fallen out of repair & become dangerous, pl'ts., who were the highway authority for the district, called upon defts. to do the necessary repairs to the roadway, & upon their refusal to do so, did the work themselves & brought this action to recover the cost thereof from defts.:—**Held:** (1) upon the true construction of the sects. of the private Act defts., & not pl'ts., were liable to repair the roadway over the bridge as well as the fabric of the bridge itself; (2) pl'ts., being under no legal liability to repair the roadway, had acted as mere volunteers in doing the repairs, & could not recover from defts. the cost so incurred by them.—**MACCLESFIELD CORPN. v. GREAT CENTRAL RY. CO.**, [1911] 2 K. B. 528; 80 L. J. K. B. 884; 104 L. T. 728; 75 J. P. 369; 9 L. G. R. 682, C. A.

**Annotations:—Refd.** Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654; A.-G. v. G. N. Ry., [1916] 2 A. C. 356.

**2714. — Increased burden of traffic—Since bridge built.]**—**Held:** whether or not a bridge was sufficient at the time it was built, a co. were bound to maintain a bridge sufficient with reference to present state of circumstances, & the jury were warranted in finding a bridge to be insufficient which, when open, left an unfenced gulf in the highway, into which a person passing along the road without any fault of his own, was liable to fall.

It is perfectly clear what is the common law obligation of persons who make canals of this kind. They may make a bridge but common sense points

out it must be a proper bridge & fit for travelling over; & that if we were now discussing what kind of bridge it ought to be I should say a bridge suitable to the present state of society. . . . To hold that the same bridge which would suffice formerly will do so now would be contrary to reason & good sense (**MARTIN, B.**).—**MANLEY v. ST. HELENS CANAL & RY. CO.** (1858), 2 H. & N. 840; 27 L. J. Ex. 159; 6 W. R. 297; 157 E. R. 346.

**Annotations:—Consd.** G. C. Ry. v. Hewlett, [1916] 2 A. C. 511. **Refd.** Kearns v. Cordwainers' Co. (1859), 6 C. B. N. S. 388; A.-G. v. Oxford Canal Navigation (1903), 72 L. J. Ch. 285; Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. Worcester Corp'n., A.-G. v. Sharpness New Docks & Gloucester & Birmingham Navigation Co., [1913] 1 K. B. 422. **Mentd.** Vaughan v. Taft Vale Ry. (1858), 3 H. & N. 743; Birkett v. Whitehaven Junction Ry. (1859), 28 L. J. Ex. 348; Hardcastle v. South Yorkshire Ry. & River Dun Co. (1859), 4 H. & N. 67; Cowley v. Sunderland Corp'n. (1861), 6 H. & N. 565.

**2715. — — — — —.]**—A dock co. being required by statute to build such good & substantial bridges for carriages, horses, & passengers over their cuts as they should deem necessary, & for ever to keep the same in good repair, built bridges sufficient to carry the traffic of the district as it then existed. Subsequently manufactories were established on a tract of land inclosed by their cuts, in which large boilers & engines of twenty tons weight & upwards were constructed, which the bridges were insufficient to carry:—**Held:** on rule for *mandamus*, the statute did not impose upon the co. the duty of providing bridges sufficient to carry such traffic.—**R. (ON THE PROSECUTION OF POPLAR BOARD OF WORKS) v. EAST & WEST INDIA DOCK CO.** (1888), 60 L. T. 232; 53 J. P. 277; *sub nom.* **Re EAST & WEST INDIA DOCK CO.**, 5 T. L. R. 151, D. C.

**Annotation:—Distd.** Birmingham Canal Co. v. Hickman (1891), 7 T. L. R. 646.

**2716. — — — — —.]**—An Act passed in 1791 empowered a canal co. to make a canal & provided that the co. should not make the canal across any highway until they should at their own proper charges have made such bridges over the canal & of such dimensions & in such manner as the comrs. appointed under the Act should adjudge proper, & that all such bridges should "from time to time be supported, maintained, & kept in sufficient repair" by the co. The canal, which was completed in 1812, was made across several highways in an urban district, & the co. made bridges over the canal in accordance with the requirements of the comrs. to carry such highways. In an action by the A.-G., at the relation of the urban authority, against the co. for a declaration that they were liable to keep the bridges in repair so as to be sufficient to bear the traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges, having regard to the present character & needs of the district:—**Held:** the co. were only liable to keep the bridges in repair in the condition in which they were made in accordance with the requirements of the comrs.—**SHARPNESS NEW DOCKS & GLOUCESTER & BIRMINGHAM NAVIGATION CO. v. A.-G.**, [1915] A. C. 654; 84 L. J. K. B. 907; 112 L. T. 826; 79 J. P. 305; 31 T. L. R. 254; 59 Sol. Jo. 381; 13 L. G. R. 563, H. L.; *reversd.* S. C. *sub nom.* **A.-G. v. SHARPNESS NEW DOCKS &**

#### PART XV. SECT. 2, SUB-SECT. 1.— E. (c) ii.

**2714 l. Canal or navigation bridge—Increased burden of traffic—Since bridge built.]**—A.-G. (DOWN COUNTY COUNCIL) v. LAGAN NAVIGATION CO., [1923] 1 I. R. 91.—**IR.**

**e. — Statutory authority—To intersect road allowances with canals.]**—An irrigation co. having obtained authority by statute to cross road allowances met with on its route:—**Held:** it was bound to build at its own cost the necessary bridges where

its canals intersected the road allowances & rendered them impassable.—**R. v. ALBERTA RY. & IRRIGATION CO.**, [1912] A. C. 827.—**CAN.**

**d. Railway bridge—Liability of municipal corporation—On default of railway company.]**—Notwithstanding



(c. 20), s. 46.]—Where a public highway is carried over a railway by means of a bridge constructed under the provisions of above Act, the railway co. is liable to maintain the bridge in the condition as to strength in relation to traffic in which it was at the date of completion, but is not liable to improve & strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which may reasonably be expected to pass over it according to the standard of the present day.—*A.-G. v. GREAT NORTHERN RY. CO.*, [1916] 2 A. C. 356; 85 L. J. Ch. 717; 115 L. T. 235; 80 J. P. 337; 32 T. L. R. 674; 60 Sol. Jo. 665; 14 L. G. R. 997, H. L.

**Annotations:—***Consd.* A.-G. for Ireland *v.* Lagan Navigation Co., [1924] A. C. 877. *Refd.* *Weston-super-Mare U. C. v. Butt*, [1919] 2 Ch. 1.

— **Approaches & roadway.]**—See Sect. 3, sub-sect. 2, B., *post*.

**Liability of undertakers to build bridge.]—See RAILWAYS.**

*See Sub-sect. 1, E. (c) ii., ante.*

**2720. Extension of boundary—Liability of authority acquiring new area—City.]**—If a new district is added to a city, the inhabitants of the city must repair the public bridges within such district.—*R. v. St. Peter's York J.J.* (1706), 2 *Ld. Raym.* 1249 ; 92 *E. R.* 323.

2721. — — — —.]—The King, by letters patents, may enlarge the boundaries of a city. K. B. has concurrent jurisdiction with the sessions about repairing bridges.

**Annotations:—***Consd. R. v. New Sarum* (1845), 7 Q. B. 941;  
*R. v. Southampton County* (1886), 17 Q. B. D. 424. **Reid.**  
*R. v. Cumberland County* (1795), 6 Term Rep. 194.

2723. ——— County.]—By 13 Geo. 3, c. 78,

s. 24, power is given to a single justice to present any highway or bridge out of repair. Bridges Act, 1803 (c. 59), enacts that all matters & things in 13 Geo. 3, c. 78, contained relating to highways shall be extended to county bridges as fully as if they were repeated & re-enacted therein. Highway Act, 1835 (c. 50), expressly repeals 13 Geo. 3, c. 78, leaving untouched Bridges Act, 1803 (c. 59), & by sect. 99 abolished all presentments for non-repair of highways. By the interpretation clause (sect. 5) "highway" is not to include county bridges:—*Held*: the power conferred by Bridges Act, 1803 (c. 59), on a single justice of presenting a county bridge is not repealed by Highway Act, 1835 (c. 50).—*R. v. BRECON (INHABITANTS)* (1849), 15 Q. B. 813; 3 New Mag. Cas. 141; 3 New Sess. Cas. 434; 18 L. J. M. C. 123; 13 L. T. O. S. 89; 13 J. P. 680; 13 Jur. 422; 117 E. R. 665.

**Annotations:—***Reid v. Glamorganshire JJ.* (1849), 13 Q. B. 561; *R. v. Estcourt* (1855), 24 L. T. O. S. 299. *Ment v. Smith* (1873), L. R. 8 Q. B. 146.

— **Approaches & roadway.**]—See Sect. 3, subsect. 2, B., *post*.

any liability which may be cast by statute upon a railway co. to maintain & repair a bridge & its approaches by means of which a highway is carried

over their railway, such highway is still a public highway, & comes within Municipal Act, R. S. O., 1887, c. 184, s. 521, & the municipal corpn. are not

absolved from liability for default, if any, of the railway co.—MEAD v. ETOBICOKE TOWNSHIP & GRAND TRUNK RY. Co. (1889), 18 O. R. 438.—CAN.



partly within county D. By a local Act the expenses of maintaining it were to be borne in equal moieties by the respective county rates. B. was an urban sanitary district partly within the two counties. Under Local Government Act (c. 41), s. 50 (1) (b), B. became wholly included in county S.:—*Held*: on a case stated under Local Government Act, 1888 (c. 41), s. 29, notwithstanding this, the local Act remained in force, & both counties were still liable to pay equally for repairs.—*Re STAFFORDSHIRE & DERBYSHIRE COUNTY COUNCILS* (1890), 54 J. P. 568, D. C.

**2725. Creation of county borough—Liability of new authority.**—*R. v. SOUTHAMPTON COUNTY (INHABITANTS)*, No. 2766, *post*.

### H. New and Improved Bridges.

*See Sect. 3, post.*

#### I. Enforcement of Liability.

##### (a) In General.

*See Statute of Bridges*, 1530–31 (c. 5), s. 1; *Statute of Bridges*, 1702 (c. 12), ss. 4, 5; 5 & 6 Will. & Mar. c. 11, s. 5; *Local Government Act*, 1888 (c. 41), ss. 34, 78, 79.

**2726. Jurisdiction of courts—Sessions—On presentment.**—*R. v. WILTS (INHABITANTS)*, No. 2636, *ante*.

**2727. ——— & King's Bench—Concurrent jurisdiction.**—*R. v. NORWICH CITY (INHABITANTS)*, No. 2721, *ante*.

**2728. Change of venue.**—*R. v. WILTS (INHABITANTS)*, No. 2636, *ante*.

**2729. Disobedience to order to repair—Attachment—Against inhabitants.**—*R. v. WILTS (INHABITANTS)*, No. 2436, *ante*.

*See, generally*, CONTEMPT OF COURT, Vol. XVI., pp. 6 *et seq.*

**2730. Costs of repair—Order for payment—Validity.**—*R. v. BARNSEY* (1725), Sess. Cas. K. B. 111; 93 E. R. 113.

**2731. Imposition of fine.**—The ct. of quarter session cannot impose more than one fine for non-repair of a bridge.—*R. v. MACHYNLETH (INHABITANTS)* (1821), 4 B. & Ald. 469; 106 E. R. 1009.

**2732. Presentment—By single justice.**—*R. v. BRECON (INHABITANTS)*, No. 2723, *ante*.

—*See, now*, *Local Government Act*, 1888 (c. 41), s. 78 (3).

**2733. Certificate for costs—F frivolous defence.**—*R. v. MERIONETHSHIRE (INHABITANTS)*, No. 2746, *post*.

**Inspection of books.**—*See* No. 2754, *post*.

##### (b) Indictment.

*See Statute of Bridges*, 1530–31 (c. 5), s. 1; *Statute of Bridges*, 1702 (c. 12), ss. 4, 5; 5 & 6 Will. & Mar. c. 11, s. 5; *Local Government Act*, 1888 (c. 41), ss. 34, 78, 79; & *generally*, CRIMINAL LAW, Vol. XIV., pp. 202 *et seq.*

**2734. Defence—Special plea as to persons alleged liable to repair.**—Information for not repairing an ancient bridge. The plea must directly answer or traverse that it is not an ancient bridge, & show who is bound to repair.—*LANGFORTH BRIDGE CASE* (1834), Cro. Car. 365; 79 E. R. 919.  
*Annotation*:—*Reid*, *R. v. Kent* (1814), 2 M. & S. 513.

**2735. ———.**—(1) The county being *primâ facie* liable for the repair of a public bridge cannot,

on an indictment for non-repair, without special plea, escape liability by casting the burden upon some other body.

(2) On an indictment for the non-repair of a bridge the ct. admitted in evidence an ancient map purporting to have been made by one C. a person of repute in connection with maps & surveys, proof being given of the custody from which it came. *Semle*: the map would have been admissible even without proof of the custody from which it came. The ct. also admitted two maps purporting to have been made by the King's Geographer, without proof of the custody from which they came; but refused to admit a copy of an old minute book which came from the custody of the bridge reeves of another bridge in the same neighbourhood as the bridge in question.—*R. v. NORFOLK COUNTY COUNCIL* (1910), 26 T. L. R. 269.

**2736. In respect of public bridges.**—An indictment for not repairing "a common bridge situated in a certain common footpath" is good without stating that it was in the King's highway: but the sessions have no power by *Statute of Bridges*, 1530–31 (c. 5), with respect to private bridges not common in the highways unless they are public nuisances & then they have jurisdiction.

An indictment lies not for non-repairing a bridge except it be in a highway (*HOLT, C.J.*).—*It. v. SAINTIFF* (1704), 6 Mod. Rep. 255; *Holt*, K. B. 129; 2 Ld. Raym. 1174; 1 Salk. 359; 87 E. R. 1002.

**2737. In respect of private bridges—Only if non-repair a nuisance.**—*R. v. SAINTIFF*, No. 2736, *ante*.

**2738. Variance between allegation & proof—Public user of bridge—Proof of limited user only.**—

A bar across a public bridge kept locked except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times, & if an indictment for not keeping it in repair, states that it is used by the King's subjects, "at their free will & pleasure" the variance is fatal.—*R. v. BUCKINGHAM (MARQUIS)* (1815), 4 Camp. 189, N. P.

*Annotation*:—*Reid*, *R. v. Lyon* (1825), 5 Dow. & Ry. K. B. 497.

**2739. ——— Non-repair of ancient bridge—Bridge widened at recent date.**—*R. v. ADDERBURY EAST (INHABITANTS)*, No. 2684, *ante*.

**2740. Removal by certiorari—Private person charged—Statute of Bridges, 1702 (c. 12).**—*Certiorari* may be granted where private persons are charged to repair a bridge.

[Above] Act extends only to bridges where the county is charged to repair (*per* 'UR.).—*R. v. HAMWORTH, STAFFS (INHABITANTS)* (1731), 2 Stra. 900; 93 E. R. 927.

**2741. ——— Repair of county bridge—Statute of Bridges, 1702 (c. 12).**—(1) Sect. 5 of above Act has not taken away from the Crown the power of removing by *certiorari* an indictment for not repairing a county bridge.

(2) *Qu.*: whether the same persons who are bound to repair a bridge are also bound to widen it, if the exigencies of the public should require it.—*CUMBERLAND (INHABITANTS) v. R.* (1803), 3 Bos. & P. 354; 127 E. R. 193, H. L.

*Annotations*:—*As to* (1) *Reid*, *R. v. Allen* (1812), 15 East, 333; *R. v. Oxfordshire* (1825), 3 L. J. O. S. K. B. 198. *As to* (2) *Consd.* *R. v. Surrey* (1810), 2 Camp. 455; *R.*

#### PART XV. SECT. 2, SUB-SECT. 1.— I. (a).

**e. Action for damages—Time limit.**—An action to recover damages sustained by reason of the neglect of a municipal corpn. to keep in repair,

the approaches to a bridge, where the bridge & approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained.—*JOHNSTON v. NELSON TOWNSHIP* (1890), 17 A. R. 16.—*CAN.*

#### PART XV. SECT. 2, SUB-SECT. 1.— I. (b).

**f. General rule.**—Where a county council is liable to repair a bridge, the proper remedy is by indictment, not mandamus.—*Re JAMIESON &*

**Sect. 2.—Repair of bridges: Sub-sect. 1, I. (b) & (c); sub-sect. 2, A. & B. (a).]**

*v. Devon* (1825), 7 Dow. & Ry. K. B. 147; *M'Kinnon v. Penon* (1853), 8 Exch. 319.

—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 405–412, Nos. 2510–2708.

**2742. Stay of judgment—Further proceedings.]—***R. v. MIDDLESEX (INHABITANTS)* (1813), 1 B. & Ald. 64, n; 106 E. R. 24.

*Annotations:—*Consid. *R. v. Wandsworth* (1817), 1 B. & Ald. 63; *R. v. N. E. Ry.* (1901), 70 L. J. K. B. 548.

**2743. —**—*The ct. is reluctant to stay judgment on an indictment for not repairing a bridge. They will not stay it generally, but only till further order; & if trial of another indictment not proceeded in with all despatch, judgment will be given.*—*It. v. SOUTHAMPTON (INHABITANTS)* (1818), 2 Chit. 215.

**2744. —**—*R. v. NORFOLK COUNTY COUNCIL* (1910), 74 J. P. Jo. 113, D. C.

**2745. Parties indictable—Every inhabitant—Whether rated or not.]—***R. v. ADDERBURY EAST (INHABITANTS)*, No. 2684, *ante*.

**2746. Costs—Where defence frivolous—Highway Act, 1773 (c. 78), s. 64—Effect of Highway Act, 1835 (c. 50).]**—(1) The clause as to costs in Highway Act, 1773 (c. 78), was substantially re-enacted in Bridges Act, 1803 (c. 59), with reference to county bridges, & therefore was not repealed when Highway Act, 1835 (c. 50), repealed, in general terms, Highway Act, 1773 (c. 78).

(2) The judge who tries an indictment for non-repair of a bridge, removed by *certiorari*, may certify after the assizes that the defence was frivolous, & by such certificate award payment of costs to the prosecutor, which will be enforced by the Ct. of K. B.—*R. v. MERTONETHSHIRE (INHABITANTS)* (1844), 6 Q. B. 343; 1 New Mag. Cas. 111; 1 New Sess. Cas. 316; 13 L. J. M. C. 158; 3 L. T. O. S. 241; 8 J. P. 570; 8 Jur. 778; 115 E. R. 132.

*Annotations:—As to* (1) *Apld. R. v. Brecon* (1819), 15 Q. B. 813; *R. v. Esteourt* (1855), 24 L. T. O. S. 299. *Reld. R. v. Glamorganshire JJ.* (1849), 13 Q. B. 561.

**Change of venue.]—***See* No. 2636, *ante*.

*See, generally*, EVIDENCE, Vol. XXII.

**2747. Oral—Reputation.]—**Presentment against the inhabitants of a county for not repairing a bridge. Plea: that A. was liable to repair it *ratione tenuræ*. Issue on A.'s liability:—*Held*: evidence of a reputation was admissible to prove A.'s liability.—*R. v. BEDFORDSHIRE (INHABITANTS)* (1855), 4 E. & B. 535; 3 C. L. R. 442; 24 L. J. Q. B. 81; 24 L. T. O. S. 268; 10 J. P. 324; 1 Jur. N. S. 208; 3 W. R. 205; 6 Cox, C. C. 505; 119 E. R. 196.

*Annotation:—Mentd. R. v. Stephens* (1866), 7 B. & S. 710.

—*See, generally*, EVIDENCE, Vol. XXII., pp. 388–508.

**2748. Documentary—Previous record of acquittal.]—**On indictment for non-repair of a bridge, charging defts. *ratione tenuræ*, they produced at

the trial a record setting forth a presentment, in the time of Edward III., against a Bishop of L., not connected with the present defts., who was thereby charged with non-repair of the same bridge, & liability to repair. The record stated a trial of this presentment at the spring assizes, in 1346, & an acquittal of the bishop as not liable; it further stated that the jury, being asked who was bound to repair, said they did not know; & being asked when & by whom it was first built or repaired, said, about sixty years since, & then of alms, & that a Bishop of L. bestowed 40s. on the workmen repairing it, of his alms, & not otherwise. In addition to this record, defts. put in a writ of Privy Seal of June 28, 1346, for a grant of pontage to the town of K., where the bridge was, reciting, as the cause of the grant, that the bridge was ruinous, & no person bound to repair in certain, according to that which was found by inquest. They also put in the grant of pontage, dated in the same year:—*Held*: the evidence was admissible on behalf of the present defts. *Semble*: the special findings of the jury may have been regular, according to the practice in the time of Edward III. But at all events the acquittal of the bishop, followed by the writ & grant of pontage, was evidence to negative the existence of a prescriptive liability in any person.—*R. v. SUTTON (LADY)* (1838), 8 Ad. & El. 516; 3 Nev. & P. K. B. 569; 1 Will. Woll. & H. 525; 7 L. J. Q. B. 205; 112 E. R. 934.

*Annotations:—*Consid. *R. v. Bedfordshire* (1855), 4 E. & B. 535. *Mentd. R. v. Stainforth* (1848), 12 J. P. 105.

**2749. — Grant of pontage.]—***R. v. SUTTON (LADY)*, No. 2748, *ante*.

**2750. — Entries of deceased persons.]—***R. v. LOWER HEYFORD (INHABITANTS)* (1840), 2 Smith, L. C., 12th ed. p. 313.

*Annotations:—*Consid. *Taylor v. Witham*, *Witham v. Taylor* (1876), 3 Ch. D. 605. *Reld. Re Fountaine*, *Re Dowler*, *Fountaine v. Amherst*, [1909] 2 Ch. 382; *Re Adams*, *Benton v. Powell* (1922), 38 T. L. R. 702.

**2751. — Surveyor's estimate & report.]—***NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN.*, No. 2661, *ante*.

**2752. — Ancient maps.]—***R. v. NORFOLK COUNTY COUNCIL*, No. 2735, *ante*.

**2753. — Ancient minute book—From custody of bridge reeves—In neighbouring district.]—***R. v. NORFOLK COUNTY COUNCIL*, No. 2735, *ante*.

**Ancient documents generally.]—***See* EVIDENCE, Vol. XXII., pp. 351–360; Nos. 3549–3678.

—*See, generally*, EVIDENCE, Vol. XXII., pp. 191–386.

**2754. Inspection of books—Matters relating to former repairs.]—**Pending an indictment at the instance of a parish, against a county, for not repairing a bridge, the object being to try whether the parish or the county were liable to repair the bridge, the ct. refused to grant defts. an inspection of the parish books relating to former repairs of the bridge.

To entitle a party to an inspection of books, either the books must be of a public nature, or

LANARK COUNTY (1876), 38 U. C. R. 647.—**CAN.**

**PART XV. SECT. 2, SUB-SECT. 1.—**  
**I. (a).**

**g. Joint duty—Necessity for proof of.]—***Semble*: when the tort alleged is the non-performance of a joint duty to repair a bridge, if the joint duty be not proved, *pltf.* must fail *in toto*, & cannot recover against deft. on whom alone the duty is imposed.—*WOODS v. WESTWORTH MUNICIPALITY & HAMILTON CORPN.* (1856), 6 C. P. 101.—**CAN.**

**h. Evidence as to state of bridge—Admissibility.]—**The D. Canal Co. having been indicted for not keeping in repair the bridge over their canal where it crosses the highway, built for them by the G. Western Railway Co.:—*Held*: evidence of the state of the bridge a few days before the trial was admissible, not as a proof of that fact, but as confirming the witnesses who swore to its state at the time laid in the indictment, & as showing such state by inference.—*R. v. DESJARDINS CANAL CO.* (1868), 27 U. C. R. 374.—**CAN.**

**k. Collapse of approach—Default of municipality.]—**The collapse of the approach to a bridge under the weight of a pair of horses using the highway in a proper manner is conclusive evidence that the highway is not in proper repair. It is also *prima facie* evidence that the duty of keeping it in repair has been neglected by the municipality responsible therefor. The onus of meeting this *prima facie* case is on the municipality. To meet it the municipality must show that by its officers or servants it had inspected the

the party desiring to inspect them must have an interest in them. In this case the books are not of a public nature, & the parties desiring to inspect them have no interest in them. In the case of parochial or corpn. books, no person wholly unconnected with the parish or corpn. has a right to inspect them. These books are not kept for the benefit of the public, or even of the inhabitants of the county, but for the benefit of the inhabitants of the parish only. They are properly speaking, not public but parochial books, & this is, in effect, an application made by one of two litigant parties against the other, to compel him to produce his own private documents, in order to establish a case against himself. Such an application cannot be granted (BAILEY, J.).—*Re GREAT MARLOW BRIDGE, R. v. BUCKS (INHABITANTS)* (1828), 2 Man. & Ry. K. B. 412.

—*See, generally, DISCOVERY, Vol. XVIII., pp. 42 et seq.*

## SUB-SECT. 2.—EXTENT OF REPAIR.

## A. Reconstruction.

**2755. Rebuilding—Bridge destroyed by flood—Local Government Act, 1888 (c. 41).]**—*ESSEX COUNTY COUNCIL v. CHELMSFORD UNION* (1891), 55 J. P. Jo. 84.

**2756. — Bridge removed by Crown—Original ferry restored.]**—*R. v. BUCKS (INHABITANTS)*, No. 2032, *ante*.

**2757. Raising level of bridge—Subsidence due to mining operations.]**—A bridge was constructed in accordance with Rhymney Railway Act, 1882 (c. cclx), but afterwards the ground subsided from causes [mineral workings] beyond the control either of the railway co. or the canal co., so that the bridge was at a much lower elevation above the towing path & was an obstruction to the traffic:—*Held*: the railway co. were bound to maintain the bridge at the height above the towing path prescribed by the Act.—*RHYMNEY RY. CO. v. GLAMORGANSHIRE CANAL NAVIGATION CO.* (1904), 91 L. T. 113; 20 T. L. R. 593, H. L.; *affg.* S. C. *sub nom.* GLAMORGANSHIRE CANAL NAVIGATION CO. v. RHYMNEY RY. CO. & GREAT WESTERN RY. CO. (1903), 19 T. L. R. 240, C. A. *Annotation*:—*Distd.* North Staffordshire Rly. v. Hauley Corpn. (1909), 73 J. P. 477.

**2758. — — — — —.]**—*NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN.*, No. 2661, *ante*.

**2759. Widening bridge—Liability to widen.]**—*CUMBERLAND (INHABITANTS) v. R.*, No. 2741, *ante*.

**2760. — — — — —.]**—The inhabitants of a county are not bound to widen a public bridge.—*R. v. DEVON (INHABITANTS)* (1825), 4 B. & C. 670; 7 Dow. & Ry. K. B. 147; 3 Dow. & Ry. M. C. 346; 4 L. J. O. S. K. B. 34; 107 E. R. 1210.

*Annotations*:—*Consd.* Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. Worcester Corpn., A.-G. v. Sharpness New Docks & Gloucester & Birmingham Navigation Co. (1913) 1 K. B. 422. *Reld.* R. v. Middlesex (1832), 3 B. & Ad. 201; R. v. Addorbury East (1843), 8 J. P. 375.

**Voluntarily undertaken—Liability to repair widened portion.]**—*See* Nos. 2683, 2684, *ante*.

**To meet increased burden of traffic.]**—*See* 2714–2717, *ante*.

bridge at reasonable & proper times, & that such proper inspection did not disclose anything from which it could be suspected that the approaches were being undermined or rendered defective in any way.—*GUNDERSON v. CALDER RURAL MUNICIPALITY* (1922), 86 D. L. R. 595; 15 Sask. L. R. 444; [1922] 2 W. W. R. 602.—*CAN.*

L. — — — — —.]—*WHEELER v. HUTCHOT RURAL MUNICIPALITY*, [1924] 2 D. L. R. 1093; 2 W. W. R. 385; 34 Man. L. R. 274.—*CAN.*

## PART XV. SECT. 2, SUB-SECT. 2.—B. (a).

## m. Liability of municipality—One

## B. Approaches and Roadway.

## (a) Public Authorities.

*See* Statute of Bridges, 1530–1531 (c. 5), s. 7.

**2761. Liability of county—Three hundred feet on either side of bridge—Common law liability.]**—*WEST RIDING OF YORKSHIRE (INHABITANTS) v. R.*, No. 2762, *post*.

**2762. — — — — — Unless other person proved liable.]**—By the common law declared & defined by Statute of Bridges, 1530–1531 (c. 5), & the subsequent Bridge Acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of the bridge, to the extent of 300 feet; & if indicted for the non-repair thereof, they cannot exonerate themselves except by pleading specially that some other is bound by prescription or tenure to repair same.—*WEST RIDING OF YORKSHIRE (INHABITANTS) v. R.* (1813), 2 Dow. 1; 5 Taunt. 284; 3 E. R. 767; *affg.* S. C. *sub nom.* R. v. WEST RIDING OF YORK (INHABITANTS) (1806), 7 East, 588.

*Annotations*:—*Consd.* R. v. Lincoln Corpn. (1838), 8 Ad. & El. 65; *Hertfordshire County Council v. New River Co.*, [1904] 2 Ch. 513. *Appl.* *Hertfordshire County Council v. G. E. Ry.*, [1909] 1 K. B. 368. *Reld.* *Nottingham County Council v. M. S. & L. Ry.* (1894), 71 L. T. 430.

**2763. — — — — — Part of approach in another county.]**—A new & substantive bridge, of public utility, built within the limit of one county, & adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge, repairable by the inhabitants of another county, who were bound in course, under Statute of Bridges, 1530–1531 (c. 5), to maintain such 300 feet of road, though lying in the other county.—*R. v. DEVON (INHABITANTS)* (1811), 14 East, 477; 104 E. R. 684.

**2764. — — — — — Specific charge in indictment.]**—Although the inhabitants of the county are, in general, liable to the repairs of the highway within 300 feet of the bridge as well as of the bridge itself, an indictment, which charges merely a non-repair of the bridge, is not sufficient to charge them with the not repairing of the highway within that distance. If it be intended to complain also of not repairing that part of the highway, it should be specifically mentioned in the indictment.—*R. v. GLOUCESTER (INHABITANTS)* (1829), 8 L. J. O. S. K. B. 97.

**2765. — — — — —.]**—The rule laid down by Statute of Bridges, 1530–1531 (c. 5), that the persons liable to repair a bridge are also liable to repair the highway adjoining to each end of the bridge for a distance of 300 feet, applies where the bridge is repairable by the county, & where the liability arises by prescription or (*semble*) *ratione tenuræ*; but it does not apply in cases where the liability is directly imposed by a later statute.

The Acts authorising the making of the New River directed that bridges should be made where convenient, & the New River Co.'s charter bound it to maintain the New River & its bridges:—*Held*: the co. were bound to maintain the bridges & the approaches thereto, *i.e.* so much of the road at each end as had been raised or interfered with by making the bridge, & what the approaches

hundred feet on either side of bridge—*Statutory liability*.—*TRAVERSY v. GLOUCESTER TOWNSHIP* (1888), 15 O. R. 214.—*CAN.*

n. *Whether liability prescriptive or statutory.*—The rule that a prescriptive liability to repair a public bridge, unexplained & unrestricted, includes the

**Sect. 2.—Repair of bridges: Sub-sect. 2, B. (a), (b) & (c); sub-sect. 3.]**

were must be ascertained as a fact in each case; they were not bound to repair 300 feet of the highway in every case.—**HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER CO.**, [1904] 2 Ch. 513; 74 L. J. Ch. 49; 91 L. T. 796; 68 J. P. 552; 53 W. R. 60; 20 T. L. R. 686; 48 Sol. Jo. 641; 3 L. G. R. 64.

**Annotations:—***Reid*, Rhondda U. D. C. v. Taff Vale Ry. (1907), 24 T. L. R. 165; A.-G. & Derbyshire County Council v. Mid. Ry. (1908), 99 L. T. 961; Hertfordshire County Council v. G. E. Ry., [1909] 1 K. B. 368.

**2766. Liability of highway authority—Bridge built since 1835—Highway Act, 1835 (c. 50), s. 21.]**

—The owners of land on one side of a river made a road across such land & built a bridge connecting such road with an existing highway on the other side of the river. They then dedicated both bridge & road simultaneously to the public, who afterwards used the same:—*Held*: the bridge not having been erected in an existing highway, the county was not liable for its repair, inasmuch as there was no evidence of acquiescence by the county in the building & dedication of the bridge. The effect of above sect. is, in the case of county bridges built subsequently to that Act, to throw the liability in respect of surface repairs to the roadway of the bridge & approaches upon the highway authority. Where a county of a town has been created by charter & declared to be a separate county, the county in which it was originally situated is not liable for the repair of bridges within its boundaries.—*R. v. SOUTHAMPTON COUNTY (INHABITANTS)* (1886), 17 Q. B. D. 424; 55 L. J. M. C. 158; 55 L. T. 322; 35 W. R. 10; 2 T. L. R. 815; 16 Cox, C. C. 117; *sub nom. R. v. HANTS (INHABITANTS)*, 50 J. P. 773, D. C.; *subsequent proceedings* (1887), 19 Q. B. D. 590, D. C.

**(b) Individuals.**

**2767. Prescriptive liability.—COMBE'S (ABBOT) CASE (1369), 43 Lib. Ass. fo. 275, pl. 37.**

**Annotations:—***Apld.* West Riding of Yorkshire v. R. (1813), 5 Taunt. 284; *R. v. Lincoln Corp.* (1838), 8 Ad. & El. 65; *Nottingham County Council v. M. S. & L. Ry.* (1894), 15 L. R. 35. *Consd.* Hertfordshire County Council v. G. E. Ry., [1909] 1 K. B. 368.

**2768. — Consideration.]**—In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription.—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)* (1821), 4 B. & Ald. 623; 106 E. R. 1064.

**Annotation:—***Reid*, *R. v. New Sarum* (1845), 7 Q. B. 941.

**2769. — 300 feet at each end of bridge—Previous repairs to fabric of bridge—Previous repairs of highway by turnpike trustees.]**—A party who is liable, by prescription, to repair a bridge, is also *prima facie* liable to repair the highway, to the extent of 300 feet, from each end. Such presumption is not rebutted by proof that the party has been known only to repair the fabric of the bridge, & that the only repairs known to have been done to the highway have been performed by comrs. under a Turnpike Road Act.—*R. v. LINCOLN CORPN.* (1838), 8 Ad. & El. 65; 3 Nev. & P. K. B. 273; 1 Will. Woll. & H. 260;

7 L. J. Q. B. 161; 2 Jur. 615, 807; 112 E. R. 760.

**Annotations:—***Consd.* Hertfordshire County Council v. New River Co., [1904] 2 Ch. 513. *Reid*, *Nottingham County Council v. M. S. & L. Ry.* (1894), 15 R. 35.

**2770. — —.]**—**HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER CO.**, No. 2765, *ante*.

**2771. Liability ratione tenuræ.]**—**HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER CO.**, No. 2765, *ante*.

**(c) Statutory Companies.**

**2772. Extent of repair—Whether 300 feet at each end of bridge.]**—**HERTFORDSHIRE COUNTY COUNCIL v. NEW RIVER CO.**, No. 2765, *ante*.

**2773. Canal company.]**—By a private Act for making a canal in the county of D., from C. to the river T., a canal co. were authorised to make such canal, & it was provided that the co., their successors & assigns, should make & maintain, & keep in repair, certain bridges over such canal. At C., in the county of N., the canal crossed a public highway, which it was necessary to raise for a distance of 180 feet on either side of the canal for the purpose of making approaches to a bridge which the co. had to construct over the canal at that point. The canal subsequently became vested in deft. co., & the highway was made a main road within Highways & Locomotives Amendment Act, 1878 (c. 77), s. 13, & became vested in pltf's. The question arose, who was legally liable to maintain & repair the raised approaches to the bridge:—*Held*: as the bridge could not have been constructed without making the approaches, the latter were practically part of the bridge, & defts.' obligation as regards the approaches did not cease on the completion of the bridge, but they were bound to keep them in repair.—**NOTTINGHAM COUNTY COUNCIL v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.** (1894), 71 L. T. 430; 15 R. 35, D. C.

**Annotations:—***Consd.* Hertfordshire County Council v. New River Co., [1904] 2 Ch. 513; *Macclesfield Corp.* v. G. C. Ry. (1911), 104 L. T. 728. *Reid*, *A.-G. v. Oxford Canal Navigation* (1903), 72 L. J. Ch. 285; *Rhondda U. D. C. v. Taff Vale Ry.* (1907), 24 T. L. R. 165.

**2774. — Repair of fencing on approaches.]**—A canal navigation Act provided that a canal co. should not be liable to repair any part of the roads approaching any bridge over their canal beyond or further than the extremity of the wing walls of any such bridge, but that the co. were not to be exonerated from the repair of all such bridges & of the wing walls, ramparts, & side banks thereof:—*Held*: the canal co. were not liable to repair a broken fence on a raised approach to one of their bridges.—*A.-G. v. OXFORD CANAL NAVIGATION* (1903), 72 L. J. Ch. 285; 88 L. T. 250; 67 J. P. 130; 51 W. R. 386; 19 T. L. R. 277; 47 Sol. Jo. 317; 1 L. G. R. 282, C. A.

**2775. — Repairs by highway authority—Recoupment from canal company.]**—**MACCLESFIELD CORPN. v. GREAT CENTRAL RY. CO.**, No. 2713, *ante*.

**2776. Railway company—Railway Clauses Consolidation Act, 1845 (c. 20), s. 46.]**—Where a railway crosses a highway, & the road is carried over the railway by means of a bridge in accordance with above sect., the railway co. are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the

liability to repair the highway at the ends of it within the distance of 300 ft., is not applicable to New Zealand, where the obligation is statutory.—**ASHLEY ROAD DISTRICT (INHABITANTS) v. KOWAI ROAD DISTRICT (INHABITANTS)**

(1901), 20 N. Z. L. R. 482.—N.Z.

**PART XV. SECT. 2, SUB-SECT. 2.—B. (c).**

**c. Railway company—Transfer of roads to municipality.]**—In an action by

the City of Glasgow for declaration that the railway co. were bound to maintain the roadways over certain bridges & approaches thereto:—*Held*: the railway co. were not relieved of their obligation to maintain the roadways

sect. the co. are to maintain.—**LANCASHIRE & YORKSHIRE RY. CO. v. BURY CORPN.** (1889), 14 App. Cas. 417; 59 L. J. Q. B. 85; 61 L. T. 417; 54 J. P. 197, H. L.; *affg.* (1888), 20 Q. B. D. 485, C. A.

**Annotations.**—*Reid*, West Lancashire R. C. v. L. & Y. Ry. (1903), 72 L. J. K. B. 675; A.-G. & Derbyshire County Council v. Mid. Ity. (1908), 99 L. T. 961; Macclesfield Corpn. v. G. C. Ry., [1911] 2 K. B. 528.

**2777. — Fences on approaches included—Private Act.]**—A private railway Act passed before Railway Clauses Consolidation Act, 1845 (c. 20), contained the enactment that "where any bridge shall be erected for carrying any turnpike road . . . over the railway, the road over such bridge shall be formed & shall at all times be continued of such width as to leave a clear & open space between the fences of the said road of not less than 25 feet"—*Held*: these words imposed an obligation on the railway co. to repair the bridge, its approaches & fences, & the road over the bridge & over its approaches.—**A.-G. v. MIDLAND RY. CO.** (1909), 100 L. T. 866; 73 J. P. 337; 25 T. L. R. 547; 53 Sol. Jo. 520; 7 L. G. R. 998, C. A.

**2778. — Common law liability.]**—A railway co., being authorised to carry their railway across a high road on the level, constructed the railway at a slightly higher level than the road, &, in order to bring the road up to the level of the railway, raised it by means of inclined "approaches" on either side of the railway under powers conferred by their special Act. The Act was silent as to any obligation of the co. to repair the roadway upon the approaches.—*Held*: there was imposed upon the co. by the common law, as a condition of the statutory authority to interfere with the high road, an obligation to keep in repair the roadway upon the whole of the approaches, including those portions which lay outside the fences of the railway.—**HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RY. CO.**, [1909] 2

K. B. 403; 78 L. J. K. B. 1076; 101 L. T. 213; 73 J. P. 353; 25 T. L. R. 573; 53 Sol. Jo. 575; 7 L. G. R. 1006, C. A.

**Annotations.**—*Reid*, Macclesfield Corpn. v. G. C. Ry. (1911), 104 L. T. 728; Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G., [1915] A. C. 654; A.-G. v. G. N. Ry., [1916] 2 A. C. 356; Brackley v. Mid. Ry. (1916), 114 L. T. 1150; A.-G. for Ireland v. Lagan Navigation Co., [1924] A. C. 877.

**Repair of bridges over railways & canals.]**—*See* Sub-sect. 1, E. (c) ii., *ante*.

### SUB-SECT. 3.—INJURY ARISING FROM NON-REPAIR.

**2779. General rule—Liability for negligence.]**—

As pltf. was passing along a highway under a railway bridge of defts., which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, & injured pltf.; a train had passed just previously. On examination afterwards, other bricks were found to have fallen out. The bridge had been built & in use three years. The jury having found a verdict for pltf., a rule was obtained, pursuant to leave, to enter a nonsuit, on the ground that there was no evidence of negligence to leave to the jury.—*Held*: defts. were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, & there was evidence from which the jury might infer negligence.—**KEARNEY v. LONDON, BRIGHTON & SOUTH COAST RY. CO.** (1871), L. R. 6 Q. B. 759; 40 L. J. Q. B. 285; 24 L. T. 913; 20 W. R. 24, Ex. Ch.

**Annotations.**—*Reid*, The Maid of the Mist (1873), 21 W. R. 310; Beaumont v. Huddersfield Corpn. (1902), 67 J. P. 57; Solomons v. Stepney B. C. (1905), 69 J. P. 360; Cole v. De Trafford (No. 2), [1918] 2 K. B. 523.

**2780. Action by individual—Against inhabitants of county.]**—No action will lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being

on the bridges & approaches by the transfer of the roads to the city authorities.—**GLASGOW CORPN. v. CALEDONIAN RY. CO.**, [1909] S. C. (H. L.) 5.—**SCOT.**

### PART XV. SECT. 2, SUB-SECT. 3.

**p. Action by individual—Against municipal corporation.]**—In an action against defts. for damage sustained by pltf. through the breaking down of a bridge some six feet wide, built on three sleepers over a culvert on a road in defts.' township, over which pltf. was attempting to drive with a buggy & a pair of horses, it appeared, from an examination after the accident, that the centre sleeper to two-thirds of its diameter & on the outside was rotten, & that its condition was either not ascertained by the persons whose duty it was to repair the bridge, or if ascertained it was not repaired, & that the bridge broke down in consequence of this centre sleeper giving way by the mere entry of pltf.'s horses, without the buggy, upon the side of the bridge. The jury having found for pltf., their verdict was upheld.—**MACDONALD v. SOUTH DORCHESTER TOWNSHIP** (1878), 29 C. P. 249.—**CAN.**

**q. —.]**—Pltf. while crossing, on horseback, a bridge within the municipality, received injuries found to have resulted from the negligence of the corpn. & its officers.—*Held*: deft. corpn. was liable, & the fact of the bridge being on a highway was no defence, or if a defence should have been pleaded.—**MCQUARRIE v. ST. MARY'S MUNICIPALITY** (1884), 17 N. S. R. (5 R. & G.) 493.—**CAN.**

**r. —.]**—An action was

brought against deft. municipality for injuries sustained by pltf.'s horse, resulting in its death, caused by the defective condition of a bridge on a public road in the municipality. The covering of the bridge was more than eight years old at the time of the accident, & required renewing. Also the unsafe condition of the bridge was known to the comrs. appointed by the municipal council to repair the road upon which it was situated, but that he had delayed repairing the bridge for over three months & did not touch it until after the accident.—*Held*: deft. was responsible for the negligence of the comr. in not recovering the bridge & making it safe.—**DIAMOND v. EAST HAMTS MUNICIPALITY** (1887), 20 N. S. R. (8 R. & G.) 9.—**CAN.**

**s. —.]**—In an action to recover damages from a corpn. for a fatal accident caused by the breaking down of a bridge over which a tramcar containing deceased was running.—*Held*: the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke, amply justified a verdict against them.—**VICTORIA CORPN. v. PATTERSON, VICTORIA CORPN. v. LANG**, [1899] A. C. 615.—**CAN.**

**t. —.]**—Petition of right to recover damages for personal injuries to suppliant by reason of a govt. bridge being out of repair. There was no evidence that the injury resulted from the negligence of any servant of the Crown while acting within the scope of his duties, so as to bring the case within Exchequer Ct. Act, s. 16 (c).—*Held*: there is no duty on the part of the Crown, or any

minister of the Crown, to keep this bridge in repair for the failure of which a petition will lie against the Crown at the suit of one injured by non-repair, unless the case comes within sect. 16 (c).—**MCBRIDE v. R.** (1900), 6 Exch. C. R. 374.—**CAN.**

**a. —.]**—Where a heavy traction engine broke through rotten timbers in the approach of a bridge on one of the highways of defts. on which work had been done & improvements made by them, & over which such engines had for two years previous been accustomed to pass, to the knowledge of defts. officials, & no attempt had been made to stop such traffic or warn those in charge of it of any danger, the bridge in question being one of the strongest across the river in many miles.—*Held*: defts. were liable for damages under Municipal Act, R. S. M. 1902 (c. 116), s. 687, but they could not be held to have been guilty of negligence amounting to misfeasance, so as to make them liable in damages independently of the statute, by reason of having failed to stop up a spike hole in one of the joints in the approach, in consequence of which it had rotted more than the others on account of water lodging in the hole.—**CURLE v. BRANDON (CITY)** (1905), 24 C. L. T. 279; 15 Man. L. R. 122; 1 W. L. R. 176.—**CAN.**

**b. —.]**—For their own purposes, defts., a township municipality, diverted the travelled road from the right hand side, going north, of the original allowance for a ditch, across a municipal ditch, to the left hand side, on which they acquired a strip of land, along the original allowance, sufficient

**Sect. 2.—Repair of bridges : Sub-sect. 3. Sect. 3.]**

out of repair.—**RUSSELL v. MEN OF DEVON** (1788), 2 Term Rep. 667; 100 E. R. 359.

**Annotations:—****Consad.** Gibson v. Preston Corp'n. (1870), L. R. 5 Q. B. 218; Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256; Kent v. Worthing L. B. (1882), 10 Q. B. D. 118; Cowley v. Newmarket L. B., [1892] A. C. 345; Thompson v. Brighton Corp'n., Oliver v. Horsham L. B., [1894] 1 Q. B. 332. **Reid.** Parnaby v. Lancaster Canal Co. (1838) 7 L. J. Q. B. 258; McKinnon v. Penon (1854), 9 Exch. 609; Hartnall v. Ityde Commr. (1863), 33 L. J. Q. B. 30; Pictou Municipality v. Geldert, [1893] A. C. 521; Whyler v. Bingham R. D. C., [1901] 1 K. B. 45; Maguire v. Liverpool Corp'n., [1905] 1 K. B. 767; Dawson v. Bingley U. D. C., [1911] 2 K. B. 149; Nash v. Rochford R. D. C., [1917] 1 K. B. 384. **Mentd.** It. v. Mashiter (1837), 6 Ad. & El. 153.

**2781. — Against county surveyor—Proof of surveyor's negligence.**—A county bridgmaster [the county surveyor] is not responsible as such for all accidents which may happen to passengers by reason of stones, required for the repair of the bridges, being placed on the road adjoining thereto. In order to fix him, pltf. must show that he, or some one employed & paid by him, placed the stones on the spot in question.—**GRIEVE v. MILTON** (1850), 14 J. P. 98.

**2782. — Of county bridge.**—No action will lie against the county surveyor by an individual to recover damages for a personal or pecuniary injury resulting from the non-repair of a county bridge.—**M'KINNON v. PENSON** (1854), 9 Exch. 609; 23 L. J. M. C. 97; 22 L. T. O. S. 318; 18 J. P. 104; 18 Jur. 513; 2 W. R. 262; 150 E. R. 260, Ex. Ch.

**Annotations:—****Apld.** Young v. Davis (1862), 7 H. & N. 760. **Consad.** Gibson v. Preston Corp'n. (1870), L. R. 5 Q. B. 218; Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256. **Expld.** Kent v. Worthing L. B. (1882), 10 Q. B. D. 118. **Consd.** Cowley v. Newmarket L. B., [1892] A. C. 345; Maguire v. Liverpool Corp'n., [1905] 1 K. B. 767. **Reid.** Young v. Davis (1863), 9 L. T. 145; Parsons v. St. Mathew, Bethnal Green (1867), L. R. 3 C. P. 56; Wilson v. Halifax Corp'n. (1868), L. R. 3 Exch. 114; Holborn Grdns. v. St. Leonard's, Shoreditch, Vestry (1876), 41 J. P. 38. **Mentd.** Kendall v. King (1856), 17 C. B. 483; Victoria Corp'n. v. Patterson, Victoria Corp'n. v. Lang, [1899] A. C. 615.

**SECT. 3.—NEW BRIDGES AND IMPROVEMENT OF BRIDGES.**

See Bridges Acts, 1740 (c. 33); 1803 (c. 59), s. 2; 1814 (c. 90), ss. 1, 2; Highway Acts, 1835 (c. 50), ss. 82, 83; 1864 (c. 101), s. 48; Highways & Loco-

for a road on that side of the ditch until a change of course of the ditch permitted a return to the original allowance. A bridge over the ditch was necessary to permit of this "cross over;" & defts., & instead of building a new bridge, made the cross-over by means of a bridge which, years before, that had made for the use of a single farm-owner, in order to give him access to the road as it then was. The effect was, that the turn which must be made, going north, at the bridge, was too sharp, having regard especially to the narrowness of the bridge & that the bridge was too narrow. It was at this place that an accident happened to a motor car in which pltf. was a passenger by reason of which he was injured.—**Held:** defts. were guilty of neglect of the duty imposed upon them by statute, to keep the highway in repair at the place where the accident happened.—**RAYMOND v. BOSANQUET TOWNSHIP** (1819), 43 O. L. R. 434; 50 D. L. R. 569.—**CAN.**

c. ———.]—**CARLSTON v. MUNICIPAL COUNCIL** (1891), 7 Nfld. L. R. 609.—**NFLD.**

d. ———.]—In an action against the board of road comrs. at

W. to recover damages for injuries caused by the non-repair of a bridge in that neighbourhood.—**Held:** the board had the duty cast upon them merely of applying & expending moneys appropriated by the Legislature, & they were not liable for non-feasance.—**PETIPAS v. SPARKS** (1906), 9 Nfld. L. R. 209.—**NFLD.**

e. ———.]—A private individual who suffers special damages caused by the neglect of a municipal council to replace a bridge on a public highway that had been carried away by a flood is entitled to recover for such damages in an action against the municipality under Municipal Act, R. S. M. 1902, s. 667.—**NOBLE v. TURTLE MOUNTAIN MUNICIPALITY**, (1905), 15 Man. L. R. 514.—**CAN.**

f. ———.]—An incorporated road board, having by law the control of bridges within its district, is not liable for injury sustained by passengers on a bridge owing to its defective state, unless it be shown that the defect which occasioned the injury was caused by some act of the board or its servants, or that it was aware of it.—**HEATHCOTE ROAD BOARD v. MANSON**, 4 J. R. N. S. 112.—**N.Z.**

motives Amendment Act, 1878 (c. 77), s. 22; County Bridges Loan Extension Act, 1880 (c. 5), s. 2; Local Government Act, 1888 (c. 41), ss. 6, 11, 34, 65, 69, 78, 79, 100; Highways & Bridges Act, 1891 (c. 63), s. 3; Crown Lands Act, 1906 (c. 28), s. 6; Development & Road Improvement Funds Act, 1909 (c. 47).

**2783. Change of position of bridge—Statutory authority necessary.**—**R. v. WILTS (INHABITANTS)**, No. 2636, *ante*.

**2784. Erection of new bridge—Old bridge closed before new bridge completed—Indictment—Prohibition to magistrates.**—The justices of D. having, under Bridges Act, 1803 (c. 59), contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous, & having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge, the ct. refused a writ of prohibition to them, to restrain them from pulling down the old before the new bridge was passable, though there were strong affidavits of the inconvenience & loss to be sustained by the neighbourhood in being obliged to use a round-about way in the interval, referring complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance, & seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice.—**R. v. DORSET JJ.** (1812), 15 East, 594; 104 E. R. 967.

**2785. — Liability of county to repair—Old footbridge replaced.**—County is bound to repair a new bridge built by a private person, if it be of public utility.

The inhabitants of G. were not bound to build this new bridge for carts & carriages; nor are they obliged to repair more than they were before bound to repair; & they were never bound to repair a bridge for carts, carriages, & horses (ASTON, J.).—**R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)** (1770), 5 Burr. 2594; 2 Wm. Bl. 685; Lofft, 238; 96 E. R. 401.

**Annotations:—****Consad.** R. v. West Riding of Yorkshire (1802), 2 East, 342; It. v. West Riding of Yorkshire (1806), 7 East, 588. **Apld.** R. v. Bucks (1810), 12 East, 192. **Consd.** R. v. Isle of Ely (1850), 4 Cox, C. C. 281. **Reid.** R. v. Kent (1814), 2 M. & S. 513. **Mentd.** It. v. Cumberland (1795), 6 Term Rep. 194.

**2786. — ———.]—R. v. SURREY (INHABITANTS)**, No. 2656, *ante*.

g. ———. **Non-compliance by plaintiff with bye-laws—Regulating traction engines.**—**MARION v. MONT-CALM** (1915), 34 W. L. R. 683.—**CAN.**

h. **Action by municipality—Injury caused by diversion of stream.**—A railway co. desiring to carry their railway across a highway at a point where it was carried by a bridge over a small stream in pursuance of its statutory powers, diverted the stream to a point some distance away, & built a new bridge over it where it then intersected the highway.—**Held:** whatever remedy the municipality might have, if they had sustained damage by reason of the exercise by the railway co. of their rights, the latter were under no liability, in the absence of special agreement, to keep the substituted bridge in repair.—**PETERBOROUGH MUNICIPAL CORPN. v. GRAND TRUNK RY. CO.** (1900), 32 O. R. 154; 21 C. L. T. 110; 1 O. L. R. 144.—**CAN.**

**PART XV. SECT. 3.**

k. **Erection of new bridge—Whether bye-law necessary.**—A municipal corp'n. can exercise & perform their statutable



**2787. — Bridge built in different position.]**—The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes or townships in which they were situate, or from rates levied on all the parishes in the island, under the following circumstances. The island having been assessed to the general county rate, & appeals against such assessment having been entered, an arrangement was made, in 1774, by consent, under an order of quarter sessions, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges & the house of correction in the island to be raised by a local rate; the island being adjudged & declared not to be liable to pay to the county bridge rate or county house of correction; & the inhabitants agreeing to erect & maintain houses of correction & bridges within the island at their own sole expense. After this arrangement, the practice was for the county quarter sessions, on the application of the justices for the Isle of Wight division, to lay a rate, in the nature of a county rate, on every parish in the island, for the repair of the island bridges & bridewell. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813 a local Act appointed comrs. for the repair of the highways in the island, with power to make assessments, & enacted that all bridges previously repaired by any parishes, tithings, divisions or townships in the island should, for the future, be repaired "in such & the same manner & by such & the same ways & means," "as other bridges" "usually called county bridges" within the island had been accustomed to be repaired. In 1842, & since, the island was assessed generally with the county, & no separate island rate made. Application for the repair of bridges & bridewells in the island had been, since that time made to the county quarter sessions:—*Held*: (1) all bridges which, at the time of the passing of the Act, were repairable by the tithings, etc., in which they were situate, were for the future repairable by the county generally, & the arrangement of 1774 did not affect the legal liability of the county, & was no answer to an indictment against it for non-repair of such bridges.

(2) A bridge in the island, originally repaired by the titling, was, after the passing of the Act, wholly rebuilt by order of the justices for the island division. The new bridge was larger than the old, & different in form, & stood higher up the stream. The expense of the building, & of repairs, were defrayed out of the island rate imposed under the arrangement of 1774. The conditions prescribed by 43 Geo. 3, c. 59, were not observed in building it:—*Held*: the county was liable to repair the new bridge.

(3) A foot bridge, formed of three planks, nine or ten feet long, & a hand rail, & which carried a public footpath across a small stream, was held not to be repairable as a county bridge, though it had been repaired by the comrs. under the above mentioned local Act.

It can hardly be said that every structure which enables passengers to cross a stream is a county bridge (LORD CAMPBELL).—*R. v. SOUTHAMPTON COUNTY (INHABITANTS)*, BLACK

BRIDGE, SANDOWN BRIDGE, & TINKER'S BRIDGE CASES (1852), 18 Q. B. 841; 21 L. J. M. C. 201; 19 L. T. O. S. 245; 16 J. P. 438; 17 Jur. 254; 118 E. R. 318.

*Annotation*:—As to (1) & (3) *Refd.* Campbell-Davys v. Lloyd (1901), 85 L. T. 59.

**2788. — Bridge erected under turnpike trust—Liability before & after expiry of trust.]**—49 Geo. 3, c. 84, appoints trustees for taking down the old & building a new bridge over the river Tone, & empowers them to take tolls, & that it shall be lawful for them, out of the moneys received to build a new bridge, etc., & vests the property in the old & new bridge during the continuance of the Act in the trustees, & that as soon as the purposes of the Act shall be executed, then & from thenceforth the tolls shall cease, & the bridge, etc., shall be repaired by such persons as are by law liable to repair the old bridge:—*Held*: during the time the trustees were engaged in executing the powers of the Act, & before they had completed them, the county was not liable to repair the bridge.—*R. v. SOMERSET (INHABITANTS)* (1812), 16 East, 305; 104 E. R. 1105.

**2789. — Liability of individual to repair ratione tenuræ—Footbridge erected alongside carriageway.]**—*R. v. MIDDLESEX (INHABITANTS)*, No. 2702, *ante*.

**2790. — Validity of contract for contribution to cost—By highway surveyor for parish—Highways & Bridges Act, 1891 (c. 63), s. 3.]**—A surveyor of highways for a parish, acting under above sect. entered into an agreement with a county council by which he contracted, for himself & his successors, as highway authority for the parish, to contribute towards the building of a bridge a certain sum by two instalments, the second of which was to be payable after the expiration of his year of office:—*Held*: he had power to make such a contract under the Act.—*HERTFORDSHIRE COUNTY COUNCIL v. BARNET RURAL DISTRICT COUNCIL*, [1902] 2 K. B. 48; 71 L. J. K. B. 610; 86 L. T. 880; 66 J. P. 531; 50 W. R. 582; 18 T. L. R. 609, C. A.

**2791. Improvement of existing bridge—Width increased—Whether liability extends to new part.]**—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)*, No. 2683, *ante*.

**2792. — — — — —.]**—*R. v. ADDERBURY EAST (INHABITANTS)*, No. 2684, *ante*.

**2793. — Addition of new arches—By turnpike trustees—Liability of county.]**—*R. v. BUCKINGHAM COUNTY*, No. 2659, *ante*.

**2794. — Discretion of justices to order—Bridges Act, 1803 (c. 59), s. 2.]**—(1) The above sect. is permissive, not imperative, & leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow & inconvenient.

(2) The making of the presentment mentioned in the proviso [in the sect.] is a condition precedent to the obligation of the justices to make an order.—*Re NEWPORT BRIDGE* (1859), 2 E. & E. 377; 29 L. J. M. C. 52; 24 J. P. 133; 6 Jur. N. S. 97; 121 E. R. 142; *sub nom.* *R. v. MONMOUTHSHIRE J.J.*, 1 L. T. 131; 8 W. R. 62.

*Annotations*:—As to (1) *Consd.* *R. v. Oxford* (Bp.) (1879), 4 Q. B. D. 525. *Refd.* *Forbes v. Lee Conservancy Board* (1879), 4 Ex. D. 116; *Julius v. Oxford* (Lord Bp.) (1880), 5 App. Cas. 214.

**2795. Bridge substituted for ferry—Whether approaches a highway.]**—*YORKSHIRE, EAST RIDING, COUNTY COUNCIL v. SELBY BRIDGE CO.*, No. 2630, *ante*.



**SECT. 4.—NUISANCES AND OBSTRUCTIONS.***See Part IX., ante.***SECT. 5.—IMPROPER USER OF BRIDGES.***See STREET & AERIAL TRAFFIC.***SECT. 6.—THE COUNTY SURVEYOR.**

*See Statute of Bridges, 1530-1531 (c. 5), s. 21; Highway Act, 1773 (c. 78); Bridges Act, 1803 (c. 59); Highway Act, 1835 (c. 50); Local Government Act, 1888 (c. 41), s. 3 (x).*

**2796. Powers of county surveyor—Bridges Act, 1803 (c. 59)—Highway Act, 1835 (c. 50).—***R. v. MERIONETHSHIRE (INHABITANTS) (1844), 6 Q. B. 343; 1 New Mag. Cas. 111; 1 New Sess. Cas. 316; 13 L. J. M. C. 158; 3 L. T. O. S. 241; 8 J. P. 570; 8 Jur. 778; 115 E. R. 132.*

*Annotations:—Raid. R. v. Brecon (1849), 15 Q. B. 813; R. v. Estcourt (1855), 24 L. T. O. S. 299. Mentd. R. v. Glamorganshire JJ. (1819), 13 Q. B. 561.*

**SECT. 7.—MATERIALS AND TOOLS.**

*See Bridges Act, 1803 (c. 59), ss. 3, 4; 1815 (c. 143), ss. 1, 3, 4; Local Government Act, 1888 (c. 41), s. 64.*

**2797. Property in materials—Bridge erected & repaired by individual—Dedicated to public use.]—**A. granted liberty, licence, power & authority to B. & his heirs to build a bridge on his land, & B. covenanted to build the bridge for public use,

& to repair it, & not to demand toll:—*Held: the property in the materials of the bridge when built & dedicated to the public still continued in B., subject to the right of passage by the public, & when severed & taken away by a wrongdoer he might maintain trespass for the asportation.—HARRISON v. PARKER (1805), 6 East, 154; 2 Smith, K. B. 262; 102 E. R. 1246.*  
*Annotations:—Mentd. Esdalle v. Oxenham (1824), 3 B. & C. 225; Howlins v. Shippam (1826), 5 B. & C. 221.*

**SECT. 8.—CONTRACTS AND CONVEYANCES.**

*See County Rates Act, 1738 (c. 29), s. 14; Bridges Acts, 1812 (c. 110), s. 5; 1815 (c. 143), s. 5; Local Government Act, 1888 (c. 41), s. 79 (3).*

**SECT. 9.—TOLLS.***See Part V., Sect. 5, ante.***SECT. 10.—FOOTBRIDGES.***See Part XIV., Sect. 3, ante.***SECT. 11.—BRIDGES IN SOUTH WALES.**

*See Highways & Locomotives Amendment Act, 1878 (c. 77), s. 2; South Wales Bridges Act, 1881 (c. 14); Local Government Act, 1888 (c. 41), ss. 13, 109 (1).*

**Highways in South Wales.]—***See Part II., Sect. 2, sub-sect. 2, B., ante.*

**PART XV. SECT. 8.**

**1. Action for recovery—Of contract price of bridge.]—***Pltf. sued to recover a balance of the contract-price of a bridge which he built for defts., a township corpn. The bridge was to replace one which formed part of a*

*highway in the township. The contract was in writing, & the seal of the township corpn. was affixed thereto, but no bye-law authorising the making of the contract was passed by the township council. The bridge was accepted by defts. & was in use:—Held: according to the true meaning of the*

*contract, pltf. had done what he had contracted to do, & was entitled to recover the contract price, unless the want of a bye-law was a good defence to his claim.—WITHERSPOON v. EAST WILLIAMS TOWNSHIP (1919), 44 O. L. R. 584; 47 D. L. R. 370; 15 O. W. N. 305.—CAN.*

**HIRE OF GOODS.***See BAILMENT.***HIRE-PURCHASE.***See BAILMENT; BILLS OF SALE.***HOLDER IN DUE COURSE.***See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.*

## HOLIDAYS.

*See* FACTORIES AND SHOPS; MASTER AND SERVANT; TIME.

## HOLY ORDERS.

*See* ECCLESIASTICAL LAW.

## HOMAGE.

*See* CONSTITUTIONAL LAW; COPYHOLDS.

## HOME OFFICE.

*See* CONSTITUTIONAL LAW.

## HOMICIDE.

*See* CRIMINAL LAW AND PROCEDURE.

## HOPS.

*See* AGRICULTURE; FOOD AND DRUGS.

## HORSE FLESH.

*See* FOOD AND DRUGS; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HORSE RACING.

*See* GAMING AND WAGERING; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

## HORSE, WARRANTY OF.

*See* ANIMALS; SALE OF GOODS.

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## HOSIERY MANUFACTURE.

*See* FACTORIES AND SHOPS; TRADE AND TRADE UNIONS.

## HOSPITALS.

*See* CHARITIES; INCOME TAX; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HOTCHPOT.

*See* SETTLEMENTS ; WILLS.

## HOTELS.

*See* INNS AND INNKEEPERS ; INTOXICATING LIQUORS.

## HOUSE AGENT.

*See* AGENCY : LANDLORD AND TENANT ; REVENUE ; VALUERS AND APPRAISERS.

## HOUSE OF COMMONS.

*See* CONSTITUTIONAL LAW ; ELECTIONS ; PARLIAMENT.

## HOUSE OF LORDS.

*See* CONSTITUTIONAL LAW ; COURTS , PARLIAMENT ; PEERAGES AND DIGNITIES.

## HOUSEBREAKING.

*See* CRIMINAL LAW AND PROCEDURE.

## HOUSING OF THE WORKING CLASSES.

*See* COMPULSORY PURCHASE OF LAND AND COMPENSATION ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## HUNTING.

*See* AGRICULTURE ; ANIMALS ; GAME ; TRESPASS.

END OF VOL. XXVI.





